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Indigenous Peoples' Land And Resource Rights

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Introduction

According to the World Bank “Indigenous peoples are commonly among the poorest and most vulnerable segments of society” (World Bank, 2001). Confronted with these depressing economic statistics, many, but certainly not all, modern nation states have recognised the plight of Indigenous communities. As a result, throughout the middle decades of the 20th century, Indigenous people, along with other poor populations of the world, were the target of a wide range of initiatives, efforts and programmes to assist in economic development. In large part, these top-down, externally developed, modernisation-based efforts failed to improve the economic circumstance of the world’s poor including Indigenous people, while at the same time often damaging their traditional economies, leaving communities less self-reliant and therefore worse off than before. Reacting to these circumstances and the centuries of colonisation that caused them, Indigenous peoples are struggling to reassert their nationhood within the states in which they find themselves. For all, claims to their traditional lands and the right to use the resources of these lands are central to their drive to nationhood.

Land is important in two respects. First, traditional lands are the ‘place’ of the nation and are inseparable from the people, their culture, and their identity as a nation. Second, land and resources, as well as traditional knowledge, are the foundations upon which Indigenous people intend to rebuild the economies of their nations and so improve the socio-economic circumstance of their people – individuals, families, communities and nations. Capturing this Fergus MacKay says the following when discussing the World Bank’s approach to Indigenous people:

For Indigenous peoples, secure and effective collective property rights are fundamental to their economic and social development, to their physical and cultural integrity, and to their livelihoods and sustenance. Secure land and resource rights are also essential for the maintenance of their worldviews and spirituality and, in short, to their very survival as viable territorial and distinct cultural collectivities ... the close ties of Indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For Indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element that they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations (MacKay 2004, 17).

Furthermore, as Roque Roldán Ortega points out, there is also a human rights dimension of land rights that has legal, economic, and social ramifications. Ortega states, “land is not only a physical asset with some economic and financial value, but an intrinsic dimension and part of peoples’ lives and belief systems. The end is not necessarily a material product or a level of economic productivity” (Ortega 2004, VI). This perception of the

land is necessary in order to fully understand the case studies introduced in this paper and the different perspectives taken by various groups.

In this paper we explore the issue on Indigenous rights to land and resources, focusing particularly on the last three decades of the 20th Century and the opening decade of the 21st. There are 4 sections including this introduction, the first. In the second section we introduce Roque Roldán Ortega's six criteria for judging the quality of a particular land and resources rights regime with regards to Indigenous governments. These criteria were introduced in his paper, "Models for Recognizing Indigenous Land Rights in Latin American," prepared in 2004 for the World Bank. Ortega derived these principles from various constitutional and international agreements, such as the International Labour Organisation Convention on Indigenous and Tribal Peoples, Convention No. 169 (ILO 169) and the United Nations Draft Declaration on the Rights of Indigenous People. Please see appendices A thru D for an overview of these agreements. As Ortega points out in his paper, the international community has become increasingly aware of the significance that the legal recognition of Indigenous land rights has had on the cultural survival, economic development, and self-determination of Indigenous peoples.

Ortega's six criteria offer up a framework for measuring the degree of security and authority Indigenous people exercise over the land the state has recognized. Furthermore, the criteria acknowledge that while no single pattern of legal rights will guarantee a successful outcome for Indigenous land tenure, legal systems more strongly support Indigenous land rights when ownership, and security of that ownership, are conceptualized within the framework of the concept of Indigenous territory. The concept of Indigenous territory that Ortega articulates is acknowledged not only as a source of subsistence resources but also as the spiritual and cultural identity of a people (RCRAP, 1996, Vol. 2, 454-464). Ortega's six criteria also highlight that land rights are stronger when legal systems concurrently recognize Indigenous people's rights over natural resources and the rights to manage their own affairs.

In the third section of the paper, we examine how these six criteria can be used to measure the degree to which Aboriginal peoples in Canada have been successful with their struggle to have of their land, resource and other rights recognized. We do this using three case studies, one examines the ongoing saga of the Mackenzie Valley Pipeline and the unfolding of events since the 1970s The story includes such historic events as the Calder Decision and the Berger Inquiry, and an overview of federal policy toward land claims, including extinguishment. Through this case study, we use Ortega's criteria to examine the responses of the legal system and governments in Canada to Aboriginal Peoples struggles for the recognition of their rights. As Ortega indicates, different combinations of rights can yield strong or weak results, depending on the context and the extent of political will. In the fourth section, we highlight the major lessons to be learned from the Mackenzie Valley Pipeline story. Essentially, these lessons are applicable to Indigenous groups with or without the possibility of land claim settlements and major natural resource development on their lands. We go on to consider how the evolution of these rights has provided Aboriginal people with the power to choose to engage in the market economy, successfully partner with various corporations, or halt development

plans on Indigenous lands because such plans conflict with traditional values and belief systems.

In this section, we also examine two other case studies, 1) The Inuvialuit and, 2) The Lac La Ronge Indian Band. The Inuvialuit case study, which is very much interconnected with the Mackenzie Valley Pipeline story, examines the institutional structures and economic development activities developed by the Inuvialuit following the settlement of their land claim. These include the Inuvialuit Corporate Group (ICG) and the major subsidiaries of the Inuvialuit Regional Corporation (IRC), the Inuvialuit Development Corporation (IDC), the Inuvialuit Petroleum Corporation (IPC), the Inuvialuit Investment Corporation (IIC). We believe the Inuvialuit case study clearly illustrates how Ortiga's six criteria have played a significant role in the Inuvialuit Final Agreement, i.e. land claim settlement, strong institution building, and the Inuvialuit's success in the market economy.

The Lac La Ronge Indian Band case study demonstrates how Aboriginal peoples in Canada, without a land claim settlement, have benefited from the strong legal framework for Indigenous land tenure through the development of 1) land use regulations and policy 2) sound economic policy and management, and 3) appropriate institutions that support economic development.

The fourth and final section highlights how Indigenous peoples are successfully forcing the world to recognize the legitimacy of their demands regarding land rights and how they are benefiting through this recognition. While progress both internationally and within Canada has not occurred without conflict, both within Indigenous communities and amongst Indigenous and non-Indigenous groups, Indigenous peoples have gained much influence over their traditional lands through the incorporation of various permutations of Ortiga's six criteria. The concluding comments can be summed up in the phrase "much accomplished by the struggle for Indigenous people for the recognition of their rights; but much left to do".

II. Criteria for Recognizing Superior Indigenous Land and Resource Legal Frameworks

The treaty-based relationship that Britain, Spain, and France established with tribes throughout the Canada and the U.S. recognized tribes as sovereign nations, therefore legally placing them on equal ground with these governments (Wilkins and Lomawaima 2001, 252). The Canadian Government has been one of the more progressive countries in continuing to recognize these rights. However, it is often only after being forced to do so by court ruling and as a result of relentless pressure by Indigenous people. Indigenous people in Canada have been leaders in the struggle for the recognition of traditional lands and resources through claims to their treaty rights. The material that follows examines the four decades of events surrounding the Mackenzie Valley Pipeline and how the gradual

recognition of land and resource rights of Aboriginal peoples have led to increased economic and political power.

Before introducing the events surrounding the Mackenzie Valley Pipeline, it is useful to introduce six criteria for judging the quality of a particular land and resources rights regime. These criteria were developed by Roque Roldán Ortiga in his paper “Models for Recognizing Indigenous Land Rights in Latin American,” prepared in 2004 for the World Bank. They are international in scope and are based on the rights in ILO 169, Articles 14 and 15. These criteria will be used to examine the land and resource rights of the Aboriginal peoples involved with the Mackenzie Valley Pipeline saga. We’ll examine how the legal framework that was gradually developed as this saga took place corresponds with Ortiga’s six criteria. As James Anaya points out regarding ILO 169, the international community has begun to reach "certain new common ground about minimum standards that should govern behaviour toward indigenous peoples" (Anaya, 1997). It is our hope to illustrate how the legal framework and institutions that were the eventual outcomes of the Mackenzie Valley Pipeline’s story have come about largely due to Aboriginal persistence to have their demands recognized, the gradual recognition of Indigenous land and natural resource rights by the government, and the development of strong partnerships, cooperation and mutual understanding amongst both Aboriginal and non-Aboriginal institutions and peoples. Ortiga’s six criteria are as follows:

1. **Land tenure regime:** The character of the right over land that has been recognized, which can range from outright (fee simple) ownership through several types of restricted ownership to simple use rights (usufruct)
2. **Territorial recognition:** Recognition of land in a form that corresponds to the concept of an Indigenous territory, as defined by ILO 169
3. **Natural resources rights:** The sorts of rights over natural resources ownership, administration, and use granted as a consequence of the land right
4. **Tenure security:** The degree of security of the type of land title
5. **Autonomy:** The amount of autonomy in managing their own affairs that is accorded to an Indigenous group as a consequence of their land rights, including legal recognition as an Indigenous group (personería jurídica), and their ability to use their own traditional legal and justice systems
6. **Legal recourse:** The legal actions to which they have recourse in order to defend their lands. (Ortiga, 2004, 17)

In his paper, Ortiga uses these criteria to divide Latin American countries into three groups according to the legal treatment of Indigenous groups: 1) countries with superior legal frameworks, 2) countries with legal frameworks in progress, and 3) countries with deficient legal frameworks. Using his six criteria, Ortiga then provides an in-depth analysis of the land and resource right regimes in four Latin American countries (Columbia, Costa Rica, Panama, and Peru) with superior legal frameworks, i.e. regulatory frameworks have been established and concrete actions have been taken to ensure those rights, including legal recognition of Indigenous lands. Please see Appendix E for an overview of these frameworks. As a result of his case studies, Ortiga concludes

There is no single pattern of legal rights that guarantees a successful outcome on the ground for Indigenous land tenure; rather, different combinations of rights can yield strong or weak results, depending on the context and the extent of

political will. Nevertheless, the case studies do show that legal systems more strongly support Indigenous land rights when they take into account not only land ownership itself, but also the security of that ownership and whether it is conceptualized within the framework of the concept of an Indigenous territory. Land rights are also stronger when the legal system concurrently recognizes other rights over natural resources on Indigenous lands and the rights of Indigenous peoples to manage their own affairs. Recognizing the land rights of Indigenous peoples then is not a simple question of granting title, but involves addressing a more complex set of interrelated legal, social, and political issues in order to be effective and secure (Ortiga 2004, p. 25).

The following case study of the events surrounding the Mackenzie Valley Pipeline story not only reflects what Ortiga believes to be a successful legal framework for recognizing Indigenous land rights, but most importantly, a framework that recognizes the demands and perspectives of Indigenous peoples and the complex set of interrelated legal, social and political issues that are a part of this story.

III. A Canadian Case

The Calder Decision and Beyond

In Canada's recent history, the Calder decision was the first step in the establishment of a successful Indigenous land and resource rights regime in Canada. In its 1973 Calder decision, the Supreme Court of Canada recognized that Aboriginal people have an ownership interest in the lands that they and their ancestors have traditionally occupied. The recognition of an ownership interest should be acknowledged as territorial recognition, one of Ortiga's six criteria necessary in the establishment of a superior legal framework recognizing an Indigenous land and resource rights regime. In this landmark decision, the Court held that this right had not been extinguished unless it was specifically and knowingly surrendered. Following this decision, the federal government was forced to rethink its position on Aboriginal title. In doing so, the federal government accepted the legal concept of Aboriginal title as outlined by the Supreme Court, and therefore the legal recognition of an Indigenous land rights regime. Ottawa also created the comprehensive claims policy, a negotiating structure, to settle land claims of lands under Aboriginal title. These two concepts - Aboriginal title and a negotiating structure - are both complex and interrelated and have been key developments in the creation of a legal framework in Canada that is international in scope, i.e. meets the terms and conditions for the recognition of Indigenous land and resource rights as listed in such international agreements as ILO 169, the UN Declaration on the Rights of Indigenous Peoples, and World Bank Policy regarding Indigenous peoples.

The concept of Aboriginal title

The existence of Aboriginal legal rights to lands other than those provided for by treaty or statute is known as Aboriginal title. Until a settlement is reached, these public lands remain under the ownership of the federal and provincial governments. They are legally

known as Crown lands. However, in some cases, land considered to be the traditional territory of an Indigenous group (usually it is the Indigenous group itself that asserts traditional rights to the land) has been subsumed by non-Indigenous property owners.

From the courts perspective, Aboriginal title is derived from Aboriginal peoples' historic "occupation, possession and use" of traditional territories. Aboriginal title is obtained after proof of continued occupancy of the lands in question at the time at which the Crown asserted sovereignty. Aboriginal title is held collectively by all members of an Aboriginal nation and decisions regarding the use of the land and resources are made collectively. Essentially, Aboriginal title is the Canadian government's recognition of a land tenure regime, another of Ortiga's six criteria. At first, Aboriginal title was restricted to the right to hunt, trap and fish within the traditional subsistence economy. Later, the rights expanded to include certain commercial rights.

But how did this evolution take place? Since 1973, the Supreme Court has ruled on a number of claims by First Nations and, in doing so, the Supreme Court has expanded the definition of Aboriginal title to include commercial rights. In their 1997 decision, *Delgamuukw v British Columbia*, the Supreme Court extended the rights under Aboriginal title to commercial activities. In 1999, the Supreme Court ruling on the Marshall case declared that the Mi'kmaq Indians in Nova Scotia had the right to catch and sell fish. While the Supreme Court recognized Aboriginal title, the devil is in the details. Accordingly, the Supreme Court in both the *Delgamuukw* ruling and the Marshall decision called for negotiations between the First Nation and the respective government to determine the details of such rights within the existing laws and regulations of Canada and those found in province or territory. Please see Appendix F for an overview of recent land claims decisions by the Supreme Court of Canada.

Comprehensives Claims Policy

The concept of a negotiation structure for Indian claims under Aboriginal title was a necessary outcome of the Calder decision. In 1973, Ottawa announced its Comprehensive Claims Policy. As outlined by Indian and Northern Affairs Canada (INAC), "comprehensive land claims are based on the assertion of continuing Aboriginal rights and claims to land that have not been dealt with by treaty or other means. Comprehensive land claims negotiations address concerns raised by Aboriginal people, governments and third parties about who has the legal right to own or use the lands and resources in areas under claim."ⁱⁱ Modern-day treaty making is otherwise known as the process of negotiating the settlement of comprehensive claims, which clarifies access and ownership to land and resources. Comprehensive claims settlements may also include self-government arrangements. The comprehensive claims policy acknowledged the legality of Aboriginal title and put into place a system for the negotiated settlement of Aboriginal land claims. While this new policy was divided into two broad categories - specific and comprehensive land claims - only comprehensive land claims negotiations apply to Crown lands claimed by Aboriginal peoples. Specific claims primarily deal with outstanding grievances that First Nations may have concerning unfulfilled legal obligations and outstanding grievances that First Nations may have regarding Canada's fulfillment of its obligations under historic treaties or its administration of First Nation

lands or other assets under the *Indian Act*.ⁱⁱⁱ Later, the 1973 Comprehensive Claims Policy was modified to take into consideration Section 35 of the Constitution Act, 1982, that recognizes and affirms Aboriginal and treaty rights now existing or that may be acquired by way of land claim agreements. Therefore, comprehensive claims agreements are given section 35 constitutional protection. Since 1973, a series of land claims agreements and treaties have moved the Aboriginal people in Canada a considerable distance toward their goal of control over their traditional lands and resources and resolved the question of extinguishment of Aboriginal rights.

From 1973 to 2006, sixteen comprehensive land claim agreements have been negotiated and settled, mostly in northern Quebec and the Yukon, Northwest and Nunavut Territories. However, according to Western Economic Diversification Canada (WEDC), comprehensive land claims are currently outstanding in approximately 20% of Canada (mostly in BC, all of the Maritimes, much of Labrador, over a third of Quebec, the Ottawa Valley in Ontario, and continuing residual claims in all three Territories).^{iv}

During the past thirty years, the claims settled were primarily in northern and remote regions with limited third party interests and in the Territories where the federal government controls the land and resources. WEDC also points out that the remaining claims are primarily in the provinces, often in populated areas with extensive third party interests and greater competition for access to land and resources, which makes the achievement of such settlements much more complex.^v

The Comprehensive Land Claims Policy has not been formally reviewed since 1986 but there have been a number of significant adjustments. In 1995, for example, Ottawa agreed to enter into discussions of self-government as part of the comprehensive land claims negotiations. As INAC points out, self-government and land claims negotiations are not the same, but are related. Essentially, self-government agreements clearly indicate where and over whom Aboriginal laws will be exercised. When the Government of Canada started to negotiate modern-day treaties in the 1970's, land and self-government were negotiated separately. "In areas where land claims negotiations are underway, the government's current policy is to negotiate land claims and self-government together. Where all parties to the negotiations agree, rights in self-government agreements may be protected in new treaties. They may also be protected through additions to existing treaties or as part of a comprehensive land claim agreement."^{vi} It is INAC's view that every self-government negotiation should be unique and tailored to the diverse needs, circumstances, and needs of Aboriginal communities. While self-government can be negotiated in the context of comprehensive land claims (e.g. Nisga'a), it can also be negotiated as stand-alone self-government agreements that may cover a range of jurisdictions (e.g. Meadow Lake Tribal Council) or a single jurisdiction (e.g. *Mi'kmaq Education Act*).^{vii}

One of the triggering events that pushed the federal government to change its position on Aboriginal title and land claims negotiations was the Mackenzie Valley Gas Pipeline Proposal and the Berger Inquiry. In the 1970s, the classic struggle between developers and Native peoples took place. This struggle of the 1970s is being replayed some 40

years later, but with a different playing field and a different mix of players. The following section examines how the Mackenzie Valley Gas Pipeline proposal and Berger inquiry led to the establishment of the comprehensive claims policy and how this policy meets the six criteria that Ortiga believes is necessary to establish a superior legal framework with regards to Indigenous land and resources rights.

The Mackenzie Valley Gas Pipeline Project and Its Inquiry

The construction of a gas pipeline from Prudhoe Bay on the shores of arctic Alaska to the delta of the Mackenzie River and then up the Mackenzie River valley to Zama, the northern terminal of the national gas pipeline system in Alberta, was one of the grand industrial projects of the 20th century. The Canadian part of this grand project was known as The Mackenzie Valley Gas Pipeline Project. In 1968, huge oil deposits were discovered at Prudhoe Bay. Within ten years, oil was flowing from Prudhoe Bay to the port of Valdez. These huge oil deposits also contained natural gas. While the market for Prudhoe Bay oil was California, its natural gas market was the American Mid-West, centred on Chicago. Consequently, a natural gas pipeline was proposed that would connect Prudhoe Bay with Chicago via the Mackenzie Valley. Accordingly, in 1974, a consortium of multinational oil companies (called Arctic Gas) made an application to the Canadian government to build a pipeline to carry natural gas from the fields in the Mackenzie Delta and Prudhoe Bay in Alaska to markets in southern Canada and the United States. At the time, most believed that the application would be approved. However, events proved otherwise.

In March 1974, Justice Thomas Berger was appointed to head an inquiry that would consider issues surrounding the pipeline. As the inquiry proceeded, the presentations fell into two camps - those opposed to the project and those favouring the project. Many opposed were local residents who felt that they would bear the social costs of the project. People in Dene communities located along the proposed pipeline route felt threatened by the project. Aboriginal spokespersons saw the project as destroying their culture and leaving their people with few economic benefits and many social costs. Environmental organizations from outside the region saw the pipeline as one more example of industry's attack on the environment. Both groups saw development as a menace and thus viewed development from the dependency perspective. On the other hand, Arctic Gas and other proponents of the pipeline argued that industrialization in northern Canada was "inevitable, desirable, and beneficial – the more the better (Usher 1993, p. 105)." They did not deny that the process would have negative impacts on traditional Aboriginal society. In fact, in their view development "required the breakdown and eventual replacements of whatever social forms had existed before (Usher 1993, p. 104)." They agreed that the process would be painful for Aboriginal people, but from it would emerge a higher standard of living and a better quality of life. In addition to their views on the desirability of industrialization and the inevitability of modernization, proponents of the project held the view that "all Canadians have an equal interest in the North and its resources" (Page 1986, p. 114). This view was based on the 'colonial' belief that title to all land and resources had passed from Aboriginal people to the Crown. Such a view, while generally accepted prior to the 1974 Calder decision, remained in play in the minds of the developers and governments until challenged in the Berger Inquiry and the courts.

During the Berger Inquiry, Aboriginal leaders challenged Arctic Gas spokespersons. The Aboriginal argument was that the pipeline project would introduce “massive development with incalculable and irreversible effects like the settlement of the Prairies” (Usher, 1993, p. 106). However, unlike the proponents, they did not feel that this was a desirable outcome for Aboriginal residents in the Mackenzie Valley. Instead, they feared the worst for their peoples. The Dene had more power than before for two reasons. First, the Berger Inquiry provided them with a platform to present their views to the Canadian public, i.e. a legal recourse, another of Ortiga’s six criteria. Second, the impact of the 1973 Calder decision began to penetrate into the inner circles of the Prime Minister’s cabinet. These two factors allowed Dene leaders to play their trump card, Aboriginal title to the lands across which the pipeline must proceed.

Within the context of global economic development, Peter Usher made a persuasive argument that the 1974 pipeline proposal, had it proceeded, would have disastrous impacts on Aboriginal peoples and their traditional culture. As one of the principal researchers for Judge Berger, his view mirrors the dependency theory of development:

This massive assault on the land base of Native northerners threatened their basic economic resources and the way of life that these resources sustained ... when all the riches were taken out from under them by foreign companies, Native land and culture would have been destroyed and people left with nothing (Usher, 1993, pp. 106-7).

In the context of Aboriginal society and economy in the 1970s, Judge Berger recognized that the Dene of the Mackenzie Valley were not ready to participate and therefore benefit from the project. In fact, great harm might come to their culture. Berger therefore recommended a ten-year delay. By then, the Dene should be ready for such a massive construction project. Judge Berger put it this way:

Postponement will allow sufficient time for native claims to be settled, and for new programs and new institutions to be established (Berger 1977, p xxvii).

Berger’s decision ushered in a new era in the relationship between Aboriginal people, the federal government, and corporations that wished to develop resources on traditional Aboriginal lands. Essentially, Berger’s decision established new measures and procedures in the national legal system to resolve land claims by Aboriginal peoples that provided the basic framework for an Indigenous land and resource framework that meets both Ortiga’s and ILO 169 standards. As mentioned above, these new measures and procedures represented a new legal recourse that First Nations could take in order to defend their lands. A key characteristic of this new era has been the emergence of Aboriginal business development based on financial capacity provided by land claim settlements, natural resource development, and by the decision of Aboriginal leaders to participate in the market economy. This shift in attitude towards industrial projects later resulted in the formation of the Aboriginal Pipeline Group (APG) in the Mackenzie Valley. The APG is represented by the following First Nations: Inuvialuit, Sahtu and the Gwich'in.

One of the key Aboriginal groups within the APG is the Inuvialuit. The following section provides an overview of how the Inuvialuit have successfully negotiated a land claim agreement that has allowed them to successfully participate in the global economy on their own terms and in a way that respects their autonomy and ways of life.

The Inuvialuit Land Claim Settlement

In May 1977, the Committee of Original Peoples' Entitlement (COPE) submitted a formal comprehensive land claim on behalf of approximately 4,500 Inuvialuit living in six communities in and around the mouth of the Mackenzie River. Negotiations between the Inuvialuit and the federal government continued through the late 1970s and early 1980s culminating in the Inuvialuit Final Agreements (IFA)^{viii} in May 1984. The goal of the Inuvialuit negotiators was to maintain their traditional way of life and, at the same time, venture into the market economy (Bone 2003, p. 193). This dual objective was achieved by the creation of a business sector (the Inuvialuit Regional Corporation) and a wildlife sector (the Inuvialuit Game Council). While our focus is on the Inuvialuit Regional Corporation (IRC), it is important to note that the Inuvialuit's traditional way of life remains vibrant. As Peter Usher has pointed out, the number of Inuvialuit who harvest has increased, although the population as a whole has increased more so (2002, 25). The major change, which Usher did not directly measure by any available survey data, has been a shift from full-time to part-time harvesting. Furthermore, Usher also points out that a typical household produces several thousand dollars' worth of food that it does not have to buy at the store, although production costs, which can often be substantial, have not been deducted. Nonetheless, Usher asserts that harvesting produces a substantial net economic benefit (Usher, 2002; Usher 1971; Smith and Wright, 1989). Please see Appendix G for a map of the Inuvialuit communities and lands.

Under the terms of the IFA, the Inuvialuit retained title to "91,000 square kilometres of land, 13,000 square kilometres with full surface and subsurface title; 78,000 square kilometres excluding oil and gas and specified mineral rights" (Frideres 1993, 118). The Inuvialuit also received \$45 million in cash compensation to be paid out over 13 years (1984 to 97), a \$7.5 million Social Development Fund (SDF) and a \$10 million Economic Enhancement Fund (EEF).

In 1984, the Inuvialuit Corporate Group (ICG), composed of Inuvialuit Regional Corporation (IRC) and its subsidiary corporations, was formed. IRC's purpose is to receive the lands and financial compensation obtained by the Inuvialuit. The corporation was given "the overall responsibility of managing the affairs of the settlement to achieve the objectives in the IFA" (ICG 1997, 4). According to the introduction to the 1997 Annual Report of the Inuvialuit Corporate Group (ICG 1997, 4), these objectives are to:

- Preserve the Inuvialuit culture, identity and values within a changing northern society.
- Enable Inuvialuit to be equal and meaningful participants in the northern and national economy and society.
- Protect and preserve the Arctic wildlife, environment and biological productivity.

Essentially, the IFA met all of Ortega's six criteria: 1) a land tenure regime, with Aboriginal title over 91,000 square kilometres being recognized, 2) territorial recognition of the land as Indigenous territory, 3) natural resource rights were recognized, although only 13,000 square kilometres with full surface and subsurface title were recognized while 78,000 square kilometres were recognized but excluded oil and gas and specified mineral rights, 4) tenure security was provided through the Canada's Comprehensive Claims Policy which acknowledges the legality of Aboriginal title and provides land claim agreements section 35 constitutional protection, 5) it provided the Inuvialuit with over \$60 million which allowed the nation a significant degree of autonomy to manage its own affairs which is evidenced by the institutional development of the ICG and its subsidiary corporations, and 6) legal recourse through the establishment of a system for the negotiated settlement of Aboriginal land claims. While the IFA seems to have provided an Indigenous land and resource framework that meets Ortega's six criteria and the fundamental components recognized by international agreements concerned with Indigenous land and resource rights, the question remains—are the Inuvialuit succeeding in the market economy without necessarily sacrificing their priorities as a nation? In an attempt to answer this question the activities of the ICG and the major subsidiaries of the IRC, the Inuvialuit Development Corporation (IDC), the Inuvialuit Petroleum Corporation (IPC), the Inuvialuit Investment Corporation (IIC), are described in the three subsections that follow.

The Inuvialuit Investment Corporation:

According to the 2000 Annual Report of the ICG, the Inuvialuit Investment Corporation (IIC) “was established to receive the bulk of the financial compensation that came from the IFA. ... invest these funds in low risk investments and to preserve the capital for future generations of Inuvialuit” (ICG 2000, 39). The company maintains a conservative and diverse portfolio of investments in national and international securities. In 2000, the IIC recorded a net income of \$6.5 million from interest and dividends on its investments, up from \$5.97 million in 1996.

The Inuvialuit Development Corporation:

The Inuvialuit Development Corporation was created to address one of the objectives of the IFA; that is, “to enable the Inuvialuit equal and meaningful participation in the Western Arctic, circumpolar, and national economies” (ICG 1998, 1). In pursuing this objective IDC says it will “build and protect a diversified asset base, generate financial returns, create employment, and increase skills and development among the Inuvialuit” (IDC 1998, 1). While some of its business ran into difficulties and a few failed, most were profitable.

The IDC has created or acquired over 30 companies operating in eight sectors—technology and communications, health and hospital services, environmental services, property management, manufacturing, transportation, northern services and real estate development. These companies operate in the north, throughout southern Canada and internationally. Many are joint ventures often with non-Indigenous corporate partners. One of the Inuvialuit Development Companies success joint ventures is a holding company called NorTerra owned in partnership with the Nunasi Corp.,

representing the Inuit of Nunavut. The company leaves both groups well positioned to participate in the much-anticipated rebirth of the oil and gas industry. Gary Lamphier writes in the Edmonton Journal

The massive project would, in turn, spur demand for air travel and marine transportation throughout the North -- services NorTerra is ideally positioned to provide through its subsidiaries, Canadian North Airlines and Northern Transportation Co. Ltd. (Lamphier 2003).

These expectations lead NorTerra president Carmen Loberg to say, "I hate to make projections. But with the opportunities that are out there, we should be a \$300-million to \$350-million company within five years" (Lamphier 2003). Revenues in 2002 were \$239 million.

The Inuvialuit Petroleum Corporation:

The Inuvialuit Petroleum Corporation was formed in 1985. The IPC began operations by purchasing shares in two small publicly-trade companies. The IPC grew steadily through the late 1980s and early 1990s. In 1994, the IPC sold all of its oil and gas assets except for one property in northwest Alberta. "IPC received a total price of \$83.4 million which after the deduction of all associated costs, resulted in an extraordinary profit of \$29.5 million. This extraordinary gain is very notable as it was realized for the Inuvialuit on an equity investment of \$11.9 million" (ICG 1998, 2). As a result of the sale of its oil and gas assets, the company ended 1994 with a \$50 million investment portfolio to be used "to investigate internally generated oil and gas prospects, pursue acquisition opportunities and finance ongoing commitments for Inuvialuit benefits" (ICG 1998, 2).

In 1995, IPC purchased the assets of Omega Hydrocarbons and formed Inuvialuit Energy Inc., a joint venture 60% owned by the IPC. The IPC's strategy has been successful. In 1997, the company reported a profit of \$5.6 million on revenues of almost \$29.6 million. Profit in 1996 was \$4.2 million. In 1999, the IPC sold its interest in Inuvialuit Energy Inc. Proceeds from this sale were added to those from earlier sales and invested in a portfolio of marketable securities. This portfolio earned \$2.1 million in 2000. IPC's strategy is to "hold the marketable securities in anticipation of opportunities to participate in discoveries on Inuvialuit lands within five years" (ICG 2001, 25). With the resurgence of interest in petroleum and natural gas resources of the Beaufort Sea and the renewed interest in the Mackenzie Valley Pipeline, this strategy has borne fruit. Indeed, following the announcement by Imperial Oil Resources Ltd., Shell Canada Ltd., Mobil Oil Canada and Gulf Canada Resources Ltd. of the rebirth of the MacKenzie Valley Pipeline project, Aboriginal leaders representing the Inuvialuit, the Sahtu, the Gwich'in and the Deh Cho, met in Fort Laird and Fort Simpson. As a result of these meetings, the Aboriginal Pipeline Group (APG) was formed in June of 2000. Much more will be said about this and events since later in this paper.

Socioeconomic Impact of the Inuvialuit Corporate Group

Together, the companies of the Inuvialuit Corporate Group made a considerable contribution to the Inuvialuit people since the settlement. For example according to the Inuvialuit Regional Corporation Annual Reports, the beneficiaries' equity rose to \$299.3

million in 2004 from \$283.5 million 2003. The ICG (including its business subsidiaries) earned a combined profit of \$18.5 million in 2004 compared to \$15.5 million in 2003. The 2004 profit was earned on revenues of \$199.4 million. Revenues in 2003 were \$170.8 million. Revenues, after tax profit and beneficiaries' equity from earlier years are presented in Appendix H. The performance over the 10 years between 1995 and 2002 has been impressive, resulting in a 117% increase in beneficiaries' equity. During this same period the ICG also distributed \$11.6 million in dividends to beneficiaries. Please see Appendix H for a table of Inuvialuit Corporate Group's Revenue, Profit and Net Assets.

In earning its 2002 profits (the latest year for which a full set of figures is available), the ICG paid out at almost \$11 million in wages and salaries to Inuvialuit people, \$627,783 in honorariums, provided student financial support of \$307,858, made payments to elders of \$456,500, distributed \$1.3 million in dividends to beneficiaries, paid \$672,534 to Community Corporations and made almost \$800,000 in payments to various community groups and individuals. In total, the ICG provided almost \$15.1 million to Inuvialuit individuals, groups and communities; at least \$5.0 million of which was paid to individuals and communities for non-business (i.e. social) purposes. This is a considerable increase over the already impressive \$14.7 million paid out in 2001 and \$11.6 million in 2000. In total, between 1996 and 2004 the ICG has contributed \$83.1 million dollars to communities and individuals, and this includes only partial figures for the final two years. If salaries in 2003 and 2004 are at least similar to 2002, this amount will rise to well over \$100 million for the nine years. In the case of the Inuvialuit, a just settlement of land claims has provided the capital for entrepreneurship and business development and contributed to the rebuilding of the Inuvialuit 'Nation' by preserving the Inuvialuit culture, identity and values within a changing northern society. For example, with financial support from federal and territorial governments, corporations, foundations, and the Inuvialuit Corporate Group, Community Development Division (CDD) coordinated the provision of over \$5 million in community development programs in the fields of language and culture, early childhood development, Aboriginal health, economic development, human resource development, education, wellness, and youth (ICG Annual Report, 2002). While the ICG can be praised for its socioeconomic impact based on its annual reports' figures, we acknowledge that the Inuvialuit people's opinions have not been incorporated into this paper. Therefore, an assessment of the ICG's socioeconomic impact is far from complete. Further research will have to be done in order to establish a more comprehensive (both qualitative and quantitative) understanding of the impact the ICG and its subsidiary corporations have had on the Inuvialuit and whether or not the Inuvialuit people are in agreement with the ICG's decisions and management of its assets. Please see Appendix I for a detailed overview of Inuvialuit Corporate Group's Contribution to Communities and Individuals.

The Inuvialuit Final Agreement also saw the Inuvialuit obtain the rights to subsurface resources. These lands and subsurface resources are managed by the Inuvialuit Land Administration. In 2002, the Inuvialuit Land Administration received 54 applications from petroleum exploration companies for use of Inuvialuit lands, resulting in over \$2.4 million revenue. One of these applications involved a geotechnical investigation in

preparation for a Mackenzie Valley pipeline (Inuvialuit Regional Corporation: Geotechnic).

Essentially, through the land claim settlement, the Inuvialuit and federal government achieved Ortega's six criteria. As a result of their land claim settlement, land holdings, and their impressive accomplishments since the dawning of the new millennium, the Inuvialuit have well positioned themselves to participate in the petroleum and natural gas development of the north in partnership with corporations and governments as anticipated by Justice Berger. These developments resulted in a far different interplay among the actors and relationships than was present during the Berger Inquiry. The same is true of two other groups; the Sahtu and the Gwich'in both with settled land claims. The fourth major group in the region, the Deh Cho, have not signed a land claim agreement. As a result, the unfolding relationship and interactions between the Deh Cho and the other actors can be expected to greatly differ from those of the Inuvialuit, Sahtu and the Gwich'in, as well from the relationship that existed in the 1970's.

The Mackenzie Valley Pipeline, Act 2

The end of the 20th Century saw a rebirth of interest in the energy resources of northern Canada and Alaska, and a pipeline to bring these resources south to the American market. The reasons were threefold (i) constantly increasing demand and resulting record-breaking prices, (ii) "technological advances in pipeline construction and drilling have significantly reduced the cost of tapping the resource" and, most importantly, (iii) the fact that "native land claims -- the main stumbling block to the pipeline dreams of the 1970s - - have, for the most part, been resolved" (Bergman, 2000). The implications of the qualifying phrase 'for the most part' will turn out to be significant in the story that unfolds.

Act 2 of the Mackenzie Valley Pipeline saga began in February 2000 when four of Canada's largest energy companies—Imperial Oil Resources Ltd., Shell Canada Ltd., Mobil Oil Canada and Gulf Canada Resources Ltd.—launched a joint study into the feasibility of developing and transporting Mackenzie Delta gas through a pipeline to southern markets. This prompted proponents of an alternative route—Westcoast Energy Inc. and TransCanada PipeLines Ltd.—to announce that they were re-evaluating their Foothills Pipe Lines Ltd. Project first proposed in the 1970s that would take Alaskan natural gas southward along the Alaska highway route through the Yukon, British Columbia and Alberta to the United States. These two routes have been seen as rivals by many since which proponents of each, particularly governments and communities, have sought to stay ahead of the other. Interestingly, this is not so for corporations involved, notably TransCanada PipeLines Ltd., as they are involved in both projects. In the remainder of this section the focus will be on the Mackenzie Valley route, but it is important to recognize that one of the factors pushing forward the Mackenzie Valley route is the specter of the competing Alaska Highway route.

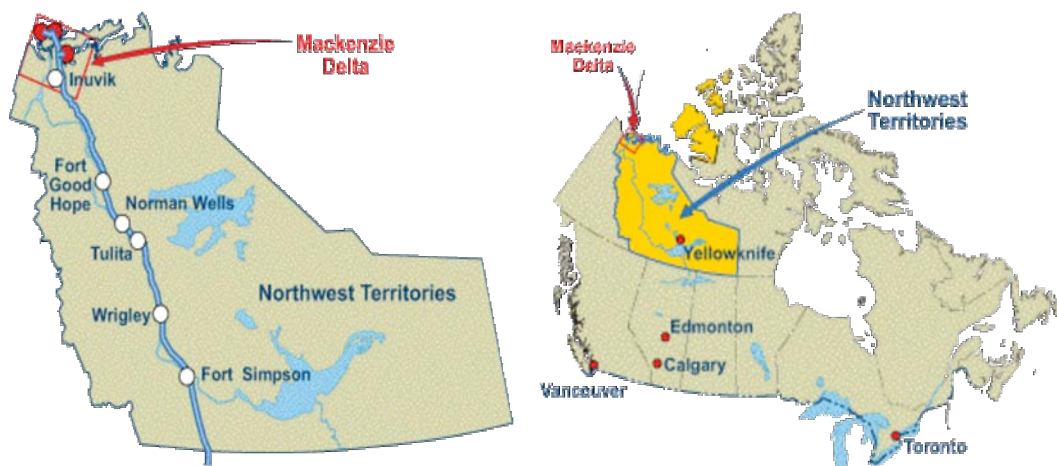
Following the announcement of by Imperial Oil Resources Ltd., Shell Canada Ltd., Mobil Oil Canada and Gulf Canada Resources Ltd., 30 Aboriginal leaders (representing the Inuvialuit, the Sahtu, the Gwich'in and the Deh Cho) met in Fort Laird and Fort Simpson. As a result of these meetings, the Aboriginal Pipeline Group (APG) was

formed in June of 2000. The first three have signed on as full members of the APG, while the Deh Cho have chosen to sit out until they sort out a land claim and self-government initiative with the federal government (Cattaneo, 2004).

According to the APG's brochure

The main reason for creating APG was to offer a new model for Aboriginal participation in the developing economy, to maximize ownership and benefits from a proposed Mackenzie Valley pipeline and to support greater independence and self-reliance among Aboriginal people (APG 2004, 1).

The establishment of the APG obviously meets with Ortega's "autonomy" criterion which requires that Indigenous groups be given the autonomy to manage their own affairs as a consequence of their land rights. In 2000, the APG received \$500,000 from the government of the Northwest Territories to develop a business plan for achieving the development of this new model of participation. They did so. The central feature of the plan is for the group to acquire a one-third equity interest in the pipeline. The full cost for this one-third interest is expected to be \$1-billion.



Negotiations between the APG and the corporations culminated in an agreement announced on June 19, 2004. According to Claudia Cattaneo, a writer for the National Post,

The deal calls for the APG to receive an annual dividend of \$1.8-million for the next 20 years if no new reserves are found and the pipeline carries 800 million cubic feet of natural gas a day, increasing to \$8.1-million after 20 years, when debt is paid off.

If significant reserves are found and the pipeline is built to move, for example, 1.5 billion cubic feet a day, the APG would receive an annual dividend of \$21.2-million, increasing to \$125.8-million after 20 years.

The other major APG goals are to have a say in the way the pipeline is developed, and to have the highest possible aboriginal participation in its construction and operation (Cattaneo, 2004).

While the negotiations went on for almost three years, the corporations never had any objection to the APG becoming a full partner in the project. Indeed, the companies actively courted them, considering their participation key to a successful project—so very different than the corporate attitude at the time of the Berger Inquiry. All the parties sought a business-to-business relationship of equals. It was the APG's ability, or rather inability, to finance their share of the \$250-million cost of the first phase of the project that caused the delay. The group needed to raise \$80-million. Ottawa refused to help APG. Obviously, the lack of capital made available to the APG speaks to the flaws with the Indigenous land and resource rights framework in Canada. Access to capital is one criterion that needs to be incorporated into Ortiga's criteria and the framework currently in place. Without access to capital, Indigenous groups' autonomy to pursue economic development with regards to their land and resources is severely limited. Enhanced access to capital is fundamentally interrelated to greater autonomy and a more comprehensive Indigenous land and resource rights framework. Given Ottawa's refusal, the APG turned to the private sector. TransCanada PipeLines Ltd. agreed to loan the APG \$80-million, which was to be repaid from pipeline revenues. The way in which the \$80-million was finally secured, through a partnership with the private corporate interests, also serves to further illustrate a fundamental change from the 1970s. TransCanada PipeLines Ltd. a proponent of the Alaska route was and is also a supporter of the Mackenzie Valley route. Gas from the Mackenzie Delta will feed into the company's existing pipeline network, increasing utilization and reducing costs to shippers (Cattaneo and Haggett, 2003). The company also has a long-standing and sophisticated interest in, and history of, working with Aboriginal groups as captured by Hope Henderson:

With pipeline and power facilities now within 50 km of more than 150 Aboriginal communities, TransCanada realizes a significant business advantage by nurturing long-term relationships with its "First neighbours." In 2001, a Corporate Aboriginal Relations Policy was adopted, which outlines commitments to employment, business opportunities and educational support through scholarships and work experience (Henderson 2003).

Consistent with this approach and in its own interest,

TransCanada PipeLines Ltd. will lend the aboriginal group \$80-million so it can pay its share of funding for the project definition phase. The gas producers group, which also includes ConocoPhillips, Shell Canada Ltd. and Exxon Mobil Corp., has agreed to give the pipeline firm an option to buy 5% of their equity stake in the pipeline (Cattaneo and Haggett, 2003).

The agreement negotiated between the APG, the pipeline corporations and TransCanada is another reflection of the changing relationship between Aboriginal communities, corporation and governments in the new economy. The APG's ability to circumvent the federal government in order to fund its participation in the Mackenzie Valley Pipeline

project signifies the growing autonomy that the APG's Indigenous groups have been able to achieve through their land claim settlements. As captured in the following

We're very excited that this has been done by the private sector and that the corporations have seen that it's part of their role to work with the aboriginal community," said Indian Affairs minister Robert Nault in an interview. "We've been in Washington talking about the Alaska line and arguing that market-distorting subsidies aren't acceptable. This shows that we walk the talk (Haggett, 2003).

At the same time as the APG and the corporations were negotiating their agreement, the Deh Cho was seeking a land claim agreement with the federal government. Almost 40% of the proposed pipeline route is on lands claimed by the Deh Cho. Such lands have a legal connotation - Aboriginal title - which means that the developers must deal with the Deh Cho question. The pipeline corporations called on Ottawa to reach a land claims agreement which, the corporation believed, would resolve the pipeline corridor issue. On April 17, 2003, the Federal government and the Deh Cho reached an Interim Resource Development Agreement (IRDA) that will last for 5 years or until a final land claims agreement is reached. Under the terms of the interim agreement each year the federal government will set aside on behalf of the Deh Cho a certain percentage of the royalties collected from the Mackenzie Valley. The amount will be paid out to the Deh Cho when a final agreement is concluded. In the interim, the Deh Cho will be able to access up to 50% of the total each year (maximum \$1,000,000) for economic development. As part of the agreement, 70,000 square miles of Deh Cho claimed lands will be set aside as a part of a system of protected areas, while "50 per cent of the 210,000 square kilometres with the land with Aboriginal title will remain open to oil, gas and mining development, subject to terms and conditions set out by the aboriginal group" (Canadian Press, 2003). Environmental groups praised the deal. The World Wildlife Federation called it a "tremendous achievement". The group has awarded the Deh Cho and the federal government the Gift to the Earth, an international conservation honour for environmental efforts of global significance.

With the interim agreement in place, the pipeline project should move forward to the next stage, environmental review. But such has not been the case. By November of 2003, the Deh Cho were threatening to seek a court injunction to halt the review and approval process "unless the government renegotiates the terms of the process to include Deh Cho representation (Anderson et al 2005, 104). "Decisions are being made without us. We should be able to have input just like the rest of the regions," [those with settled land claims] said Keyna Norwegian, chief of the Liidlii Kue band in Fort Simpson" (VanderKlippe, 2003). VanderKlippe goes on to say that there is a strongly held belief among the Deh Cho that "protecting traditional areas is more important than using their land to transport Arctic gas." "We're pretty rich in our own resources," said Norwegian. "We can live without the pipeline." The Deh Cho have allies among the environmental groups who have serious concerns about the project including risk to the already threatened Bathurst caribou herd, the stability of the pipeline in permafrost under conditions of global warming, risk to the 500 rivers that the pipeline must cross, and a general resistance to ongoing reliance on petrochemicals. The dispute remained unresolved as of June 6, 2004 (Weber, 2004) when this solution collapsed. The Deh Cho thought they had reached an agreement in May that would give them a seat on the review board.

The federal negotiator's view of that agreement differed. His understanding was that the agreement reached examined ways in which the Deh Cho could participate. Chief Norwegian of the Deh Cho accused the regulators of renegeing on an agreement and the impasse continues (Weber, 2004).

The Mackenzie Valley Pipeline, Act 3

On January 25th, 2006, the National Energy Board commenced its public hearings into the application of Imperial Oil Resource Ventures Ltd for permission to construct and operate the Mackenzie Valley Pipeline.

The issues involved in what is considered over a \$16 billion project have been divided roughly into two set of hearings. The first set of hearings is concerned with the project's economic, safety, technical issues. These hearings were under the authority of the National Energy Board and were completed in December 2006 (CBC, March 2007).

The second set of hearings will look at the project's environmental, socio-economic, and cultural issues — what will it mean for the land and the people and wildlife that live there. These hearings are being held by a Joint Review Panel and are currently underway. The Joint Review Panel is a seven-member independent panel that was appointed by the federal minister of the environment on August 18, 2004, in consultation with the Producer Group and the Aboriginal Pipeline Group. The Inuvialuit, Sahtu and the Gwich'in are involved in these hearings, again pointing to the legal recourse criterion emphasized by Ortiga. Their hope is that there will be an early start to construction. As part owners of the proposed gas pipeline their past efforts to establish a partnership with the developers succeeded. As owners of the APG, their relationship with government has been similar to that of their non-Aboriginal corporate partners, namely a relationship of applicant to regulator.

The panel is listening to evidence from months of hearings and reporting on what it thinks the impact of the project will be on the environment and the lives of the people who live in the region. With regards to both the engineering and economics panel and the environmental panel, anyone can appear before the panels either at informal community sessions or formally as interveners. Intervenors must submit an application which has to be approved before they can present their case for 15 minutes – 30 minutes if they are appearing at hearings dealing with technical issues. A Participant Funding Program has also been set up for intervenors in order to support public participation by concerned citizens and groups in the environment assessment process. The panel will issue a report which will include its recommendations after the public hearings have ended. The National Energy Board will decide whether or not the project should be stopped or move forward. The final decision on whether the pipeline is to be approved is up to the federal cabinet. That decision should come in 2008. If Ottawa gives the go-ahead, construction could start by 2010. The gas could be flowing by 2014 (CBC, March 2007).

For the Deh Cho, they wish to be a full partner in the project, but only after their land and other rights have been recognized and entrenched. With little progress on the Deh Cho claim, the Mackenzie Gas Project appeared stalled. Ottawa announced the Interim

Resource Development Agreement (IRDA) in April 2003 in order to bridge the Deh Cho concerns. The IRDA outlines that the Deh Cho will receive access to funds each year for economic development projects. In 2005, the agreement provided nearly \$1-million for Deh Cho firms to undertake both large and small economic development projects within the lands claimed by Deh Cho. Despite the IRDA, negotiations with the Deh Cho as of May 2007 have been stalled. If the Deh Cho's Land Use Plan is not approved and implemented, the interim land withdrawals which were agreed to in 2003 could expire in October, 2008, leaving all Deh Cho lands exposed to sale, lease and development (DFN Chief Negotiator's Report on the Deh Cho Process, July 2007, pg. 3). At the negotiating session that took place in Yellowknife in April 2007, the Deh Cho and Canada made compromises, which allow the Land Use Plan to be revised over the next 12 months. According to the Deh Cho, the Land Use Plan has been hailed by public interest groups and land use planning experts all over Canada as an "outstanding mode of cooperation that balances the interests of conservation and development," (DFN Chief Negotiator's Report on the Deh Cho Process, July 2007, p. 3).

According to the Calgary Herald, "the Deh Cho First Nation is refusing to join an agreement in principle to share resource revenues and administrative powers in the Northwest Territories....Herb Norwegian said the deal -- seen as a precondition for the proposed Mackenzie Valley natural gas pipeline -- offers native communities 'crumbs' in exchange for their land and resources" (Polczer, Calgary Herald, 2007). The Resource Revenue Sharing Agreement-in-Principle (AiP) was signed by the GNWT and the Inuvialuit Regional Corporation, the Gwich'in Tribal Council, the Sahtu Secretariate and the Northwest Metis Nation in Yellowknife on May 9, 2007. According to the Deh Cho First Nation (DFN), the groups, which have signed the AiP "have extinguished their traditional territories (Inuvialuit, Gwich'in, and Sahtu) or have vague or undefined claims to land and resources (NWT Metis). These groups do not have any significant claims to ownership of lands or resources outside of their small selected parcels. They therefore have virtually no leverage in negotiating a resource revenue sharing agreement with Canada or the GNWT," (DFN Chief Negotiator's Report on the Deh Cho Process, July 2007, pg. 4). For these reasons, and many others, the Deh Cho have tabled the AiP. In March 2007, the APG said the Deh Cho's 34% share "will be held for them if and when they choose to participate" (CBC, March 2007). As of May 2007, Bob Reid, speaking on behalf of the APG, stated that "bringing the Deh Cho onside has become a lower priority in light of revised timelines. 'We're basically not pursuing APG membership for the Deh Cho at this time because the project has been delayed'" (Polczer, Calgary Herald, 2007). However, the AiP has been structured in such a way to allow the Deh Cho to sign on at a future date. Given the halt in negotiations and strong difference in opinion of the Deh Cho from the other Aboriginal groups involved in the Mackenzie Valley Gas Project, the project could reach its first phase, namely the National Energy Board hearings, before their land claims are settled. At this stage, the Deh Cho's resistance to signing on with the APG and the Producer Group, and their ability to slow the Mackenzie Valley Gas Project to the degree they have, speaks to the incredible power the Deh Cho have in this whole process. The Mackenzie Valley Pipeline story clearly illustrates how the development of an Indigenous legal framework with regards to land use and natural resources, which meets all of Ortiga's six criteria,

has provided Aboriginal groups involved with the project a greater degree of sovereignty and autonomy to guide the Mackenzie Valley Gas Project's development than ever existed before.

As illustrated above, the Calder and Berger decisions incorporated 1) Land Use Recognition 2) Territorial Recognition and 3) a Legal Recourse into the Canadian legal system. Eventually, with the development of a negotiating structure through the establishment of the Comprehensive Claims Policy, Ortiga's remaining three criteria, 4) Natural resources rights 5) Tenure security, and 6) Autonomy became defining characteristics of the Indigenous land and resource use legal framework that is currently in place in Canada. While agreements are far from perfect for all Aboriginal groups involved in the project, the fact that each group has been able to either come to an agreement with the government and corporate interests or halt development until an agreeable negotiation is reached illustrates how power dynamics have changed since the 1970s due to the development of this framework.

Conclusion on the Mackenzie Valley Pipeline

Much has changed over the past forty years. First, many land claims have been settled. Second, as a result of these settlements, Aboriginal organizations that emerged have elected to engage in the market economy. Third, companies are perfectly prepared - maybe even eager - to have the Aboriginal groups participate as equal equity partners in the Mackenzie Gas Project. Nellie Cournoyea, Chair of the Inuvialuit Regional Corporation, expressed this new business climate as "the biggest change since the 1970s is that the oil and gas industry realizes aboriginal people are an integral part of development, and that they must receive a fair share of resource revenue and have the opportunity to invest directly in pipelines and offshoot businesses" (Bergman 2000). Fred Carmichael, President of the Gwich'in Tribal Council and Chairman of the Aboriginal Pipeline Group summed it all up by saying "We're ready," at the opening of the National Energy Board Hearings (Jaremko 2006). Fourth, the environmental and social concerns about pipeline development trampling fragile northern environments and Aboriginal settlements that existed in the 1970s are still a major concern. However, with the development of a strong Indigenous legal framework surrounding land and natural resource rights, the Aboriginal groups involved are well-situated to negotiate a land use policy with the government and corporate interests attempts to balance socioeconomic and environmental concerns. Thomas Berger stated in his remarks to Edmonton Journal reporter Gordon Jaremko:

The recommendations I made have been carried out. How events unfold in an area as dynamic as the Mackenzie Valley will depend on the people of the Mackenzie Valley. I'm confident they'll decide what's in their best interests (2006).

The shift in relationship between the Aboriginal groups, especially the Inuvialuit, Sahtu and the Gwich'in, and environmental groups, deserves attention. Aboriginal groups and environmentalist were strong allies during the Berger days. Now the Inuvialuit, Sahtu and the Gwich'in are proponents of the project. Environmental representatives are not. The position of the Deh Cho is somewhat ambivalent. On the one hand, this First Nation has accepted the interim agreement, which permits the Mackenzie Gas Project to proceed to the National Energy Board Hearings. On the other hand, the Deh Cho are still very

focused on environment issues as part of their land claim and still seek the environmental groups as allies in their land claim negotiations. As the National Energy Board Hearings proceed, the position of the Deh Cho will be critical. While they are not opposed in principle to economic development, they wish to control such development within the framework of their comprehensive land claim agreement. If the Deh Cho becomes dissatisfied with the Resource Development Agreement, the gas pipeline project could be in trouble.

This story just told is not unique to northwestern Canada. The very same points could have been made by discussing the James Bay and Northern Quebec Agreement and what has followed for the Cree, the Inuit and the Naskapi in northern Quebec; the Nisga'a and their struggles and success in British Columbia; and many others. The struggle by Indigenous people in Canada is bearing fruit. As the Deh Cho say, the pipeline will not be built without their consent, and it won't!

Section IV: The Lac La Ronge Indian Band

The Lac La Ronge Indian Band (LRIB) is the largest First Nation in Saskatchewan. It is comprised of six communities: Grandmother's Bay, Hall Lake, Little Red, Nemeiben River, Stanley Mission and La Ronge. La Ronge is the largest of these communities. The Band's current land-base includes 18 reserves totaling 43, 250 hectares. The LRIB is an excellent example of a community that has developed incredibly successful economic ventures and employment and capacity building opportunities for members in spite of not having a large land claim settlement.

On August 19, 1992, Chief Harry Cook of the Lac La Ronge Indian Band (LRIB) requested that the Indian Claims Commission (ICC) conduct an inquiry into the Band's entitlement claim. On March 8, 1993, the Government of Canada and the Chief and Council of the Band were advised that this Commission would conduct an inquiry into the government's rejection of this claim. However, as of 2007, the government has rejected the Lac La Ronge Band's TLE application.

Despite the fact that a land claim settlement has not been possible and natural resource development has not been the primary source of wealth for the Band, the LRIB has been incredibly successful. The Kitsaki Development Corporation (KDC), established in 1981, performs the for-profit economic development function for the Lac La Ronge Indian Band. The chief and council, through the board of directors, work to serve the 8,000 Band members. The LRIB formed the Kitsaki Development Corporation (KDC) in 1981 in an attempt to improve socioeconomic circumstances through economic development. At the time KDC (it was later renamed as the Kitsaki Management Limited Partnership [KMLP] in order to reflect a new corporate structure) was first established, the LRIB's unemployment rate was 32% compared to 10% for the neighbouring non-Aboriginal community of La Ronge, while the participation rate at 37% compared to 79% for La Ronge. As a result, the LRIB employment rate (the number employed divided by the potential labour force) was 24% compared to 71% for La Ronge. The challenge presented by these unsatisfactory circumstances was compounded by the growth in the potential

labour force growth between 1986 and 2001, 116% for the LRIB and only 10% for La Ronge; and the growth in the actual labour force, 153 % for LRIB and just 7% for La Ronge.

From its creation in 1981 the KMLP's strategy for improving the socioeconomic circumstances of the people of the LRIB has been to form "sound, secure partnerships with other Aboriginal groups and successful world-class businesses in order to generate revenue for Kitsaki and employment for Band members" (McKay 2002, 3). As part of this strategy

Kitsaki seeks to create and manage a portfolio of active business investments rather than the individual companies. We try to obtain a majority interest in a business with a highly motivated entrepreneur or a strong corporate partner. We then work with that partner to maximize profits, employment, and training opportunities (McKay 2002, 1).

Implementing this strategy, between 1981 and 2004, the KMLP has created a number of business ventures, some wholly owned, others are partnerships. These businesses now employ almost 450 people (an average of 38 per business) and have an annual payroll of almost six million dollars. In addition, an estimated 300 LRIB members were paid \$120,000 for picking wild mushrooms and 200 other Aboriginal people were paid \$80,000. As well, 300 LRIB members were paid \$637,000 to harvest wild rice and 200 other Aboriginal people were paid \$275,000. Combining these payments with the payroll, the Kitsaki companies paid out a total of seven million dollars in salaries and contract payments annually.

Data from Statistics Canada confirm that the activities of KMLP have had an impact over the two decades from 1981 to 2001. In spite of a 116% increase in the potential labour force and a 6.3% increase in participation rate, which together resulted in a 153% increase in the actual labour force, the LRIB unemployment rate fell by 2% and the employment rate increased by 5%. The number of LRIB people employed increased by 410. This is a considerable achievement, especially when compared to the figures for the neighbouring community of La Ronge for the same period. The La Ronge potential labour force grew by only 10% while the actual labour force increased by just 7% because of a 2% decline in participation. The increase in number employed increased by only 70 resulting in an increase in the unemployment rate of 1% and 3% decrease in the employment rate (Anderson et al 2004, pp. 16-18).

Furthermore, according to the *Kitsaki Update Summer 2007*, KMLP has contributed to the Lac La Ronge Indian Band in the following ways:

- Paid tens of millions of dollars to LRIB members over the years. In the last fiscal year alone Kitsaki and our partnerships paid over \$4,000,000 in wages to members of the Lac La Ronge Indian Band.
- Employed up to 165 La Ronge Band Members full time in the past year and hundreds more on a seasonal basis.
- Paid hundreds of thousands of dollars in charitable donations and trappers assistance over the years, including over \$60,000 in 2006.

- Provided financial and technical assistance to Keethanow Bingo North, enabling them to pay millions in donations to charities.
- Paid for the Band's Treaty Land Entitlement costs for 20 years, including legal fees. Has also maintained the position of Treaty Land Entitlement coordinator to assist in the TLE process and perform other functions for the Band such as the election act review.
- Contributed financially to the health care system to improve imaging communication between our hospital and Royal University Hospital, thus reducing travel for elders and Band Members requiring medical help.
- Contributed to many student scholarships.
- Encouraged our business partnerships to invest in ongoing training to improve employment opportunities.
- Assisted Band entrepreneurs with their efforts to get into business by directing them to appropriate agencies.
- Administered numerous third party training programs so students can be educated in their chosen field, and in some cases paid for their education.
- Worked on the land use planning process to help protect our environment and identify and map traditional and sacred sites for the protection of our heritage for future generations
- Administered Sarcan (a recycling bottle depot) to retain job opportunities for Band Members
- Administered brush clearing, tree planting, fire smart programs and other short term contracts to improve the communities and encourage employment.
- Technical assistance in the decision to bring natural gas to La Ronge.
- Donated hundreds of Ice Wolves tickets to Lac La Ronge Indian Band Schools and also supported the team financially.
- Supported the wild rice industry annually so that Band members can earn money and maintain a more traditional lifestyle.

It is also important to note that the LRIB is a band that has a Financial Transfer Agreement (FTA). This type of block funding agreement is typically of a 5 year time period and it is only given to bands with a high degree of sound management practices and policies to effectively manage several areas. We assert that the following factors are major contributors to the LRIB's success: 1) strong land use regulations and policy 2) sound economic policy and management, and 3) appropriate institutions that support economic development. Furthermore, the fact that the Band has developed and implemented a traditional and contemporary land use policy into their economic policy, management, and institutions, demonstrates the incorporation, of Ortiga's six criteria into the operations of the Band. Without these criteria in place, i.e. a well-developed Indigenous land and resource legal framework, the LRIB's land use policy and the incorporation of this policy into their economic development ventures, would be difficult to achieve.

Under the strong leadership of Chief Tammy Cook-Searson and the CEO of KMLP, Russel Roberts, economic development is being pursued in accordance with the Band's Development Philosophy, encompassing:

- a. A commitment to a healthy environment;
- b. Protecting the traditional cultural pursuits of its members;
- c. Planned Commercial Enterprises; and

- d. Continuing support for existing Subsistence and Commercial Uses (hunting, fishing, trapping, gathering of plant products such as berries, mushrooms, and wild rice)

With regards to land use, the Band has developed the following *Principles for Traditional Land Use* that build upon the Band's history and traditions while developing the potential for resource development. These principles are as follows:

- a. We will develop our Traditional Lands and Resources [sic] in accordance with the rights, expectations, and obligations of all parties as manifested in our Treaty, treaty rights, and treaty relationships.
- b. We will practice a Balanced use of Natural Resources. We believe that the use of our Traditional Lands can be balanced to be of ongoing benefit to our people and our partners in development. We will strive to protect the relationships and natural condition of the land, lakes, rivers, plants, and animals. We will do this by balancing the needs of spiritual and cultural pursuits, hunting, fishing, trapping, harvesting of medicinal and food plants, recreation, and commercial and industrial development.
- c. We will practice Sustainable Use of our Traditional Lands. We believe that our Traditional Lands and the resources they contain are a Heritage from our Ancestors and must be maintained as a Legacy for our children.
- d. We will engage in Consultation with our membership and other key stakeholders on important issues regarding the present and future use of our Traditional Lands and resources (Lac La Ronge Indian Band Policy on Traditional and Contemporary Land Use 2005, p. 15).

The Band has also established the following key land issues:

1. The authority of the Band to administer and manage the use and development of their Traditional Lands within the North Central Land Use Area. Such management would encompass: protection of its ecology; sustainable use of wildlife, timber, and non-timber forest products; water and mineral resources; and ongoing controlled access to areas and sites of spiritual and cultural significance.
2. Development of a Forest Management Agreement that is guided by Traditional Knowledge and Values.
3. Economic Development in accordance with the Band's Development Philosophy.
4. Development of a full range of tourism projects appropriate to specific areas, including tourism focused on ecology, culture, regional and Aboriginal history, nature and photography, and all levels of wilderness adventure.
5. Ongoing, controlled access to desirable areas (including hunting, fishing, trapping, gathering, burial, and ceremonial sites) through maintenance of an environmentally sensitive network of roads, trails, and portages.
6. Conservation of the environment, encompassing: air and water quality; protection of the Boreal Shield Ecozone; biodiversity of forest plants, fish, and wildlife; sustainable

commercial and industrial development; waste management; and areas of restricted access.

7. Resolution of Traditional Lands boundaries (Lac La Ronge Indian Band Policy on Traditional and Contemporary Land Use 2005, pgs. 15-16).

In its policy on traditional and contemporary land use, the Band asserts the significance of natural resources as an important source of economic development and the importance of sustainable approaches to natural resource development. Furthermore, with regards to natural resource development, the LRIB states that it will “develop natural resources on its Traditional Lands in partnership with other stakeholders including the provincial and federal governments” (Ibid, 17). This approach to land use and natural resource development fits well within the Band’s partnership model of economic development and is clearly illustrated in the following example.

The LRIB currently holds a Term Supply License (TSL) within their traditional lands. A TSL is an interim license, provided by Saskatchewan Environment as a bridging mechanism, allowing organizations the opportunity to begin operations while pursuing a long-term license to manage forests under a Forest Management Agreement (FMA). The FMA will develop strategic forest management plans and environmental assessments (as part of the FMA licensing process), annual operating plans, and plans for supervising harvest and renewal operations. With regards to access to capital, the Band believes that the TSL and completion of the FMA “present a very real opportunity to secure collateral for major economic development projects. The acquisition of the TSL has provided the required equity for large projects that are currently recognized and accepted by banking institutions. Banking institutions view these agreements as a long-term tenure over the resource that is critical for long-term sustainable business viability. Without it, development of resources on and off reserve is virtually impossible” (Ibid, 18). In her correspondence with the Minister of Saskatchewan Environment, David Forbes, on May 3, 2005, Chief Tammy Cook-Searson made the following statement: “We see an FMA as a unique opportunity to manage our Traditional Lands in a way which balances traditional use and economic development. This will be of benefit to our Band membership, our partners, other northerners, and Saskatchewan citizens in general” (Ibid, 21). The Minister responded on May 25, 2005 by saying that “The Government is committed to working with the Band and its communities to ensure that they are very much a part of the management of the forest in their Traditional Areas (Ibid, 22). The LRIB’s land use principles and natural resource development philosophy has helped to shape its overall economic development strategy:

- 1) To gain and maintain control of resource and land use to ensure that the Band’s Traditional Values [sic] will always be respected.
- 2) To maintain and enhance Band support for traditional cultural pursuits (Subsistence Living) and for existing commercial activities (trapping, fishing, wild rice, berry and

- mushroom gathering, and arts and crafts) through improvements in communication, funding, education, transportation, and other needed initiatives
- 3) To develop alternative economic pursuits that reflect Traditional Cultural Values [sic] and appeal to Band members who are unable or unwilling to be involved in forestry, mining, or other industrial activities.
 - 4) To form sound, secure partnerships with other Aboriginal groups and successful businesses in order to generate revenue and employment for Band members.
 - 5) To fully educate, train, and counsel our people so that they may participate in the development of our natural resources and our economy.
 - 6) To increase Band ownership of resource development enterprises.
 - 7) To promote Aboriginal entrepreneurship based on partnerships, training, and mentoring.
 - 8) To strengthen initiatives to address barriers to Aboriginal participation in resource development.

Both this strategy and the land use policy guide the KMLP's operation of the following enterprises: Athabasca Catering, Canada North Environmental Services, Dakota Dunes Golf Links, First Nations Insurance, Kitsaki Management, Northern Lights Foods, Keewatin Procon, La Ronge Motor Hotel, La Ronge Wild Rice Corporation, Northern Resource Trucking, PANS Joint Venture, Wapawekka Lumber, and Woodland Cree Logging. Based on both its land use policy and economic development strategy, KMLP has developed a diversified network of businesses that attempt to meet KMLP's following commitments:

- We shall encourage and support education and training for people to prepare themselves for employment and economic opportunities.
- We shall maintain a diverse group of profitable enterprises, allowing Kitsaki the flexibility to adapt to evolving markets.
- We shall maximize Aboriginal employment in Kitsaki and Band enterprise through a "training oriented" work environment.
- We shall develop the resources of the Lac La Ronge Indian Band's Traditional Lands according to the principles of sustainability, environmental protection, multiple use of resources, preservation of traditional activities, and public participation and consultation.
- We shall maintain and support Traditional Aboriginal Knowledge that provides value-added advantages to the Kitsaki group of business (KMLP Brochure, 12).

In addition to a strong land use policy, the LRIB's sound economic policy and management is very evident through the series of managers the Band has employed to head up the economic development arm of the community. This series of managers has helped the LRIB to develop a partnership or alliance model of economic development that attempts to blend the old with the new; heritage with innovation. "Kitsaki is a demonstrably successful portfolio of Indigenous entrepreneurial enterprise based on the partnership model" (Hindle et al. 2005, pg. 1). As past CEO of KMLP, Ray McKay, stated, part of KMLP's management strategy is to "to get strong partners so that we don't have to invent the management..." (Lett 1987). Furthermore, their management is guided

by combination of cultural skills and technical business skills (the twin skills inventory, which has helped to make KMLP successful (Hindle et al. 2005, 14). In terms of institution building, KMLP's success in this area is evidenced by the creation of the KMLP and the successful operation of its many enterprises.

Concluding Observations

Aboriginal people in Canada did not view the land and its resources as something they owned, so they did not see the treaties as a transfer of ownership. Rather, they saw the treaties as providing a basis upon which the use of the land and its resources could be shared.

Around the world Indigenous people are struggling to reacquire control over their traditional lands and resources with mixed success. However, what cannot be denied is that they have made remarkable progress in forcing the world to acknowledge the legitimacy of their demands. Ortega's research in Latin America, the Mackenzie Valley Pipeline, the Inuvialuit, and the Lac La Ronge Indian Band's case studies all illustrate that the following criteria provide a strong formula in the development of a superior Indigenous land and resource legal framework: 1) Land tenure regime, 2) Territorial recognition, 3) Natural resources rights, 4) Tenure security, 5) Autonomy and 6) a legal recourse. Furthermore, the LRIB's development of a strong land use policy illustrates that First Nations need not have a land claim settlement in place in order to develop a strong land and resource policy that successfully guides economic development.

With a land and natural resource legal framework in place that incorporates Ortega's six criteria, Indigenous people around the world might be in a better position to rebuild their communities in a manner of their own choosing. For many, this would occur through participating in the global economy, but on their own terms, as is happening with respect to the MacKenzie Valley Pipeline. As the MacKenzie Valley story illustrates, this will not occur without conflict. However, Indigenous people will be in a position to be heard, like the Deh Cho now, and COPE in the 1970's, thanks to the resilience, persistence and courage of Aboriginal peoples and allies such as Thomas Berger.

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Endnotes

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ⁱⁱ http://www.ainc-inac.gc.ca/ps/clm/ccb_e.html

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- ⁱⁱⁱ <http://www.ainc-inac.gc.ca/ps/clm/scc-eng.asp>
- ^{iv} http://www.wd.gc.ca/rpts/audit/absn/6a_e.asp
- ^v Ibid.
- ^{vi} http://www.ainc-inac.gc.ca/nr/prs/s-d2004/02551dbk_e.html
- ^{vii} Ibid.
- ^{viii} The Inuvialuit Land Claim Settlement