THE SETTLEMENT OF NATIVE CLAIMS*

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After stressing the urgency of settling native land claims, the author in his speech suggests that a 'legalistic' approach to the problem should be abandoned. The James Bay Agreement is discussed as an example of how one such claim was dealt with and, drawing upon his personal experiences with the Agreement, the author suggests that it is the political aspects of a particular claim that will govern in the end. Further, it is suggested that the business community can play a valuable role in native land claim settlements.

I. INTRODUCTION

I believe that I should be right in assuming that it would be superfluous to emphasize to the members of the Canadian Petroleum Law Foundation the urgency of settling native claims.

Aside from the moral considerations, which alone are a sufficient reason to settle these claims, there is obviously a very pragmatic reason why we should come to terms with native people. We need, more than ever, the natural resources which can be developed in those areas where native people are claiming rights. From a practical point of view, it becomes very necessary to settle these claims so that we can develop these resources in an orderly manner for the benefit of all Canadians, and in an atmosphere of social peace.

However, it is important for all to realize that, independently of the potential problems which could be caused to native communities by certain developments, there exist serious problems affecting the native communities and our relationship to them. We should all realize that the annual budget of the Department of Indian Affairs and Northern Development for the Indian and Inuit Program is approximately $400 million. Therefore, aside from the social problems, we have a very direct interest in trying to resolve the problems affecting native communities.

Through the settlement of native claims, we have a unique opportunity not only to safeguard these communities with respect to future development, but also to provide solutions to existing problems.

II. THE LEGAL ASPECTS

Although the extent and precise definition of native rights is open to interpretation, I believe that there is a basis for a legal claim at least in the Yukon, British Columbia and parts of the Northwest Territories. There may also be a basis for a claim in Northern Alberta. Prior to the James Bay Agreement, of course, there was also a basis for a legal claim in Northern Quebec.

Without discussing the details of the various court cases concerning native claims, I would like to make a few observations concerning the jurisprudence affecting native rights.

It is essential to be aware of the legal basis of native claims, and to have answers to certain questions. For example, do native people have

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* This paper was delivered at the Canadian Petroleum Law Foundation Midwinter Conference held February 11, 1977 at Calgary, Alberta.

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rights over a certain territory and if so what precisely are such rights which can be enforced in a court of law? However, I believe that one should abandon what I would call the 'legalistic' approach to native claims. This is an approach categorized by a strict interpretation of the statutes, proclamations, orders-in-council, and other pertinent laws or theories relating to native rights.

When a litigant resorts to the courts, his attorney is really asking the courts to give to his client what is generally accepted by society as being just and equitable. In attempting to do this, of course, he must find a basis in law to support his contention. Most laws are open to interpretation and in interpreting the laws the courts generally reflect the mores of society. With this view of the law, there should be lessons to be learned by both native parties and government. On the one hand, because our sense of justice and concern for the disadvantaged is generally accepted by society, governments must be more flexible in their approach to native claims. On the other hand, claims cannot contain concepts and be viewed as being so exorbitant as to be rejected by society. We are caught in a balancing act between the views and needs of society on the one hand, and the needs and aspirations of the native community on the other.

An examination of the most pertinent jurisprudence relating to native claims (such as the *Calder* case in British Columbia, the registration of the caveat in the Northwest Territories, the James Bay litigation) is a good illustration of this balancing act between the claims of the natives and the requirements of our society as perceived by the courts.

From reading these decisions, one cannot help but draw the conclusion that the courts were giving the parties involved a message: negotiate and settle. These claims cannot be settled by the courts. They do not deal with purely legal matters. All that the courts can do is enforce certain rights along the way, sometimes in favour of the natives and sometimes in favour of governments. But the courts cannot settle the claims.

The British Columbia claim is still very much alive. The *Calder* decision has only postponed a determination of the real issues. The recent Supreme Court decision with respect to the caveat in the Northwest Territories has not settled the question of the native claims in the Northwest Territories. Because of their nature, native claims will not be settled by the courts.

III. THE JAMES BAY SETTLEMENT

Before discussing the role of government in the settlement of native claims and the political consequences of settling or not settling these claims, I think that it would be helpful if we analyzed the elements and contents of native claims. I will take as an example, of course, the James Bay settlement. Despite the criticisms levelled at this agreement, the claims of other native groups, whether in the Yukon or in the Northwest Territories, are patterned after this settlement.

The agreement affects 10,500 native people living in Northern Quebec. The superficial area of the territory involved is 410,000 square miles. The James Bay agreement has, as one of its objectives, the preservation of the way of life of the native people by protecting their traditional pursuits of hunting, fishing and of trapping.

To achieve this objective, the agreement contains provisions relating to: a hunting, fishing and trapping regime; a land regime; an income security program; an environmental and social protection regime; and modifications to the project.

The natives are granted guaranteed levels of harvesting as well as exclusive trapping rights over the territory. In addition, certain species are reserved exclusively for the natives. Through a co-ordinating committee, made up of equal representation between natives and the government, the natives have a direct participation in the formulation and supervision of laws and regulations relating to the hunting and fishing activities of natives and non-natives over the entire territory.

This is the first time that any government has accepted such a principle in an area of activity which is of the utmost importance to the natives.

Quebec has undertaken to set aside 2,158 square miles of land (known as Category I land) for the exclusive use and benefit of the James Bay Crees. Of this area, 1,274 square miles (Category IA land) are modified reserve lands and 884 square miles (Category IB land) are granted to provincial corporations composed solely of James Bay Crees. Quebec has agreed to grant to the Inuit, in ownership, 3,250 square miles for community purposes.

The Crees and Inuit have also been granted exclusive hunting and fishing rights, and the exclusive right to operate outfitting facilities over a total area of 60,000 square miles (referred to as Category II lands), as well as exclusive trapping rights over the entire territory.

The income security program, which is in effect a guaranteed annual income and which may be the first such program in North America, is designed to safeguard the traditional pursuits of the natives and applies to those natives who wish to pursue harvesting activities as a way of life.

Since the native people have a particular relationship to the land and its resources, particular attention was paid to the protection of the environment, necessitating the creation of new legal structures in this field. Not only is it a means to help protect the way of life of the natives ("Environmental and Social Protection Regime", the name of the regime itself, is an indication of its thrust) but it also contains concepts which should apply to all developments and to all areas, whether inhabited by natives or non-natives.

Impact assessment studies are mandatory in projects which are recognized as having a potential impact on the environment and on the natives. These studies must consider and evaluate the impact, not only on the physical environment, but also on the social environment of those to be affected. Guidelines are set forth and accepted by governments respecting those factors to be considered in deciding whether projects should proceed.

Various organisms have been created, such as the Environmental Quality Commission and the James Bay Environmental Review Board which give to the native people a meaningful participation in the administration and management of the Environmental and Social Protection Regime and in evaluating and making decisions with respect to future projects.

As a result of the opposition by the Crees against the project,

significant modifications to the project were agreed to by the James Bay Energy Corporation. More importantly, however, a firm agreement was made by the Energy Corporation to effect remedial works which will be required as a result of the construction of the project.

A government corporation (SOTRAC) has been created with a budget of $30 million to be responsible for these remedial works. This corporation will try to minimize the damages which may result from the construction of the project in a way that the Crees think will be most effective. The initiatives as to the nature and extent of the remedial measures are to come from the Crees.

The Agreement also provides for the meaningful participation of natives in the government process. If the native people are to remove themselves from being wards of one federal government department, it is essential that they participate in all aspects of governmental decisions and in all the important areas of governmental activities. It is also essential that they relate to the communities which surround them. Since many of the important governmental activities in the province are under provincial jurisdiction, it is therefore, essential that the native communities relate not only to the federal government, but also to the provincial government. Therefore, new legal structures were created providing for the participation of the natives in the government of the territory at the local, regional and provincial levels.

The Cree Regional Authority has certain powers of a regional government. The James Bay Regional Zone Council , composed of an equal number of representatives from the Crees and from the James Bay Municipality, exercises all municipal powers over Category II lands (approximately 25,000 square miles). The Kativik Regional Government covers the entire region north of the 55th parallel. All of these structures relate to, and work with, the appropriate provincial authorities with proper safeguards, of course, relating to the control of lands granted to the natives.

The Agreement accepts the principle that the natives must be furnished with the proper resources under their control and that they must be allowed to use their own initiatives in managing their resources and their lives. The $225 million which are to be paid to the natives will be paid to corporations which are totally controlled by the native people.

The provisions of the Agreement relating to economic and social development will permit those natives who so wish to choose alternatives to their traditional pursuits.

The Agreement recognizes that the native people have a language and a cultural heritage different from that of other Canadians and accepts the principle that this language and cultural heritage must be protected. There are various provisions recognizing the use of the Cree and Inuit languages in various official government bodies both at the local and regional levels. This use is recognized both for individuals and for the official structures of government in the territory. The Agreement provides for the creation of a Cree School Board and a Kativik School Board with all the powers of a school board under provincial laws, plus certain additional powers as specified in the Agreement and with powers to "develop courses, text books and materials designed to preserve and transmit the language and culture of the native people". The teaching languages include Cree and Inuit.

There are special provisions relating to the administration of justice

and policing which reflect the special needs of the Crees and the Inuit. For example, the Agreement provides that the Minister of Justice shall establish programmes to train non-native persons who are designated as judges or public officers in the particular problems of the judicial district in which the natives are situated "as well as respecting the usages, customs and psychology of the Crees in the said district".

The foregoing is a very brief summary of the contents and philosophy of the James Bay Agreement. The Agreement itself contains 820 pages and is divided into 31 chapters.

In trying to find solutions to native claims, it is important to realize who must be involved in the formulation, discussion and negotiation of the various elements of these claims. This is essential in order to realize what some of the problems are and how to cope with them. Let me assure you that not all of the problems which must be overcome to reach a settlement are created by the native parties.

The James Bay settlement is an agreement between seven parties. The Government of Quebec, the James Bay Energy Corporation, the James Bay Development Corporation, the Quebec Hydro Electric Commission, the Grand Council of the Crees, the Northern Quebec Inuit Association and the Government of Canada are all parties to the Agreement. The discussions culminating in the signature of the final Agreement involved representatives from most of the departments of the Quebec government, many federal departments, the Energy Corporation, the Development Corporation, Hydro Quebec, the James Bay Municipality, the Crees and their advisers, and the Inuit and their advisers, together with a back-up staff of secretaries, clerks and translators. There were up to 100 people at some of the meetings during the final stages of the settlement.

This will give you an idea of how many people were involved and how many views had to be accommodated.

The following government departments participated in the James Bay negotiations: Revenue; Finance; Education; Justice; Environment; Natural Resources; Tourism, Hunting and Fishing; Municipal Affairs; Social Affairs (health and welfare); Corporate and Consumer Affairs (*re* legal entities); Lands and Forests; Intergovernmental Affairs; Solicitor General; Transport; Industry, Trade and Commerce.

In addition to these provincial departments, we had the equivalent federal departments plus the very direct involvement of the Department of Indian Affairs and Northern Development.

After the involvement of the various government departments, the Agreement was open to public scrutiny and criticism through the vehicle of a Parliamentary Committee. For several days prior to its signature, I was obliged to defend the terms of the agreement against attacks by the Opposition and by opposing groups of natives within the Territory.

The signed Agreement also had to be enacted into law, and was again subjected to public scrutiny through the various legislative stages. Quebec has given third reading to the Act Respecting the James Bay Agreement. We are now waiting for Ottawa to pass its legislation.

You cannot settle native claims without the involvement and participation of various government departments. However, on their own, they do not have the degree of flexibility required to settle native claims. By their very nature, government departments tend to protect

their own interests and jurisdiction. It is difficult to get them to give up a certain degree of control in various areas where native people have expressed certain needs. However, you cannot settle native claims without removing from government departments certain activities and giving them to the native people. After each department is through protecting what it considers to be the public interest in its own sphere of activity, there is not much left to give to the natives.

In the process of negotiations these various departments must be co-ordinated. It is perhaps too much to expect an official of one department, who will have to work and live with his fellow civil servants, to co-ordinate the other government departments and enforce the necessary concessions which will have to be made to the native parties.

Native claims will not be settled by entrusting the responsibility of negotiations to an official of a government department. This is not necessarily a criticism of public servants. It is only a statement of fact. The bureaucracy will *not* settle native claims.

IV. THE POLITICAL ASPECTS

When you are discussing native claims, you are dealing with a wide spectrum of issues encompassing: the cultural rights of a minority and the economic benefits which should be provided to a disadvantaged minority. You cannot avoid becoming involved in a discussion of the impact of our society on the natives and the effects on them, for example, of our administration of justice. You must seek out methods to ensure the participation of a people in the government process. You are called upon to find ways and means of assuring that a group with a different cultural background can thrive and flourish in our society. Of course, you must also be constantly aware of the attitudes and demands of the non-natives in the territories which are the subject of the settlement.

You are dealing with political issues. They are public issues where everyone feels he has, if not a direct interest, at least a sufficient interest to entitle him to have views on the subject and, more often than not, views which he considers just and which should prevail. No matter how much the native parties may ask for and no matter how little governments are willing to concede (and I would even go so far as to say that no matter how extensive the legal arguments that may be made on behalf of the natives) the settlement of native claims will be determined by the political acceptance of their contents. What the government offers and finally negotiates must be acceptable to the public.

Because of the issues involved in native claims, the business community should take a more active role in their settlement. You cannot hope to leave the settlement of native claims in the hands of the bureaucracy and expect an early settlement acceptable to all sides. Strange as it may appear to many who are critical of the role of the developer, it would have been more difficult to settle the James Bay dispute without the presence of the James Bay Energy Corporation and of Hydro Quebec and this is understandable.

The business community can be more flexible and more pragmatic with respect to certain specific problems facing them directly. They can offer meaningful economic incentives. They know the importance of deadlines and will be more flexible in finding solutions so that the

deadlines can be met. They do not have the restraints of government with respect to jurisdictional issues made more complicated than they really should be.

Lest I be misunderstood, I am not suggesting that we leave the settlement of native claims to the business community. The input and restraints of government are still required, especially in the social areas. However, I am suggesting that the business community, which is directly involved, take a more active role to help bring about the settlement of these claims.

V. CONCLUSION

Should native claims be settled prior to any development taking place in the territories involved? This is a question which I'm certain is uppermost in the minds of many and which the government must soon decide. I can only repeat the statement which I made to the Berger Commission when it held its hearing in Montreal.

> If governments do not develop the resources of the North, this will not necessarily help the natives. The contact between natives and non-natives as a result of development began many years ago. The harm that has already been done must be undone. Failure to proceed with further development will not ameliorate the tenuous relations presently existing between certain native and non-native communities. Nor will it provide better living conditions for many native communities existing in poverty and on the edge of despair.
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> Without the James Bay project there would be no agreement. Unfortunately, governments rarely act with that degree of foresight, generosity and magnanimity which many of us would expect. Governments ususlly respond to situations and, in this case, the response of government was made necessary by the hydro-electric project.
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> For the first time, governments have accepted certain concepts and certain obligations which they had failed to accept previously. In that sense, the agreement is a precedent. The principles that it contains cannot be ignored—either by governments or by other natives. It is to be hoped that both groups will strive to utilize these principles in other areas of the country to solve the problems which face them; the natives, hopefully, by being realistic and the governments, hopefully, by being idealistic. In that manner, development can be an opportunity to effect important reforms while providing adequate protection to the native communities.