LAND, COMMUNITY, CORPORATION:
INTERCULTURAL CORRELATION BETWEEN IDEAS OF LAND
IN DENE AND INUIT TRADITION AND IN CANADIAN LAW

by

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ABSTRACT

The present enquiry is a study of specific social possibilities in a culture-contact situation, namely the encounter of the Dene and Inuit of the Northwest Territories with Canadian society; and shows how by analyzing the basic content of two traditions in contact with one another, the possibilities for mutual adjustment of one tradition to the other, or the lack of such possibilities, may be logically derived from that content. The study also uses the perspective of cultural ecology to devise and demonstrate a way in which any system of land-tenure may be compared with any other, without the concepts of one system being imposed upon the other.

The particular problem of the enquiry is to compare the traditional ideas of land and land-tenure among Dene and Inuit with the ideas of land and land-tenure in Canadian law; and to discover a way whereby the Dene and Inuit may use the concepts of the dominant Canadian system to preserve their own traditional ways of holding land.

The analysis begins by outlining the cultural ecosystem of each people, their basic modes of subsistence, the resources used, the kinds of technical operations applied to those resources, the work organization, and relevant parts of social organization and world-view. Then, in order, the idea of land which the people appear to be following, the kinds of land-rights and principles of land-holding recognized by the people, and
the kinds of "persons" who may hold land-rights, are described. The systems are then compared in order to discover the possibilities for "reconciliation".

The enquiry concludes that the basic premises and characters of the Dene and Inuit systems of land-tenure are fundamentally irreconcilable with those of Canadian real property law, but that the Dene and Inuit systems can be encapsulated within the dominant Canadian system by means of the Community Land-Holding Corporation (CLHC). The CLHC as proposed in this enquiry would allow the members of a community to hold land among themselves according to their own rules, while the corporation holds the land of the whole community against outsiders according to the principles of Canadian law.
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The head chief told us that there was not a family in that whole nation that had not a home of its own. There was not a pauper in that nation, and the nation did not owe a dollar . . . Yet the defect of the system was apparent. They have got as far as they can go, because they own their land in common . . . There is no selfishness, which is at the bottom of civilization. Till this people will consent to give up their lands, and divide them among their citizens so that each can own the land he cultivates, they will not make much more progress.

-- U. S. Senator Henry L. Dawes, in the early 1880's, after a visit to the Cherokee Nation in Oklahoma, quoted in Waters (1970: 125).
I

QUESTION AND CONTEXT

A

The Problem

The purpose of this enquiry is to compare the ideas of land and land-tenure in the "traditional" cultures of the Dene and Inuit of Canada's Northwest Territories with the ideas of land and land-tenure in Canadian law, specifically the Common Law tradition; and to discover a way, if any is possible, in which Dene and Inuit communities might use the legal concepts of the dominant Canadian system of land-law to preserve their own ways of land-tenure without serious distortion.

The enquiry is an essay in the application of anthropological understanding to a particular instance of a recurrent problem in the contact of cultures. That problem is, what happens when the system of land-tenure of a given society becomes subordinate to, in law or in practice, another society whose system of land-tenure is radically different in kind? Must the subordinate society lose its own system of land-tenure (which will now likely be labelled "traditional") to the new and dominant system, or can the subordinate society somehow preserve (if it desires to) its own system of land-tenure and the particular interests founded on that system?

Clearly, for one system of land-tenure to become subord-
inate to another, the dominant system must have both the power to dominate the other and the will to allow the subordinate people some existence as a distinctive culture, including some maintenance of the subordinate people's own ways of dealing with the land. If the would-be dominator lacks the power to dominate, the other society will not become subordinate and the question of a servient land-tenure system surviving will not arise. (At this point, let me adopt the usage of legal writers such as Hooker (1975:55) and Smith (1974:4) and label the subordinate legal system or system of land-tenure the "servient" one. The word "subordinate" will then be reserved for the people or society which is thus being dominated.) On the other hand, if the dominator refuses to recognize the other group as continuing in some measure to be a distinct group having its own ways of dealing with its own land, the subordinate group loses its land anyway except as it can persuade the dominant group to let the subordinate people hold land according to the ways of the dominant group; and so the people's old system of land-tenure is abolished and swept away. In other words, the situation of a servient legal system or a servient system of land-tenure, emerges where the cultural and legal difference between the two peoples or societies in contact is maintained, while one of the peoples or societies possesses the power to intervene to change the laws and practices of the other.

The problem of reconciling different systems of land-tenure arises, therefore, in the intermediate zone bounded by, on the
one extreme, the meeting of independent societies of equal power, and, on the other, the total domination and assimilation of one society by another.¹

One variety of this intermediate condition characterizes the land interests of Indian and Inuit peoples in Canada. Although politically completely dominated² by Canadian society, these peoples have nevertheless been recognized in Canada as being morally and legally entitled to some special regard as the aboriginal peoples of the country. They are recognized in Canadian law as possessing various aboriginal rights. One of these rights is to the traditional use and occupancy of their land, except insofar as they have given away this right by treaty with or sale to the Crown, or except insofar as they have abandoned the land, or perhaps have lost it to the Crown by the Crown's conquering them in war (which has not happened in Canada). This recognition of aboriginal title is a right granted in Canadian law, i.e. by the law of the dominant society, and rests on various moral ideas and historical precedents within both Canadian society particularly and Western civilization generally.³

As part of its own notions about what is and what is not legally proper, the Canadian government has been obliged to make treaties with the various Indian peoples in order to extinguish the Indians' "aboriginal title" (the last vestiges of former Indian sovereignty) and property claims over the land, and to clear the way for the Crown legally to deal with the land as it deems fit.⁴ In Canadian eyes at least, these treaties in-
olved the recognition by the Indians that ultimate legal control over the land had passed from the Indians and was now vested in the Crown. Treaties No. 8, in 1899, and No. 11, in 1921, supposedly extinguished aboriginal title for the Indians of the Northwest Territories. No such treaties were signed with the Inuit.

However, the Dene, that is, the Indian people of the Northwest Territories, in their own eyes signed only treaties of peace and friendship. As they viewed, and still view, what happened, they did not give away their land to anyone. This fact was brought to light as a result of interviews conducted, since 1966, by members of the Company of Young Canadians, by the Indian Brotherhood of the N.W.T., and by anthropologists from the University of Iowa (Fumoleau 1973:15), and was made more widely known in Fumoleau's book, *As Long As This Land Shall Last* (1973). The discrepancy between the Dene and Canadian interpretations of the treaties persuaded Mr. Justice Morrow of the Supreme Court of the Northwest Territories, in 1973, to decide that Treaties 8 and 11 had not clearly extinguished the aboriginal title of the Dene (*Re Paulette et al. and Registrar of Titles* (No. 2) (1973), 42 D.L.R. (3d) 8, at p. 35).

This fact influenced the context of proposals to build pipelines for gas and oil traversing the Mackenzie River valley from Alaska (via the northern Yukon and the Mackenzie delta) to Alberta and points further south. The federal government in March 1974 therefore appointed a Royal Commission under Mr. Justice Thomas R. Berger to inquire into and report upon
the social, environmental, and economic impacts of constructing such pipelines. Preliminary hearings began in April 1974, full formal hearings in March 1975, community hearings began in April 1975 and ended in August 1976, hearings were held in ten southern Canadian cities in May and June 1976, and formal hearings concluded in November 1976 in Yellowknife, N.W.T.  

Dene and Inuit leaders, in the Denendeh and the Nunavut proposals (to be described in chapter VI, section A, below), have striven and are still striving for some form of land settlement which will give them maximum control over the ways in which the resources of their lands (as they regard these) will be exploited. Through Denendeh and Nunavut, the Dene and Inuit seek political control over the economic development of the North. If they get what they seek, namely, something somewhat more autonomous than a province and akin to Home Rule (Patterson 1976), they will be able to maintain, if they wish, aboriginal ideas of land-tenure in large measure, or to change them, again in large measure, as they see fit. Someone coming from (the rest of) Canada to Denendeh or Nunavut would then be moving from a country with one kind of land-law to a country with another kind, and the problem of adjusting one's expectations would be no different than in passing from the jurisdiction of one sovereignty to another. The problem of two dissimilar systems of land-tenure being in contact would be solved by politically and legally separating the two systems so that neither could dominate the other.

The present enquiry, on the other hand, envisages the
likelihood that the Dene and Inuit will not realize their Denen-deh and Nunavut proposals. The territories would then remain under the jurisdiction of Canada (or perhaps become Common Law provinces) and the present land-law would prevail. Is there still any way, a more modest way, whereby such Dene and Inuit as may wish to, might preserve their own ways of regarding land and holding it? Could the Dene and Inuit use Canadian legal ideas concerning land and land-tenure to preserve ideas and practices concerning land which rise out of different experiences and cultural traditions and follow different premisses? This is the problem addressed by this enquiry.
B

Method

The problem itself dictates the method of its solution. If we could extract, from relevant sources, the ideas of land and land-tenure held respectively by the Dene and Inuit and in Canadian law, and compare them, we should be able at once to perceive how they might (or might not) fit together. The more similar the two systems, the easier it should be for the servient systems (those of the Dene and Inuit) to express and maintain themselves in the terms of the dominant (that of Canada).

Extensively detailed inquiry into either side of the comparison should not be necessary. We would be comparing the structures of each system, and especially the basic postulates or fundamental assumptions of each system, with those of the other. The more radically different the systems being compared, the sooner should these differences display themselves, and the fewer details be necessary.

As it happens (if I may anticipate for a moment the results of the enquiry), when we compare the "traditional" Dene and Inuit systems with the Canadian system, we find that Dene and Inuit approaches to land and land-tenure are closely similar varieties of a kind of land-tenure which might be labelled (though awkwardly) "tribal", while the Canadian system belongs to a very different kind which may be labelled "proprietorial". (What "tribal" and "proprietorial" systems are, will be explained
in the next chapter.) The two systems are so different, indeed, that they cannot be fitted together without one system destroying the other.

There is one way out, however. By means of the idea of "corporation," found in Canadian law, a community of people following a tribal system of land-tenure may encapsulate themselves as a single property-holding person within a proprietorial system. Something resembling this solution is, indeed, already followed within Canadian society by such groups as the Hutterites, and is familiar as a minor theme in Western civilization generally.

The argument will therefore proceed in four steps. First, I shall describe the ideas of land and land-tenure which the Dene and Inuit of the Northwest Territories have. My data sources are ethnographic materials and the community hearings of the Berger Commission. The Dene of the N.W.T. belong to the wider family of Athapaskan-speaking peoples who dwell not only in the western Northwest Territories (mostly in the District of Mackenzie), but also in northern Alberta, northern and central British Columbia, the Yukon, and Alaska. Although there are appreciable differences among the various Athapaskan regional groupings (see Jenness 1958:377-404; National Museum of Man 1974:20-37; Vanstone 1974:1-22), the peoples are nevertheless sufficiently similar that the description of the Dene of the N.W.T. may be cautiously enlarged by data from other northern Athapaskan groups.

Second, I shall describe the ideas of land and land-tenure
found in Canadian law, specifically those from the common-law tradition, since this is the legal tradition which governs the Northwest Territories. My data sources are written legal decisions, statutes, and textbooks in law and jurisprudence, plus the advantage of a Bachelor of Laws degree.

Third, having described each system, I shall then set them side by side so that they can display their own similarities and differences. From this display, the difficulties of reconciling the two systems should appear quite plainly.

Fourth, I shall outline the idea of a community land-holding corporation which seems to be the only means of reconciliation (and "reconciliation" in a somewhat strained meaning, at that). In doing so I shall have not only to specify the characteristics which such a corporation must have, but also to distinguish it from a number of other legal entities (such as the share-holding corporation) with which it may be confused.

Finally, I shall draw the argument together in a concluding assessment and there try to deal with any difficulties which may have emerged.

Before I can begin to describe the Dene and Inuit land systems, however, I shall have to interpose a chapter discussing the definitions of "land", "land-tenure", "property", "ownership" and "possession", and "person" for comparative purposes. This discussion will follow in the next chapter. The same chapter will also discuss the three general types of land-tenure which (for want of better names) I shall call "Type A" or "tribal", "Type B" or "administrative", and "Type C" or
"proprietorial".

In comparing systems of any kind, and not only systems of land-tenure, however, it is a great help to have in mind a general pattern, appropriate to the kind of systems being compared, whereby the descriptions of the particular systems may be set out. Then the similarities and differences between the particular systems can stand out almost by themselves.

For comparing the Dene and Inuit land systems with the Canadian legal land-system, I shall have in mind the following ideal order. First, since ideas of land and of land-holding are part of a mode of subsistence or of production relating the society to its environment, each description begins with a sketch of the cultural ecology of the people whose ideas are to be described. This description covers, in order, the environment and resources used by the people, the chief techniques by which the people appropriate and use these resources, the work organization of the people, and finally relevant portions of the social organization and (perhaps) world-view of the people. In a word, the first step (ideally) includes describing the "use and occupancy" of the land by the people.

The second step is to describe the idea of land which the people have. How do they perceive or conceive the land on which they live and the resources which they use? Is the land a blank on which they write whatever they desire, or is it something with its own characteristics which must be appreciated and cooperated with? Is it something passive, to be used as the people's own purposes dictate, or is it perhaps a place
of powers actively interacting with the people? Is it empty, or is it full of meaning? Is it bounded, and can it be divided and subdivided; or is it perceived more as an indivisible and interdependent whole? Are the people separate from the land, or are they themselves also part of the land? And so on.

While we may not be able, given the data, to answer all such questions as these, still these questions indicate the scope of what we should consider when searching for a people's idea of land.

Third, then, come the rules and practices concerning who may and may not use what aspect or portion of land, and who may and may not enjoy what rights and duties, claims and liabilities, concerning the land.

Such is the general pattern which will organize the descriptions of the particular land systems being compared in this enquiry. I shall not try to manifest the whole pattern, however, but only so much of it as is needful for the argument.

In discussing the rights and duties connected with land, it will be especially useful to keep in mind the distinction between sovereignty and property. Sovereignty concerns the right and power of the whole community to admit outsiders to the land or to exclude them from the land, and to determine, without outside interference, what rules and practices the members of the community may properly have among themselves concerning the land. Property concerns those rules and practices themselves; it is the rights and duties which the members of the community exercise between themselves concerning
the land.

The distinction between sovereignty and ownership (or property) bears upon the problem of the enquiry as follows. The question to be answered asks if there is any way in which the Dene and Inuit can use the ideas of land and land-tenure in Canadian law to preserve their own traditional ideas of land and land-tenure. The question assumes (for purposes of argument) that the Dene and Inuit have lost sovereignty and must therefore secure their claims to the land by means of the concepts of Canadian law, i.e. the law of the dominant society. If they had sovereignty, namely, if they were recognized as the rulers of the territory on which they dwell, they could secure their claims according to their own law and would not need to use Canadian law concepts at all. Then the problem which this essay seeks to resolve would not arise, except as a purely hypothetical problem. The problem presupposes that the Dene and Inuit have lost sovereignty, and so must defend themselves by means of Canadian legal ideas.

The very notion of "aboriginal title" or of "aboriginal rights" as a special basis for land claims presupposes that the "aborigines" have lost sovereignty. This implication was made very clear by Chief Justice Marshall of the U.S. Supreme Court, in an argument which has been accepted as correct by Canadian courts. The original inhabitants (he said)

... were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will,
to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. (Johnson v. McIntosh, 21 U.S. (8 Wheat.) 240 (1823) at p. 254; cited in Cumming and Mickenberg 1972:34) (Emphasis mine -- S.P.)

The Dene Declaration (McCullum and McCullum, n.d.; Watkins 1977:3-4) calls for the recognition of the Dene Nation as a distinct people, and says that "Nowhere in the New World have the Native peoples won the right to self-determination and the right to recognition by the world as a distinct people and as Nations." The Governments of Canada and of the Northwest Territories, says the Declaration, "were not the choice of the Dene, they were imposed upon the Dene." In these words the Dene concede that they do not have sovereignty (and also that they have not voluntarily relinquished it).

The particular problem of the present enquiry therefore presupposes a situation which in fact exists at the time of the enquiry, even though some Dene and Inuit also desire and are working to change that situation. The problem, that is to say, is not purely hypothetical, but is one which the Dene and Inuit may themselves discover, and the solution proposed is one which they might find useful.

I have referred above to "traditional" ways of landholding. The word "traditional" has various meanings. It may be used to characterize societies which are in some way not "modern" and therefore are open to or perhaps resistant to "modernization". It may be used to mean the society or culture as it was prior to contact with Western civilization, or those elements in the present society or culture which supposedly survive from pre-contact times. Or the word "tradition-
al" may be used to name those items of society and culture which the people themselves consider to be established as their own way of doing things, whether these items be in fact pre-contact or recent in origin. "Traditional" in the latter sense means "accepted" and is contrasted with "imposed from outside". A given belief or behaviour may, of course, be "traditional" in all four of these meanings at once; and an item beginning as "imposed" may in time become "traditional".

But the difference between these meanings is important for our enquiry as regards the Dene and Inuit. "Traditional" in the fourth meaning now includes trapping for furs to be sold for money or store-goods. Such trapping for furs to be sold etc., is not a pre-contact practice, although it is partly similar to setting traps as part of hunting; and the word "trapping" is used to name both hunting for food and trapping for furs. Hunting for food is itself an activity continuous with pre-contact practices, and old techniques continue to be used; but the major hunting weapon is that post-contact instrument, the gun.

For the purposes of this enquiry, therefore, I shall mean by "traditional" those items of culture or society which have been accepted by the people as the people's own, and which whatever their origins are now regarded as worthwhile parts of a way of life thought worthwhile preserving by the people. "Traditional" in this meaning contrasts with "imposed by outsiders".
Anthropological Perspectives

I described this enquiry at the beginning as an essay in the application of anthropological understanding. I could also have called it a test of the applicability of anthropological ideas. Every attempt to apply an approach or a set of ideas is automatically also a test of whether those ideas can or cannot be applied; and there is no way to test their applicability except by trying to apply them.

In this section of chapter one, I should like to review briefly what anthropological ideas I have found to be applicable to the particular problem of this enquiry. I will concentrate on what has been positively helpful, because to review also what is not applicable would be tantamount to a review of the whole of cultural and social anthropology.

As a first approximation, the anthropological perspectives used in the present enquiry, may be sorted under four headings, namely, (1) general anthropological perspectives, (2) specific theoretical and topical contributions, (3) specific ethnographic or descriptive contributions, and (4) contributions from applied anthropology.

1. General Anthropological Perspectives

If I were to try to sum up in one phrase the golden thread, as it were, which unites the perspectives of anthropology, I would say, "Cognizing human phenomena in context." There are
many contexts in anthropology, and many ways of construing items in these several contexts. A given event, custom, or datum (whatever it may be) can be viewed as something within an evolution, as an item of culture learned and diffused, as an expression of human nature, as part of an ecosystem, as an element in a structure, as having a function in a larger system, as a tool of adaptation, as an exemplification of a cultural theme, as something within or having a history, as part of a process of some kind, as being caused and having effects, as something within a spiral of feedbacks, as an element in a system of meanings, as something related to various human motives, as part of a sanction system, and so on. It can be viewed against the background of the society or culture in which it occurs, or against the background of other human societies or cultures (the comparative perspective), or within a geographical setting, or within the context of the whole planet. But whichever particular context may be chosen by the observer, still the particular matter being observed will be observed in context.

Along with this sense of context, goes a sense that the matter being recorded in context is somehow a part of a system, that there is an order with a structure which can somehow be apprehended and described. This sense of, or feeling for, system has traditionally (in anthropology) expressed by saying that society or culture is "integrated", is some sort of a "whole". I would instance Kroeber (1948), Malinowski (1944), Radcliffe-Brown (1952), and Firth (1961) as giving, each in
his own way and from his own perspective, well-known exemplary statements of context, system, and structure; these particular works have also shaped my own basic anthropological perspective very considerably (even when I do not agree with their particular assertions).

(To say that society or culture is a "whole" should not, however, be taken to mean that there is no conflict within society, or even that societies or cultures are necessarily self-maintaining systems. There are instances (e.g. Henry 1964 on the Kaingang of Brazil) of societies driving pell-mell for destruction. And yet even there, behind the appearance of destruction some sort of order is being realized.)

Anthropological enquiry has, I think, two aspects which complement one another. One is the **nomothetic** or law-seeking aspect, whereby the anthropologist "attempts to subsume particular facts or events under general rules or laws." (Nadel 1951:191) This is sometimes called the "scientific" aspect of anthropology. The other is the **idiographic** or (as it is sometimes called) the "historical" aspect, whereby the enquirer tries to portray the particularity and uniqueness of what he is observing. Nadel (1951:194) while characterizing anthropology as science, wrote also that anthropology is something more. It reaches out to the "totality of experience" to touch something which the purely nomothetic cannot reach.

The nomothetic and the idiographic, I think, depend upon one another. The universal must be sought for in the particulars, but the particular is also (besides being itself) the
coming together of many universals. In the general anthropological perspective, as I would like to conceive it, these two are joined.

The habit of mind which I am here describing as the general anthropological perspective, informs the present enquiry from beginning to end. The ideas of land and of land-tenure of each society in contact are seen as parts of a larger socio-cultural and ecological context. But the particular problem of the enquiry, and the method of solution, are such that the context may be very much reduced and still the question fully answered. The general anthropological habit of mind works here, paradoxically, in deciding what anthropological theories and descriptions are relevant and what irrelevant to the problem — in setting, that is, criteria for exclusion.

Having said that anthropology views social phenomenon in context, I must immediately recognize that for a given social phenomenon not all parts of the context are equally important. This is fortunate: otherwise a description of the context would be logically bound to include the whole world present and past and possible. Context is graded into degrees of relevance. Degrees of relevance are defined by one's problem and purposes as well as by the nature of the phenomenon being investigated. They are also defined by one's notion of relevance or significance, and that notion is guided by one's theories or, in the absence of theory, by one's hunches or detective's intuition.
2. **Specific Theoretical and Topical Contributions**

One division of anthropology has proven immediately relevant and specifically helpful. That is the discipline of **cultural ecology**. Interpreted broadly, this discipline views human populations and cultures as living in environments which both affect and are affected by the humans; the people and their environment form a single system every part of which is sooner or later affecting every other part. As I see it, this broad interpretation implies that each part (however defined) both has its own character which cannot be reduced to the expression or result of the other parts and also is what it is partly because of its position in and interaction with the whole system. Each part conditions, but does not wholly determine, the other parts. This broad interpretation accomodates both the narrower viewpoint which Asch (1979:82-88), for instance, with the Dene in mind, has labelled the "ecological-evolutionary model" and criticized as inadequate, and the "mode of production approach" (Asch 1979:88-90) which he himself prefers. In my view, the environment of a people should be construed to include not only the natural or non-human environment, but also the other human societies and cultures with which the people interact. Thus the colonial situation, which the Dene and Inuit are in (compare Watkins 1977; Brody 1975), is an ecological factor of first importance to which a people must adapt.

Cultural ecology has usually been interpreted more narrowly as being concerned with the relationships between a people and
their natural environment, culture being regarded as the human means of adaptation, and the mode of subsistence as the chief mode of adaptation (for examples of this approach see Netting 1977; Cohen 1968, esp. pp. 40-60). Other variations include concerns with system and feedback and natural selection (repeated themes in the collection edited by Vayda 1969), and with the control of energy by humans (Cottrell 1955; Vayda 1969). These various concerns inform my approach, even though they may not be explicitly applied. The concept of adaptive strategy also informs Vanstone's (1974:121-126) summary of northern Athapaskan culture, which has been a considerable help in the present enquiry.

Ideas of land and land-tenure fall very neatly into a cultural ecological framework, including a framework concerned with adaptation and modes of subsistence. In particular, Julian Steward's (1955:40-42) "three fundamental procedures of cultural ecology" have specifically provided the model for the ideal order for comparing the Dene and Inuit systems with the Canadian system, outlined in section B of the present chapter.

The theory of acculturation is another division of anthropology which bears on the present enquiry. In particular, the elementary framework given by Dohrenwend and Smith (1962) has helped to guide my perceptions and constructions of the Dene and Inuit meeting the Canadians. Significantly enough, Dohrenwend and Smith single out as a major factor in culture-contact situations the degree of power which one of the cultures enjoys over the other. They quite explicitly include the colonial situation as a variable affecting acculturation. Apart from
their paper, however, the literature on acculturation is largely marginal to the specific problem of the enquiry. The foci of acculturation theory and of the present enquiry are different enough so that the two enquiries touch only obliquely.

If power is a concern of the enquiry, however, perhaps the discipline of political anthropology has something to offer? The proposal of the Community Land-Holding Corporation is a proposal for a means whereby the Dene or Inuit communities can gain or retain a measure of power within a legal system based on premisses alien to their traditional cultures. It is a way of using the dominant society's own rules to protect the subordinate society. Power is surely at stake here.

Political anthropology may be sorted into the study of political systems (exemplified by Fortes and Evans-Pritchard 1940) and the study of political processes (exemplified by Bailey 1969, and by Swartz, Turner, and Tuden 1966). Apart from being included in the general anthropological perspective discussed above, the study of political systems as such has not been applicable. The study of political processes adds not much more. It does, however, emphasize that rules, such as laws, are resources to be used in political conflict (Nicholas 1968), and so reminds me that the matters being investigated in the present enquiry occur against a ground of political activity. Bailey's (1969:144-185) discussion of "encapsulation" gives a name to the solution provided by the proposed Community Land-Holding Corporation.

But the enquiry is not an enquiry into process (we shall
find out further on just what sort of enquiry it is), and so the minimal applicability of political anthropology is not surprising.

Legal anthropology is relevant in an oblique sort of way. Hoebel's (1954) suggestion that the legal systems of various cultures can be summarized as sets of jural postulates and so compared, parallels what I am doing in the present enquiry. I am abstracting the guiding ideas of two systems (namely the Dene and Inuit) and comparing them with the guiding ideas of a third (namely, Canadian law), just as Hoebel was doing in his summaries of jural postulates. (I would not, however, go so far as to characterize my summaries as summaries of jural postulates.) But otherwise, legal anthropology is not precisely applicable.⁹

These, then — cultural ecology, acculturation, political and legal anthropology —, are the parts of the theoretical side of anthropology which have anything to contribute to the solution of the specific problem of this enquiry. Has the descriptive side anything to offer?

3. **Specific Ethnographic or Descriptive Contributions.**

The short answer to the question, "What ethnographies (in a broad sense) are relevant to the present study?" is, "None, unless they describe Dene, Inuit, or Canadians." But this short answer requires explanation and qualification.

The problem and the method compare two cultures (Dene and Inuit on the one side, Canadian on the other) and examine the
logical-structural compatibility of the two. This logical-structural compatibility depends on the characters of the cultures being compared, and not on anything else. It is therefore methodologically correct to compare the two cultures as if nothing else existed in the world. While it may be interesting to note congruent or non-congruent phenomena elsewhere in the world, those phenomena do not reveal the characters of the Dene or Inuit or Canadian societies. The present enquiry is idiographic and not nomothetic. We are investigating the possibilities inherent in one particular situation, namely the encounter of Dene and Inuit with Canada, and not anywhere else. We are not proposing a general law, not even a general law about the encounter of societies like the Dene and Inuit with societies like Canada.

Of course, data about what has happened elsewhere can throw light on the particular encounter which we are cognizing. But that light depends on our first cognizing the encounter. Before I can decide, for example, if happenings in (say) Oceania help me to understand what is happening in the Northwest Territories, I must first clearly know what is happening in the Northwest Territories. And of course I must also know what is happening in Oceania. Otherwise I am simply comparing unknown with unknown.

I can use the better known to help me discover more about the lesser known, provided I assume at least hypothetically that the lesser known is similar to the better known. Then I can propose hypotheses about the lesser known and use them
as guides to experience the lesser known. The result of these experiencings will then reveal to me whether or not my hypotheses were true and whether my assumption of similarity was true. If I were trying to explain something about the particular situation, and were developing a general law to do so, this procedure would be applicable. But the present enquiry is not that sort of enquiry.

The general principle here involved is that the particular facts must be established logically prior to the general law, and that comparisons presuppose that the objects to be compared have already been separately cognized (whether temporally beforehand or concurrently). More specifically, before I can decide whether other situations are relevant to the Dene-Inuit-Canadian encounter, I must first know the character of that encounter. And since the problem of the present enquiry asks only about a possibility within that encounter, other happenings are neither directly relevant nor particularly helpful in my construing that encounter for what it is idiographically.

Methodologically, therefore, the problem of the enquiry can be answered without reference to any ethnographies except those about the Dene, the Inuit, or the Canadians. These latter are, of course, indispensable.

Other ethnographic evidence would become relevant, however, once I have concluded the enquiry and proposed the Community Land-Holding Corporation. Then one may properly ask, "Will the CLHC really work? What difficulties might it have to face? Perhaps the experience of similar corporations else-
where in similar situations will shed light on these questions."
Indeed, not only similarities but also differences would then be
relevant. (See section A of chapter VI for examples.) Co-
variations between differences in context and differences in
outcome would allow us to propose nomothetic hypotheses about
implementing CLHC's which we could then apply to the Dene-Inuit-
Canadian situation in order to anticipate possible outcomes
there. But that application already presupposes that we have
done what the present enquiry does.

4. Contributions from Applied Anthropology

Insofar as applied anthropology involves the theoretical
and descriptive sides of anthropology, its applicability to the
present enquiry has already been assessed above. But there is
something more to consider. The present enquiry is itself a
work of applied anthropology. Even if the extent of anthropol-
ogy's applicability be thought to be not large, the ingredient
is present and essential.

By "applied anthropology" I understand the application
of anthropological ideas and methods towards the achievement
of purposes and goals other than acquiring anthropological
data or making and testing anthropological theories. In other
words, applied anthropology uses anthropology to achieve ends
outside anthropology itself. Those ends, of course, may or
may not be consonant with the aims of anthropology.

Let me presume, for the purposes of argument, that the
aim of anthropology is to understand, both nomothetically and
idiographically, the nature of humankind and human culture and society, and is not, *qua* anthropology, to change the world. (This is what Bastide (1974:170) calls the "liberal" conception of anthropology.) Then the attempt to change the world, or to resist changes in it, will be another sort of activity, and when it uses anthropology as a means may be called "applied anthropology".

As a first approximation, the ends, or values and purposes, which applied anthropology serves, may be characterized as either *liberating* (promoting autonomy) or *dominating* (promoting heteronomy) (Barclay 1968:5; Bastide 1974:8, 158). Liberation or autonomy is the determination of an act by the uncoerced wills of the actors themselves; domination or heteronomy is the determination of an act by purposes or actors other than the actors actually performing the act and against the unpressured choice of the latter. The distinction between the two is not in practice always so simple, but it will serve as a general note for the present enquiry. The tasks of the applied anthropologist may be divided into *intelligence gathering* and *implementing ends*. In "intelligence gathering", the anthropologist simply gathers facts and analyzes possibilities, but the facts which he seeks to gather and the possibilities which he analyzes are set for him by the requirements of others and will be used by those others for their purposes (or by the anthropologist himself to realize his non-anthropological purposes). Thus the facts and analyses produced by the anthropologist have fairly direct implications for social action.
A review of a native land claim is an example of such "intelligence gathering" and analysis. In "implementing ends", the applied anthropologist uses his anthropological knowledge to direct people's activities to achieve certain goals. He may seek to educate them, or he may be an administrator or even a politician. Indeed, as soon as the anthropologist communicates his findings beyond the esoteric circle of his fellow anthropologists, he is "educating" or "influencing by words" and so at least beginning to implement ends. "Action anthropology" (Tax 1964: 256-7), for example, is liberatory education.

How do these remarks bear on the present enquiry? The problem of the enquiry is to compare the Dene and Inuit ideas of land and land-tenure with the ideas of land and land-tenure in Canadian law in order to discover if the two sets of ideas are "reconcilable" and if the Dene and Inuit can use the ideas of Canadian land-law to preserve their own traditional ways of land-holding. I am, that is to say, exploring two traditions to discover if they allow certain kinds of action to be realized. The enquiry is an enquiry into social possibilities, into the potentialities for a particular kind of action permitted by the traditions. This kind of enquiry is itself a type of applied anthropology. To search out a social possibility is to discover a possibility either for domination or for liberation; to publish one's finding is a political act open-endedly relevant to increasing either (or both) domination and liberation. (Knowledge is always two-edged.)

But, and not paradoxically, this is the nature of the
anthropological enterprise itself. The study of human social and cultural phenomena, and of the connections among them, by itself reveals possibilities for human action, and the communication of those findings bears directly on human domination and human liberation. The present enquiry is therefore anthropological at its very root, where the difference between "pure" and "applied" anthropology disappears and the terms "pure" and "applied" become meaningless.10

The records of applied anthropology contain studies made for various purposes, and stories of interventions actively involving anthropologists. In particular we may note the field of community development. Stories of success and failure in community development are ethnographic material relevant to the question whether a Community Land-Holding Corporation might fail or succeed. Most particularly, they remind us that communities exist in larger political systems, and must cope with these political environments. The story of Vicos in Peru is exemplary (Dobyns, Doughty, and Lasswell, eds., 1971). The very act of forming a corporation is political. But these questions, as I have already noted, arise beyond the strict bounds of the problem set out at the beginning of this enquiry.
D

The Logic of the Present Study

This enquiry is a study of social possibilities, but of a very specific sort of possibilities. The question is whether one normative tradition, namely the land-law of the dominant Canadian society, can be used to defend and preserve another normative tradition, namely the ideas and practices concerning land of the subordinate Dene and Inuit societies. We are comparing cultural "patterns" existing in the form of explicit and implicit rules about how to deal with land, and assessing the logical compatibility of these two "patterns".

On the Canadian side, we have a tradition of rules and precedents whose adherents are aware that they are following and applying a tradition of rules and precedents. The law, that is to say, is an explicit system. It is what E. T. Hall (1977:106-107) has called a "low-context system". That is, the legal tradition leans towards making its rules and precedents explicit, and towards, as it were, spelling matters out. Also, it tends to try to be self-contained, separated and specialized from the rest of the culture. As such, the tradition becomes a body of knowledge which can be used as resources for influencing and sanctioning people's behaviours. The knowing and using of this tradition becomes something which particular persons can specialize in. That is to say, the tradition becomes the object of a technic or craft, and practitioners, namely lawyers, become technicians.
Because the Canadian land-law is a normative tradition which has been explicitly crystallized or exteriorized in documentary form, namely in statutes, the records of judicial decisions, textbooks, and commentaries, we can discover its content and structure fairly easily. Because Canadian society is the dominant society, Canadian land-law is the tradition into which the ideas of land and of land-holding of the subordinate Dene and Inuit societies must be cast if they are to be defended. (Note how the practical or pragmatic concern behind the problem is shaping the logic of problem and method.) Therefore, we must construe the Dene and Inuit ideas of land and land-holding as if they are, or could become, as explicit a normative tradition as the Canadian law; and we must, if the traditions permit, try to express the Dene and Inuit ideas of land and land-tenure as if they were a body of rules and principles and categories. (In so doing, we are also implicitly assessing the potentiality of the Dene and Inuit traditions to give rise to a body of law different in content and structural form from Canadian law, perhaps, but still recognizably a legal order.) Thus the overall politics of the situation, namely a concern to help the Dene and Inuit gain or retain a measure of self-determination in their position of societal subordination to Canadian society, sets Canadian law as the target-form (as it were) with reference to which and towards which the Dene and Inuit traditions are to be translated. Having noticed this direction of translation, we can of course ask ourselves if we could or should also translate in the other
direction; and we shall therefore desire a method which allows translatability (where such is possible) in either direction.

When we examine Dene and Inuit societies, however, we find there no tradition which is an explicit and specialized normative tradition like the Canadian legal tradition. The closest to such is the body of "mythology" (as we call it) collected by ethnographers and others from Dene and Inuit. This "mythology" is drawn from the stories which the people tell from generation to generation. The stories are accounts of the remembered past and also paradigms for action and justifications of present practices. Some stories are also about what ought not to be done, and what ought not to have been done. They express and portray an order of living. (The closest parallel to them in the Canadian legal tradition would be the collections of law reports which contain the statements delivered by judges when they made their decisions. The court records relate what happened at the trials; the judicial decisions, on the other hand, justify the judges' decisions in terms of the legal tradition, and have thereby a certain near-mythic quality about them. Both law -- even administrative regulations -- and mythology are collective representations maintaining the "mechanical solidarity" (Durkheim 1964:130) of a social order.)

Furthermore, Dene and Inuit societies were aboriginally, and still are, non-literate cultures. They are transmitted by example of behaviour and by word of mouth. The stories are heard, not read. The ideas of land and land-tenure which
the Dene and Inuit have, are communicated in the practices of 
Dene and Inuit regarding their use and occupancy of the land 
and in the stories they tell which reveal the meaning of the 
land to them. This is very clear, for instance, in the materials 
contained in the Report of the Inuit Land Use and Occupancy 
Project (1976).

We must therefore transform the ideas of the Dene and 
Inuit via their oral and behavioural expression into written 
materials corresponding to the written materials of the Canadian 
legal tradition. Fortunately, this task has been done for us, 
at least sufficiently for our purpose, by ethnographers and 
other writers describing the Dene and Inuit; and this written 
material has been further digested and summarized into some 
helpful and useful surveys. Many Dene and some Inuit have also 
told their stories at the community hearings of the Mackenzie 
Valley Pipeline Inquiry, and the transcripts of these hearings 
provide another source of written data.

The ethnographic literature and the community-hearings 
transcripts, on the side of the Dene and Inuit, and the statutes, 
law reports, textbooks, and commentaries, on the side of Can­
adian law, provide therefore the two deposits of tradition upon 
which we may draw for our comparisons.

From these two deposits of tradition, these sets of writ­
ten words, we then draw out the guiding themes or principal 
ideas, and express these, again in words, as a description of 
the overall structure, or structural form (to borrow and trans­
pose a notion from Radcliffe-Brown 1952:192-193), of each trad-
These 'structural forms' are then compared and their logical compatibility is ascertained. If the two structures are logically compatible, then one tradition may be cast into the form of the other without being distorted or destroyed, and it should be possible to defend Dene and Inuit ideas of land and land-holding by means of Canadian land-law ideas, both in theory and in practice.

Let us now look at this problem in a somewhat different manner. We have construed the problem as one of comparing two traditions, variously expressed in deeds, spoken words, and written words, and have traced how these two traditions can be transposed or transformed into the same medium of written words and therefore made logically comparable. Now let us consider briefly the relationship between these traditions, thus construed and compared, and the "social processes" or "social actions" from which they have been, as it were, abstracted.

Ideas of land and of land-holding occur in contexts. They are part of the dealings which human beings have with land and with one another. Ideas are models, within human minds, "of" and "for" (cf. Geertz 1966:7) the world and human actions within the world. A system of land-tenure is, in all its fullness, people acting upon the land and upon one another, and variously coping with the effects of their doings. Actions follow one another in sequences, and sequences of actions intersect one another in interwoven strands. This following and interweaving of actions is what we call "process", and the
shape of the following and interweaving is what we call the "structure" of the "process". This structure may be viewed as a pattern or form persisting through time, much as the shape of a human body persists through the incessant biochemical and biophysical activities of life. Such a form may be labelled "synchronic". Or the structure of the process may be the form or shape of its changes through time, namely such changes as are labelled "growth", "development", "evolution", "oscillation", and "feedback". Such forms may be labelled "diachronic". Both synchronic and diachronic structures may be perceived by the actors involved in them, as well as by outside actors, and mentally modelled accordingly. The mental models of these structures can then enter the processes of action as models for the actors to follow, models which blend with and transform the models for and of behaviour which the actors are already following.

In this enquiry, however, we are not describing social processes. We are seeking to discover and to summarize and to compare the general character of the mental models used within that kind of social process which may be called "land-holding". Process is the ground against which we shall make our observations, but ideas and the structural forms of ideas are the figures which we shall be describing and comparing. The structures which we shall seek out, furthermore, are synchronic rather than diachronic.

In this way, the problem of the enquiry becomes manageable. That problem is (I repeat) to compare the ideas of land
and land-holding traditionally held by the Dene and Inuit of the Northwest Territories with the ideas of land and land-holding in Canadian law, and to discover a way (if there is a way) whereby Dene and Inuit might use the ideas of land and land-holding in Canadian law to preserve their own way of regarding and using and holding land. The method follows from the problem, and has already been outlined.

The method has its own elegant simplicity. It is, as I have already noted, idiographic in that it requires no comparative material from societies other than the societies whose possibilities are actually being assessed. In order to demonstrate the simplicity of the method, I shall in the following chapters confine the discussion strictly to what is directly required by the method outlined. In this way, the nature and logic of the ideational structures of the three traditions of land-holding which we are comparing, should be plainly evident, and the possibilities or impossibilities of reconciling them equally plainly evident.
Notes to Chapter I

1 Hooker (1975:56) writes concerning the distinction between dominant and servient:

It should be stressed at this point that the systems which we designate 'dominate' all operate and were or are effective from a position of political superiority in any particular area. In both practical and theoretical terms this means that the legal system of the dominant political culture possesses absolute and unqualified power on its own terms to admit, alter, or suppress any existing indigenous laws. These powers were or are exercised wholly in terms of the dominant legal policy or policies as to what is felt to be desirable for the indigenous population. In many cases, of course, the policy itself often varied either in time or in space, allowing for changes in legal attitude towards the (politically) inferior systems.

However, "absolute and unqualified power" overstates the matter. The power is "absolute and unqualified" in a legal sense. The dominator is legally sovereign. But in a political sense the power is not absolute and unqualified. It must be exercised with some awareness of the sensibilities of the subordinate people, who are, after all, being left in some measure to follow their own ways. The power is there, nonetheless.

If the dominant society has both the will and the power to assimilate the subordinate society, and has sufficient time to do so, the subordinate people's legal system will not long be servient — it will disappear. Where the will to assimilate is lacking, or the power is insufficient to accomplish this goal, then the subordinate people will survive as a distinct people and their social system will survive albeit in a servient role.
Dohrenwend and Smith (1962:31-32) recognize the power relationships between cultures as a major differentiating character in acculturation.

Dohrenwend and Smith (1962:31-32; 1957:80) use the following three conditions, combined, as the criteria of dominance. Culture A dominates culture B, if A can (1) recruit members of B into its activities in positions of low status, (2) exclude members of B who wish admission to its activities in positions of high or equal status, and (3) gain admission to activities of B in positions of high status. By these criteria, as well as by the criterion suggested by Hooker (1975:56) in note 1, above, the Indians and Inuit of Canada are clearly subordinate to Canadian society. The Canadian power to dominate is not always exercised, but it is nonetheless always there. The history of relationships between the Indians and the Inuit, on the one side, and Canadian society, on the other, is well documented by Brody (1975), Hawthorn (1966-67), Knight (1978), Patterson (1972).


With the exception of most of the Indians of British Columbia. For a discussion of the law relating to Indian treaties, see Cumming and Mickenberg (1972:53-62). The early treaties, to Treaty No. 7, are given, together with associated documents, in Morris (1880). A history of
Treaties Nos. 8 and 11 is given by Fumoleau (1973: the text of the treaties at pp. 70-73, 165-168).

The Commission's report is Berger (1977), with a note at p. 203 of vol. one on the history of the inquiry. Background on Indian land claims, with specific reference to the Berger Commission, and from a viewpoint sympathetic to the Indians, is in McCullum and McCullum (1975). A collection of material supporting the Dene claim and revised from material originally presented at the inquiry, is given in Watkins (1977). A short account of the hearings, also sympathetic to the Indians' cause, and containing portions of the Indians' testimonies, is provided by O'Malley (1976). Background on the Pipeline debate, severely critical of Berger's approach, may be found in Peacock (1977).

These people are variously called "Athapaskan" or "Athabascan". "Athapaskan" seems to be the accepted anthropological usage (e.g., as in Jenness 1958:377; Vanstone 1974; and National Museum of Man 1974), and I will follow it, except where my sources use a different spelling.

Brody (1975:141-142, 214) distinguishes between the "classical social anthropologist's" definition of "traditional" as "the customs of pre-contact culture" and the Inuit view of "tradition" as what is "now regarded as traditional by contemporary Eskimos."

An excellent summary history of the literature on acculturation is provided by Voget (1975:721-785). Voget does not, however, cite Dohrenwend and Smith (1962).
One problem I do not need to canvass is whether the Dene and Inuit systems of land-tenure are "legal", or whether or not Dene and Inuit had "law". I am comparing systems of land-tenure, not legal systems as such. It is (in a sense) coincidental that one of those systems (i.e., the Canadian) is part of a system of law. My approach in the present enquiry does not depend upon first ascertaining, or even assuming, whether a given rule or practice or system is or is not "law".

This is also the place where anthropology becomes philosophy.
II

DEFINITION OF LAND, PROPERTY, LAND-TENURE, AND PERSON IN COMPARATIVE PERSPECTIVE

A

Land

Land, in the widest meaning of the word, is the space which an individual human being or a group of humans inhabits (occupies, exists in) and uses (exploits). But by "space" here we should not mean merely an empty void to be filled or a frame of reference, but rather a stage or scene for human activities which is comprised of phenomena and powers relevant to those activities. So defined, "land" does not mean merely dry land, but includes water and things in water; and it is three-dimensional as well, going above and below the surface of the earth on which humans dwell (Crocombe 1974:1; Paton 1951:411). So defined, furthermore, land becomes land (and not merely space or material universe) because it is in a certain general relationship to human beings.

Barlowe (1958, as cited and summarized in Clawson 1968: 551) has distinguished seven major meanings to the word "land": (1) space, or room and surface, where life occurs; (2) natural environment, including sunlight, rainfall, wind, and other climatic conditions, soil, and natural vegetation; (3) a factor of production, along with labour and capital; (4) a consumption good, used, for example, as a site for dwellings and parks;
(5) a situation or location with regard to markets, geographical features, other resources and other countries; (6) property, entering into legal relations between individuals and between governments; and (7) even capital in an economic sense. These different meanings themselves reflect the different relationships which members of one society, namely Barlowe's own, can take up towards land.

Bohannan (1963:222) distinguishes between land as "site" and land as "factor of production". Though site and factor of production are connected, they can be examined independently of one another. In some societies, he says, land as a factor of production, and with it "land-tenure", are defined primarily in relation to land as site. Thus in a society based on principles other than contract, some existing social groups live together and so make a community. The members of these groups exploit the land on which they find themselves as members of those groups, and exert their rights to exploit it because they are members of those groups. In other societies, namely societies based on contract, such as Western societies, where land enters the market, "local groups come into existence because land has been parcelled out in a certain set of ways in order to maximize production, and then sold." (Bohannan 1963:223) This happens, Bohannan says, "only in a contract society." Thus land comes to be viewed primarily not as a place where people live, but as a set of resources which can be used.

These contrasts are shown in the "folk geography" which
the members of a society have. Bohannan (1963:223-226) contrasts the Western idea of a rigid grid established by celestial reference points, with the Tiv "genealogical map" of their country and the Plateau Tonga system of overlapping neighbourhoods focussed on rain shrines which acted as "rallying points". In noting that, apart from names for rivers and hills, Tiv place names are the names of lineages living in certain areas, Bohannan intimates that place names reflect the folk-geography and the view of land which is part of it.

Bohannan's discussion implies that land, qua land, has a dual character. It is something with its own inherent nature, with which the people who live on it (or in it) must cope; and it is also what it is because of the people's view and activities and, generally, relationship to it. Land as site and land as factor of production are both elements in the action of the people in the world.

The ideas of "land" proposed by Barlowe and by Bohannan, but especially by the latter, are analytical concepts proposed while viewing the relationships between a people and the world from outside, from the position of the detached observer, for the purpose of comparing these relationships with the relationships between other peoples and their worlds. The people's own view of the "land" is part of their relationship to the world, namely what Bohannan would call a "folk concept". But the distinction between land as site and land as a factor of production is also influenced by the economists' ideas of land, labour, capital, and enterprise (Bohannan prefers the term
"ingenuity") as the factors of production, and the economists themselves are working within a culture devoted to the production of goods for sale on a market. The idea of factors of production, that is to say, is itself a folk-category of European\textsuperscript{3} culture, sub-cultural variant 'economics'. Bohannan has thus begun, but not accomplished, the transition to a truly cross-cultural analytical notion. He has given us a direction to follow.

First, we have land as \textit{place, site, or scene}. It is a region in the world where the people are placed or set, against which their activities can appear as figure against ground, and something to which they must relate. As scene, land has its own characteristics. It is not empty, but a place of powers, a source of experiences for people, \textit{any} people, who encounter it. We can disentangle land thus defined, furthermore, into land as the possibility for experience,\textsuperscript{4} a potentiality waiting to be evoked by some human observer encountering it; and land as experienced, the encounter made actual. This latter is scene in the strict sense. Land as place, site, or scene is still, however, also part of an interaction between itself and the people. Land, in this first meaning, is place interacting with people. A particular land is what it is, that is to say, because of a particular place and a particular people with their particular interactions.

Second, we have land as \textit{an element in a technical operation}. This is land as (a) the \textit{site} of the operation, (b) the \textit{raw materials} transformed by the operation, and (c) the \textit{fuel}
or energy used to effect the transformation. This is land as a **factor of production** where we are thinking of production as human action shaping the world, or the land, in accordance with human purposes.

Third, we have land as **property**, namely as the object of rights and duties, or claims and liabilities, between people.

Fourth, we have land as a **commodity**, namely something which can be bought and sold on the market. Commodity is property, but property is not necessarily commodity. The economists' factors of production combine land as an element of a technical operation with land as a commodity: production is for sale on the market.

Of these four notions of land, the first three will be found in all human cultures in one way or another. They are, as reflection will show, all necessary aspects of human ecological relationships with the non-human world. But land as commodity depends upon a particular way of dealing with land, and therefore upon a particular kind of human culture.

Fifth, we have land as an **element in a moral order**, namely something towards which people may regard themselves as having duties or obligations. As an element in a technical operation, land is merely a means to human ends. As an element in a moral order, land is recognized as an end in its own right. (The contrast between technical operation and moral order follows Redfield's (1957:20-21) distinction between "technical order" and "moral order".) Land as an element in a moral order need not be found in all human cultures.
All of these five notions of "land" view land as part of the relationship between land and people, and define land according to the kind of relationship. "No land without people, no people without land," is implied. Land without people is merely potentially land, and does not become land until people arrive. But when the people do arrive, what happens next depends on both what the land is and what the people are.

Land is an element in the interaction between people and the land. This interaction includes not only the "objective", "material" behaviours which an outside observer might perceive, but also the ways in which the people perceive and construe the land. Land is not only something existing apart from the people, but also something construed by the people in their world-view and something constructed by the people through their actions upon it. It therefore follows that the conception of land which a people have is an important part both of their ecosystem, i.e. their relationships with their environment, and of their culture.
The word "property" usually means both the things "owned" (in a wide meaning) and the various rights which the owner or owners and other persons have concerning the things owned. Even writers who insist that property is really the rights which people have over the thing often fall back into language describing property as the things. It seems best, therefore, to accept that "property" may mean one or more elements of a given complex, and to use special words to refer to these specific elements. That said, we may for comparative purposes simply define "property" as anything concerning which persons have rights and duties, or claims and liabilities, among themselves.

"Own", "owner", and "ownership" have wider and narrower meanings also. In the widest sense, they mean no more than having some right of property; in the narrower sense, they mean having the right to complete and exclusive control over the thing of property (see Paton 1951:419-425). For comparative purposes, the idea of ownership may properly be wider than in English-speaking or Anglican law. We should distinguish, that is to say, between "ownership" as an analytical concept (Bohannan 1963:10-13) in the anthropology of law or of property, and "ownership" as a folk-category (Ibid.) of an English-speaking legal order. On the other hand, it is convenient, and reduces confusion, if the two meanings can be
A system of property exists where we find the following:

(a) Things, or res, which are the objects of property rights.

(b) Property rights, or recognized claims to the rightful use of and control over the things (res).

(c) Persons who claim property rights and whose claims are recognized by the community.

(d) A community, or group of people, which includes the right-holders, and which recognizes and supports the holders' claims.

(e) A set of practices and/or rules, arising from the community's recognition of claims, which defines property rights.

(f) A set of sanctions and procedures for enforcing property rights, which comes into play when recognized claims are breached or not met.

(g) Persons who infringe upon property, or who make counter-claims, and so provoke the emergence of sanctions and procedures and the definition of rights in rules and practices.

By "practice" I mean a behavioural mode which is taken to provide an example both of what is done and of what ought to be done. A "practice" is thus both a mode of behaviour and a model of behaviour, even if it is not stated in a formal rule.

Of the seven criteria, (a), (b), (c), and (d) are logically necessary for property to exist.
A good description of the nature of a thing or *res* as the object or matter of a legal relationship is given in Paton, *A Textbook of Jurisprudence* (1951:409-410), from which I quote:

... 'A thing is, in law, some possible matter of rights and duties, conceived as a whole and apart from all others, just as, in the world of common experience, whatever can be separately perceived is a thing.' In this sense every legal right has a *res* as its object. According to the classical analysis, a right-duty relationship concerns two persons, relates to an act or forbearance, with regard to some particular *res*. Thus the object of a right of ownership may be Blackacre, the object of my right not to be defamed is my reputation. In this sense, *res* concerns much more than is covered by the law of property, but as the analysis of a *res* is so bound up with this subject, it is more convenient to discuss it at this place. Unfortunately, however, legal usage is not consistent, and there are really many different elements of thought. A thing may mean:

1. A thing in the material sense which is corporeal and tangible and has an organic or physical unity, e.g. a horse or a block of marble.
2. A thing which is corporeal and tangible, but consists of a collection of specific things, e.g. a flock of sheep.
3. A thing which exists in the physical world but is not material in the popular sense, e.g. electricity.
4. A thing which is neither material, corporeal, nor tangible but is an element of wealth, e.g. a copyright or a patent.
5. A thing which is not material and which is not directly an economic asset or element of wealth, e.g. reputation. If every right concerns a *res*, then we must admit this wider conception. The law of defamation binds others by a duty not unjustifiably to interfere with the thing in question, my reputation.

Some German writers suggest that a thing is 'a locally limited portion of volitionless nature'. This may be true of the popular usage, but it is not true of the legal. A slave may be a *res*, an idol may be a legal person. Law distinguishes not between those who possess volition and things which do not, but between legal persons to whom the law imputes a will (John Smith or an idol) and things which cannot hold rights but can merely be the objects thereof. Law in this instance has refined common usage.
Again, it is inconvenient to say that a res nullius is not a thing until it has been acquired by someone. It may be that, if the law specifically refuses some res to be in any circumstances the object of a right, it should fall outside the definition of a res. But whatever is a potential object of legal rights should be considered a res. A lion is a res even before it is caught.

It follows from this that anything may become a thing or a res to the law of a community, whether or not that thing have any corporeal existence or even be recognized as a reality by the observer from outside the community. So likewise for the res of a property-right. Anything whatsoever, corporeal or incorporeal, visible or invisible, phenomenal or noumenal, may be treated as a thing of property by a legal system, and be the object of legal relationships. The res is a res because it is conceived so by the legal system, and not otherwise.

There are a number of different ways of classifying res. Paton (1951:410-419) instances the following distinctions: corporeal vs. incorporeal; chose in action vs. chose in possession; res mancipi vs. res nec mancipi; movable vs. immovable; real vs. personal; fungible vs. non-fungible; those consumed by use vs. those not consumed by use. But the boundaries between these classes vary according to the legal system and are often affected by historical accidents. Thus the typical immovable is land and the things attached to it. But land as material may certainly be moved. Houses are often considered as immovables in law, but are movable in fact. In some legal systems ships are immovable in law, though as Paton remarks, "a vessel that is immovable in fact is of very little
use." Similar variations occur for the other distinctions. In general, says Paton (1951:419),

The main legal reason for classifying things is that dealings in them may be facilitated by the growth of such special rules as are necessary for each class. But the methods of division vary so much in each system that it is impossible to do more than indicate some of the more important methods of classification.

Note again that what determines the classification in a given legal system is not alone the character of the thing itself, but the way in which the thing is viewed and used by the community whose legal system is being examined. To say this is not to say that the character of the thing is irrelevant. There are features about land, for instance, which make it distinctive and the recurrent core in the class of immovable res. It is more enduring than personal property, and hence future interests in it have a real value. It is not, as space at least, movable and so may be used as a security. It can be subdivided without necessarily losing its value. It cannot be secretly stolen and hidden. It remains the same, and does not multiply by natural increase, and is thus the original scarce good (Paton 1951:416). It can become easily encumbered with all sorts of claims, so that there is no guarantee that the possessor of land is its owner (Cheshire 1962:5–6, cited in Gluckman 1972:114–116). And finally, because of its relative immovability, it can provide a fixed framework for social continuity which movable property does not. Gluckman (1972:116–117) writes:

I propose to suggest that in tribal society at least
immovable property and chattels have different functions in the maintenance, through time, of a social system as an organized pattern of relations. Immovable property provides fixed positions which endure through the passing of generations, through quarrels, and even through invasions and revolutions, and many social relationships are stabilized about these positions. Movables establish links between individuals occupying different immovable properties, and tribal practice artificially accelerates movement of these goods. The two kinds of property therefore acquire different symbolic values in the law and ritual of tribal society. The difference in social function is based on the obvious fact that all social systems, including those of nomads, are settled on land which changes but slowly, while the living personnel of the system and their interrelations change comparatively rapidly. These attributes may help to account for the fact that the distinction is so sharp in tribal society, although their ownership of chattels, unlike ours, was not generally free or unencumbered by demand-rights held by others than the producer or possessor. In Barotseland, as in other African societies, any chattel may be subject to a number of rights held by different persons.

Pursuing Gluckman's suggestion further, and thinking too about Bohannan's discussion of folk geography and the importance of land as site, we may distinguish between people for whom the land is not just a resource to be exploited but is also an exteriorization, as it were, of their personal and social identities, and people who may use land but regard it merely as a resource to be exploited and discarded when it has served its purpose. In the former, we might expect a sharp distinction between land and chattels; and in the latter, not. For the latter people, dispossession from the land is an inconvenience and an offence against property, but does not strike at their identity and self-respect. For the former people, dispossession from the land is a disaster which strikes at their very being both as individuals and as a group, and may lead to
anomie, despair, and suicide. The former people may be ex-
pected to have an attitude of stewardship to their land, to
regard it as put there not merely for themselves to use but
also for their unborn descendants, and to regard it as some-
thing to be cherished and not wantonly destroyed. People of
the latter sort, on the other hand, may be expected to have
a much more utilitarian and exploitative view of the land,
and to have no great objection to the destruction of the land,
especially if such destruction is economically profitable to
them. When people of the one kind meet people of the other
sort, misunderstandings are very likely as each imputes to the
other its own view of the land. But even if no such misunder-
standing occurs, there will still be conflict. To people of
the latter sort, the former people will appear to be cautious
and backward, refusing to exploit their lands fully, and per-
haps being rather soppily sentimental about it. To people of
the former sort, the latter people will appear as a horde of
locusts devouring the land and passing on to leave devastation
behind.

Having drawn the contrast so starkly, I must also say that
in reality the two attitudes occur in various mixtures. In a
society where the latter attitude predominates (such as Canada,
if I may trust my own impressions and also studies such as
Gutstein 1975), resistance to urban expropriation and to re-
zonings which permit and even encourage land "development" is
motivated by "sentimental" attachments to place as well as con-
cerns to preserve one's "investment". Zoning laws are them-
selves partly to protect attachments to land, as well to pro-
tect amenities and the characters of neighbourhoods and the
values of real estate. But the law which requires compensa-
tion for expropriation sets the compensation as a money pay-
ment based on the market value of the property, and does not
recognize attachment to the land, or its involvement in one's
sense of identity, as monetarily compensable.

So much for the nature of things or res. Now let us
look at the relationship called "ownership", and at the variety
of rights which persons may have vis-a-vis one another with
regard to the res.

Part of the difficulty of defining "ownership" for com-
parative purposes is that ownership, even in English, is not
an all-or-nothing relationship. It admits of degrees, and its
characteristics vary from legal system to legal system and even
within legal system. The "owner" for one purpose may not be
the "owner" for another purpose. Furthermore, there is neces-
sarily a complementary tension between the rights of the indi-
vidual and the rights of the community as a whole. The indi-
vidual owner is always an owner because he is supported by
the sanction and authorization by the community, namely his fel-
lows. But he may try to use his owner's rights and privileges
to the detriment of his fellows, and so the community may in
some sense have to modify his exercise of those rights and
privileges. In some situations this modification may go so
far that the community or its leading representatives are de-
scribed as the "owner".
We can deal with these uncertainties, however, by specifying what the full rights of an owner would be, and allowing that these rights might be considerably diminished by any particular property system before we became reluctant to describe the property relationship as "ownership". The full rights of an owner, according to Paton (1951:420), are:

(a) the power of enjoyment (e.g. the determination of the use to which the res is to be put, the power to deal with produce as he pleases, the power to destroy);
(b) possession which includes the right to exclude others;
(c) power to alienate inter vivos, or to charge as security;
(d) power to leave the res by will.

Where these are, there is no doubt that ownership exists. The most important of these powers is the right to exclude others. Indeed, this criterion could be taken as the one whereby the owner is determined. If one individual alone has the power, he is the owner and ownership is individual. If he can do so only in conjunction with others, the whole group of himself and those others is the owner, though he may be the group's official representative and spoken of as the "owner". Where this power is lacking, the other powers will be seriously restricted also.

Even where ownership as so defined is substantially present, there are various qualifications. The powers of the owner may be restricted by law or by agreements which he has made, forbidding him from exercising his powers in particular ways. Then, again, he may grant away all his rights of enjoyment until all that is left is "a magnetic core . . . which attracts
to itself the various elements temporarily held by others as they lapse." (Paton 1951:421, citing Noyes, Institution of Property, 310) Paton (1951:422) therefore distinguishes between:

(a) ultimate ownership, where but the residual core is left to the owner, the rights of present enjoyment being held temporarily by others;

(b) complete or beneficial ownership, where the owner enjoys all the rights and privileges which it is legally possible for an owner to have;

(c) fractions split off from ownership, some or all of which may be held by persons other than the owner, so long as the 'magnetic core' remains in the owner.

Property systems may thus in principle be arranged along a continuum, ranging from those where individual ownership is given an absolute value and least restricted by communal or public interests to those where individual ownership disappears so that the community or the state must be spoken of as the sole owner. Even in the latter instance, there will be a distinction between rightful and wrongful possession. Even in the former, there will be a community interest as well as the individual interests of the owners.

Defined in the narrower sense, ownership is only one form of arranging property rights; and we then need another term for the general relationship between the res and the holder of the rights. "Proprietor" and "proprietorship" might do, if they did not mean (as they do) owner and ownership in the narrower sense. "Tenure" and "tenant" on the other hand, especially the latter, suggest relationships less than ownership, and in any event apply specifically to land. At least, that is to say, we do not usually refer to someone who has rented a motor
car as the "tenant" of the car. We need terms which will name the holder of property-rights whether these be the rights of ownership or of tenancy or of stewardship or of whatever: perhaps for the time being, "property-holder" will do.

Another distinction between property systems concerns the relationship between ownership and possession. Is ownership to be defined in terms of rightful possession, or in terms of a bundle of legal rights and relations separable from the land and chattels which are the objects of the legal rights and relations? Modern legal systems clearly opt for the latter view. An estate in Anglican land law is not the land itself but the bundle of rights associated to the land. But it has been asserted by some legal writers (see, e.g., Smith 1974:6; 1976:213-216) that in primitive and archaic legal systems possession and ownership are not thus distinguished. In disputes over possession (it is said), the question was not, "who owns the object?" but "does the present possessor hold it rightfully, or has a wrong been done to the prior possessor?" (Smith 1976:214). I am not myself convinced that ownership and possession are not distinguished in primitive or archaic systems. The actual situations in these societies are too complex to be so summarily dismissed. The case studies of Oceanian land-tenure collected in Lundsgaarde (1974) show this fact very clearly. The idea of "ownership", in the meaning given that word in English, is really too crude to describe adequately these systems, and perhaps is better left unapplied. Nevertheless, once a given system has the idea of ownership in it, or of some near
equivalent, the question does come up concerning the relationship between ownership and possession. Furthermore, the degree to which rights can become abstracted from physical objects is still important in distinguishing property systems (cf. Cappannari 1960:140-141, in his essay on property among the Shoshone).

What, then, are we to mean by "possession"? Here is another concept which we are taking from a particular legal tradition (namely, the English common law tradition) in order to use it for analyzing and comparing other property systems. As before, it is convenient if the comparative meaning and the meaning in the original tradition are the same or very similar. Analyzing the idea of possession in English law, Pollock and Wright (1888:26-27) distinguish three separable aspects to possession:

i. Physical control, detention, or de facto possession. . . .
   ii. Legal possession, the state of being a possessor in the eyes of the law. . . .
   iii. Right to possess or to have legal possession. This includes the right to physical possession.

Physical possession or possession-in-fact occurs when the human actor effectively occupies or controls the object, so that he can exclude others from its enjoyment, and intends if necessary so to exclude those others (Pollock and Wright 1888:12-14; Paton 1951:454). It is therefore possible for a possessor to lose possession either by accident (as when I lose my watch) or by wrongful possession (as when my watch is stolen) without the consent of the possessor; while an owner cannot in general lose ownership without his consent (Paton 1951:453-454), except
by the decision of the community. Legal possession occurs when de facto possession is recognized by the law. The right to possess is a normal incident of ownership or property (Pollock and Wright 1888:27), and is separable from both possession in fact and legal possession. But though ownership normally entails the right to possess, the right to possess does not necessarily entail ownership.

Putting these and other considerations together, and preferring to mean by "possession" simpliciter "possession in law", Paton (1951:455) sums up the possible relations of a person to an object as follows:

(a) Custody — where the holder either lacks full control or else has no animus to exclude others, e.g. a customer examining a ring in the presence of the jeweller.

(b) Detention — possession in fact which for some reason is not regarded as possession in law.

(c) Possession — legal possession. In most cases the legal notion is built on the popular notion, but each legal system has certain anomalous cases either where a possessor in fact is denied possession in law or where one who does not possess in fact is given the rights of possession.

(d) Ownership.

Paton's summary shows, as indeed does Pollock and Wright's discussion, that the idea of "possession" in English has its penumbras of uncertain application as much as does "ownership". Also (and Pollock and Wright discuss this too), "possession" for the purposes of criminal law is not the same as "possession" for the purposes of the law of property, although the various meanings are still linked.

The uncertainties in the idea of "possession" are probably inherent in the situation. There is a constant tension
between "possession-in-fact" and "possession-by-right", because a person's de facto control over an object depends not only on whether he or she has the physical, bodily control over it, but also on whether other persons recognize his or her right to exert that physical control. If they do not recognize that right, they will (when their powers permit and their intentions so incline them) force the possessor to relinquish control. Furthermore, rightful possession may be hedged about with qualifications and contingent upon the performance of various duties. Perhaps we might put the matter this way. Possession is immediate control over the object, but, humans being social actors, that control is necessarily conditioned by all the sanctions, positive and negative, to which the possessor is subject. With this qualification, we may then say that property and possession, as correlatives of each other, are found in one form or another necessarily in all human societies; but that ownership, in the strict meaning of that word in Anglican law, need not be.  

Any institution of property must have rules or accepted practices providing for creating or for recognizing property-rights, rules or accepted practices providing for transferring property-rights from one member of the community to another, and rules or accepted practices determining how a given property-relationship may be ended so that other persons may acquire the res (this last set of rules is especially required where the property rights are to ownership or exclusive control). The content of these rules will vary according to the particular social system.
Land Tenure

Land tenure comes into being when land, as defined in section A, becomes a res for a property system, as defined in section B. Briefly defined, land tenure in a society is the collection of rules and practices defining who has the rightful use and control of the use of land (compare Crocombe 1974:1; Biebuyck 1968:562; Morris 1964:376). This includes ownership as one form of tenure, but much more besides (see Clawson 1968:552).

Crocombe (1974:5-6) lists six classes of rights relating to land:

1. Rights of or claims to direct use, which include the rights to plant, to harvest, to gather, or to build. It should be noted that various rights of direct use may be held by various persons in respect of the same parcel of land. For instance one person may have rights to collect wild fruits, another to plant short-term cash crops, and another to harvest tree crops. Apart from the above rights which govern production from the land, we may recognize subsidiary rights of users, which include rights of access and rights to the use of water.

2. Rights of indirect economic gain such as those to tribute or to rental income.

3. Rights of control. Rights of use are almost invariably limited by rights of control, which are held by persons other than the user. For instance, a man with the exclusive right to plant land may nevertheless be required to plant a specific crop or to conform to certain technical requirements of husbandry or to erect a specific type of house. On the other hand, the control may be negative, restraining the user from allowing the land to be used for such purposes as the growth of noxious plants. . . .
4. Rights of transfer, which are the effective power to transmit rights, either those in the land itself or those in other property attached to the land, by will, sale, mortgage, gift, or other conveyance.

5. Residual rights include the reversionary interest acquired in the event of death of the former right holders without descendants or collateral heirs; of non-compliance with specified conditions, as when persons are evicted for breaches of social norms; and of extreme need by the holder of the residual rights, such as the power of eminent domain which is held by governments.

6. Symbolic rights or rights of identification. In many societies there are clearly recognized relationships between men and land which have no apparent economic or material function, though they may serve important psychological or social functions.

So pervasive is land tenure to a society, that a classification of land tenure systems is a classification of whole societies from the viewpoint of land tenure. This is clear not only from Crocombe's list of land rights, but also from such surveys as the article on "Land Tenure" in the Encyclopaedia of the Social Sciences (Brinkmann et al. 1963:73-127), and the many studies of land tenure since that time. Biebuyck (1968:566) could in the mid 1960's still note that "a theoretical, precise framework for dealing with land-tenure systems and a cross-culturally valid and applicable method of investigation" was badly needed. Nonetheless, a beginning of a classification was made earlier, from an agronomist's perspective, by Liversage (1945). (The picture presented in brief by Liversage is sustained at length country by country by Meek 1949.) Liversage distinguished eight varieties of agricultural land tenure, of which the first two are founded on status, and the rest on contract (Liversage 1945:1): (1) Tribal tenure,
(2) Feudal tenure, (3) Labour tenancy, (4) Share tenancy, (5) Produce-rent tenancy (Liversage 1945:36). (6) Cash tenancy, (7) Emphyteusis, and (8) Owner-occupancy. In a given society, more than one of these varieties may co-exist, though one perhaps is likely to dominate.

Tribal tenure (Liversage 1945:2-18; compare Meek 1949:11-31) is marked, first, by the claim of the whole group, be it family, clan, or tribe, to land developed or undeveloped, cultivated or uncultivated, within the group's area of control. This claim is analogous to the territorial claims of sovereignty by state systems, or as Liversage (1945:4) puts it, "We may look upon claims based on this consideration either as a delineation of political boundaries or as something equivalent to the schoolboy's 'bags I'." Within this group claim, the individual members of the group have the right to take undeveloped land for their use, and to keep it so long as they use it, and to distribute the produce as they see fit, subject to the group's rules as to how produce should be distributed. Sometimes the right established by use is permanent, in other instances the right lapses when use ceases. These rights pass from an individual to his heirs, who hence can claim recognition of these rights for themselves. These rights to use the land and to dispose of its produce are variably subject to control by family and clan heads, councils of elders, chiefs, and kings or paramounts, who represent the authority of the community and may direct the allotment of land and control production. Land therefore is not saleable or devisable by will, and can be alienated from the community only by the community as a
whole or by its acknowledged representatives. (This is precisely analogous to the cession of land by one sovereign state to another.) But this does not prevent an outsider from acquiring, with the community's consent, the right to use the community's land. Within these general limits, tribal tenures are quite various; the degree of control by the community varies from strong control by the highest chief to an inchoate sort of public opinion; land rights overlap, and may be considerably fractured. In these societies, an individual gets land rights because of who he is in the social structure of the group, who his parents, family, or spouses are; or in a word, fundamentally because of his status in the group. This status is not necessarily fixed or purely ascribed, however, and land tenure arrangements are often quite flexible.

Thus far Liversage's account. Some comment is needed. Clearly "tribal tenure" is a distinct type of land tenure, notwithstanding the variation within it, associated with relatively small-scale societies mostly but not exclusively without the state as a political institution. It is not well described either as "primitive communism" or as "communal tenure", for the communal element is the equivalent of sovereignty or eminent domain in state polities. Nor, as Gluckman (1972:85-86, 100) has noted, is "usufructuary" really a satisfactory name for the rights of individuals under "tribal tenure", for the individuals have more than just a right to the fruits of their labour on the land.
The term "tribal tenure" is also inexact. It suggests that this kind of land-tenure is that characteristic of "tribes". But what are "tribes"? The term "tribe" has a wide range of meanings. For example, in Service's (1962; 1978:4-9) classification, "tribe" is a particular level of social organization more evolved than "bands" and less so than "chiefdoms". But both "bands" and "tribes", so defined, show "tribal tenure". "Chiefdoms," on the other hand, commonly show a type intermediate between "tribal tenure" and "feudal tenure". Fried (in Helm, ed., 1968:5) has described the word "tribe" as figuring "prominently on the list of putative technical terms ranked in order of degree of ambiguity as reflected in multifarious definitions." But perhaps since the term has so many meanings, and in lieu of a better, we can leave this first type of land-tenure labelled "tribal" without the term "tribe" having to mean anything in particular.

Feudal tenure (Liversage 1945:19-27) is marked by the existence of an aristocracy existing between the king or paramount and the rest of the people, the focussing of governmental and especially military responsibilities in the aristocracy, and the distinction between the producers and the aristocracy. In return ostensibly for protection by the aristocracy, the producers pay dues in produce and labour, as a sort of tithe or taxation. These services may be commuted to customary payments of money. In return for military service, the king or paramount grants governmental powers in varying degrees to the members of the aristocracy, whose domains are thus simultan-
eously both units of administration and groupings of units of production. The king or paramount still in theory represents the welfare and sovereignty of the entire community; though in the larger systems, this may be more ideal than actual as far as the local producers are concerned. The various payments between the strata of the society are generally in service or in kind rather than in money, and are customary rather than contractual. Liversage includes African kingdoms, such as the Barotse, and traditional India under this heading.

On the one side, tribal tenure blends into feudal tenure as tribal societies become larger and the political stratum of society becomes distinct. On the other hand, as the customary element declines and services and products are replaced by money payments, feudal tenures turn into landowner-tenant relationships, for example the zamindar-cultivator relationship in British India.

Feudal tenure, as Liversage describes it, is thus characteristic of agrarian states where money is either absent or not a major organizing medium of society, and neither market nor contract appear except in specialized contexts. "Feudal tenure" is not the best term for this type of tenure (Gluckman (1965:40-41; 1972:88), for instance, considers feudal terms inappropriate for traditional Africa.), but we are again clearly dealing with a distinguishable type of social order and tenure system, notwithstanding the existence of societies transitional to other systems as well.

Again we have a problem of labelling. However, since
the existence of higher administrative levels ostensibly regulating the use of the land in the interests of the whole society is a defining characteristic of this type, it might be called "administrative". The system is potentially or actually bureaucratic. Feudal society in the strict sense (as in mediaeval Europe) is a special variant of this type. An important feature of any particular instance of this type would be the degree to which the higher levels actually regulate or interfere with local initiatives, or are "merely" recognized by local people as rightfully due recognition.

This is the general type under which Gluckman's (1965: 40-41; 1972:89-92) distinction between "estates of production" and "estates of administration" arises. This distinction roughly parallels Crocombe's distinction between "rights of direct use" and "rights of control".

The next varieties of tenure are described by Liversage as contractual. They are not total systems of tenure, unlike the two preceding, but are relationships which in varying degrees can coexist with one another, with tribal or with administrative tenure, and with contract-based money-and-market societies. But perhaps if we look at them as a whole, we will get an intimation of a third great type of land-tenure system, which we can put beside tribal tenure and administrative tenure and which we can call "proprietorial".

Labour tenancy is described by Liversage (1945:28-30) as an arrangement obtaining in Kenya and South Africa whereby native labourers, in return for a contractually defined mini-
mum of labour, are allowed to reside with their families on farms operated by Europeans.

In share tenancy (Liversage 1945:31-36. This is also called métayage.), land is let not for a fixed rent but for a share of the produce. Liversage cites instances from India, Europe, the United States, Argentina, South Africa, Brazil, the Sudan, and the West Indies.

Many variations are found in the detailed arrangements of share tenancy. In the most common form the landlord provides the land and its permanent equipment; the tenant provides the labour and the implements of husbandry and the produce is shared equally between the two parties. In other cases, the landlord provides oxen and implements, and even advances the tenant money for his personal expenses until the crops are marketed, deduction interest and repayment from the tenant's share. Sometimes livestock enterprises are shared as well as crops, the landlord providing his share of the breeding stock. (Liversage 1945:35)

Most of Liversage's examples, but not all, are concerned with the production of crops for sale.

Produce-rent (Liversage 1945:36) is distinguished from share tenancy in that in produce-renting the tenant is obliged to pay a fixed quantity of the crop rather than a share proportionate to the total crop. It differs from cash tenancy only in that the money value of the fixed quantity of produce varies with the market. It differs from share tenancy in that the tenant bears a larger proportion of the risks and the opportunities.

Cash-tenancy (Liversage 1945:37-50) occurs where the tenant rents the land for cash, and occupies and uses the land generally as he sees fit and keeps the produce to sell as he
will. The agreement between landlord and tenant may specify other conditions of tenancy as well; the tenant who fulfills these conditions and pays his rent then remains on the land as long as he will. Depending on the length of the lease and the security of tenure, cash-tenancy grades into emphyteusis or lease-hold tenure.

Emphyteusis or lease-hold tenure (Liversage 1945:41-43) occurs where the conditions of lease and occupancy give the occupier a long-term interest in the land which shades into the interests of an owner-occupier. Thus in former times, English tenancies might run for a term of years, the life of the occupant, a term of three lives, and sometimes for ever. Other instances are cited from Kenya, India, and Holland.

Owner-occupancy (Liversage 1945:44) includes both freehold and allodial tenure. It is the dominant form of farm tenure in the greater part of Northern Europe, North and South America, Australia, New Zealand, and South Africa (Britain being a notable exception). The tenant is an owner in the full sense defined in the preceding section.

Standing back from Liversage's classification and viewing it in the light of the previous sections, we can see the outlines of a third general type of land-tenure system, which we may call the "proprietal". In this, land is normally owned in the strict sense by individuals and corporations. The land-owner may reside on the land himself or he may rent it to some tenant or tenants in return for labour, produce,
or money. Generally the purpose of production is sale rather than consumption, and this system thrives in a money-and-market economy. The powers of the state vis-a-vis the land may be reduced to general political sovereignty, the power of eminent domain, and taxation, preferably in money. People differ in the amount of land which they own, and there may be classes of great proprietors, little proprietors, persons who do not own land but rent it, and persons who neither own nor rent land. Land may be sold on the market, just as labour and produce are. The emphasis on ownership, with its claim to exclusive control, promotes an emphasis on sharp boundaries and the division of land into tidy parcels. At the same time, these parcels may become the objects of differing kinds of rights, encumbering the strict powers of the owner. The essence of the proprietorial system of land tenure, however, whether the land be divided into small tracts owned by many or large tracts owned by a few, is that ownership in the narrow sense is the normative pattern of tenure and that this ownership is distributed throughout the society and not confined to the state as a whole.

Liversage's review of land-tenure systems thus points the way to a tripartite classification. We might label these types respectively "tribal", "administrative", or "proprietorial", although the term "tribal" is misleading and the term "administrative" is only weakly descriptive. (The term "feudal" is even more inadequate than "tribal".) Or we might prefer simply to label them "A", "B", and "C".
The three types can be thought as occupying the three angles of a triangle, with the pure types at the vertices, and combinations and intermediate types occupying the area in between. The change from one type to another then is a movement from one corner to another, and there are six such movements where the change is from one pure type to another.

Type A characterizes relatively small communities without a distinction between rulers and ruled, and certainly without a state type of political system. The community as a whole controls the land, and the members of the community (be it village or lineage or other kind of group) all have a say in the disposition of the land. If there is a head to the community he (or more rarely, she) controls the land clearly on behalf of the community. All members of the community have the right to use the land to meet the needs of themselves and their dependents, and the community assures this right. But the land cannot be alienated without the express consent of the community. In such a society, exclusive control belongs to the community as a whole, which is also the political sovereign. Thus ownership and sovereignty belong to the same social unit, which is, of course, the community. But administration and production are nevertheless in the same persons' hands.

In types B and C, these unities are separated, but in different ways. The "administrative" and "proprietary" types are opposite ways of holding land in societies which have become large enough to be stratified, that is, to have distinct-
ions between rulers and ruled or between rich and poor. They are thus opposed both to each other and to type A.

In pure type B, ownership and sovereignty are still fused. The state, or the head of state, has (officially) exclusive control over the land, and the members of the society hold rights over and obligations concerning the land dependent on their position in the state's administrative system. The people who actually work and live on the land need not have much, if any, say in controlling or administering the land. Thus we can speak (if we wish) of "estates of production" and "estates of administration".

In type C, ownership and sovereignty are clearly separated. The state's land-laws set the frame within which ownership may be exercised; but the proprietor enjoys otherwise the exclusive control over his or her land. The proprietor may be an individual or (in some varieties) a corporation. The proprietor may use the land directly and live on it, or may not. In the latter event, some tenant uses the land and lives on it, in return for rent or some other consideration paid to the owner. Stratification may be minimal, as in a community of independent but roughly equal proprietors; or it may be maximal, with great proprietors, petty proprietors, and non-proprietors.

The right to tax land is not precisely the same as the right to control the use of land, even though the failure to pay taxes may lead to the loss of the right to control the use of land. The existence of taxation, and the degree of taxation, however, provide one measure of the importance of the adminis-
trative element in land-tenure systems. Taxation of land amounts to a payment made by the owner or tenant to the sovereign in return for the right to use the land. A purely proprietorial system would not tax land as such.

Taxation lies between the sovereign and the land-holder. Rent similarly lies between the owner or superior land-holder and the tenant or inferior land-holder. The inferior pays rent in return for the right to use the land, and loses that right when he ceases to pay the rent. Rent is consistent with pure proprietorial systems.

Where there are both land-taxes and rent, however, and a complex arrangement of sub-tenancies, the resulting system will be either an administrative system or a system partly administrative and partly proprietorial. Perhaps the most significant feature affecting such systems, is the extent to which taxes and rent are paid in goods or services or in money.

Each of these three types as outlined here is a pure type, signified by a corner of the triangle. By changing the degree of stratification within the system, and by changing the degree of separation between ownership and sovereignty, one pure type can be transformed into another. Actual systems may partake of more than one type.

So viewed, the three types exhaust the logical possibilities.

Any actual tenure system can be placed within the triangle, at some position between the three points, depending on its combination of characters of types A, B, and C. One
need not think of the actual system as occupying a point; instead, think of it as occupying an area within the triangle, depending on the relative importances of the various elements. A land-tenure system need not be wholly logically consistent, so long as it possesses within it some means of settling in particular instances which rules govern those instances.

Furthermore, the classification of land-tenure systems as "tribal", "administrative", or "proprietorial", turns out to be not merely a classification of land-tenure systems, but of whole social systems from the point-of-view of land-tenure. Each type of land-tenure goes with a distinct set of possibilities for political systems; and as these systems change so also must the land-tenure which goes with them.

Viewing land-tenure systems as thus located within this triangle, we can then ask what conditions of production, or ecological conditions, cause them to be in such and such a position or to move from one part of the triangle to another. Thus the type A character of the traditional Dene or Inuit system, as we shall discover below, follows quite logically from the Dene or Inuit mode of subsistence. Were that mode to change, their land-tenure would be changed accordingly.

'Ecological conditions', however, includes not only habitat and subsistence, but also the political and military environments within which a community must live and with which it must cope. For the Dene and Inuit, for example, that political and military environment today consists of Canada and the pressures towards northern resource exploitation. The Dene and Inuit
land-holding system must today help the people to cope with this social environment as well as with the non-human environment; or at least it must not greatly hinder their coping.
If we are to construe property and land-tenure as involving rights, or claims made by human individuals and recognized as right by the community, then we must construe property and land-tenure as involving persons. By "person" I mean not a human individual perceived through the senses as such, but a human individual or other entity conceived as the bearer of rights and duties and the recipient of others' duties. Things (res) as the objects of rights and duties imply persons who perform these rights and duties vis-à-vis one another concerning the things. If one is going to think in terms of property or of rights and duties one is therefore logically impelled, whether implicitly or explicitly, to think about persons in the sense of "right-and-duty-bearing units".¹⁴

"Legal personality," writes Paton (1951:315),
is an artificial creation of the law. Not all human beings necessarily possess legal personality: thus in early systems slaves were regarded as mere chattels and aliens were not permitted to sue in the courts. Many human beings may possess a restricted legal personality, such as infants and lunatics. Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol . . . . Twenty men may form a corporation which may sue and be sued in the corporate name. An idol may be regarded as a legal persona in itself, or a particular fund may be incorporated. In these two cases it is clear that the idol and the fund cannot carry out the activities incidental to litigation or the signing of a contract, and, of necessity, the law is forced to set up certain human agents as representatives of the will of the idol and the fund. But the acts of such an agent (within limits set by the law) would be imputed to the legal persona of the idol, and would not be juristic acts of the human
agent. This is no mere academic distinction, for it
would be the legal persona of the idol that would be
bound, not that of the agent. Legal personality is a
particular device by which the law creates units to which
it ascribes certain powers.

Hence just as the law can recognize anything as a res,
including things imperceptible to the senses, so the law can
recognize anything as a legal person, including beings imper­
ceptible to the senses. Legal personality is a theoretical
entity, or an entity by postulation, to borrow a term from
F.S.C. Northrop (1959:83). Legal personality is therefore
defined in terms of the basic concepts of a legal order or a
legal system, and there is no guarantee that what is reckoned
as a legal person in one system will be reckoned as one, or
even one of the same kind, in another.

Nevertheless, we may, as in English law, distinguish be­
tween "natural persons" and "artificial persons" (though these
terms taken literally import metaphysical judgments which other
legal systems need not share). By "natural person" I mean a
legal person epistemically correlated (See Northrop 1959:119)
with a single human organism as a perceivable entity (See dis­
cussion in Paton 1951:316-319). An "artificial person" is any
legal person not epistemically correlated with a single human
organism; it therefore requires the law artfully to recognize
some natural person to act as its agent (Paton 1951:316).\textsuperscript{15}
The way in which this agency is conceived may, of course, vary
from one legal system to another. We might also distinguish
"aggregate persons" where the legal person is epistemically
correlated with a group of human beings who are therefore as
a whole spoken of as the person; in such an instance, any act by any member of the group could be imputed to the whole group and so to the other members as well (for example, as in the blood feud). (An aggregate person is not the same as a "corporation" in English law.)

As with the distinction between ownership and possession in respect to things, so in respect to persons there is the distinction between legal personality recognized as distinct from sensorily apprehended human individuals, groups, etc., and legal personality fused with sensorily apprehended human individuals, groups, etc.

Legal personality is a special instance of something which we might call "moral personality", that is, the quality of being recognized as a person, or actor, in a moral order, i.e. someone recognized as having rights and duties in respect to the recognizer or observer. Operating within the technical order, one treats others as things, means to one's own ends; but within the moral order, one treats others as ends in their own right, and not merely as means to satisfy one's own purposes. There can be no legal personality except in a system of law; and it is at least arguable that law is not found in all cultures, (the argument depends partly on one's definition of law as well as upon the ethnographic facts). But there can be moral personality without legal personality, and there are (I venture to say) no human groups whose members do not regard at least themselves as moral persons, that is, as "human". The issue is both philosophical and anthropological, and I do
not want to get into it in the present enquiry. But for com-
parative cross-cultural purposes, a "person" may be defined
as some being recognized by the people of a given culture as
a source of action who can be communicated with in ways analogous to the ways of communicating with someone who speaks one's own language, who can meaningfully be described as having rights and duties of some sort, and who is in some sense treated as someone who must be reasoned and argued with. Not all human organisms need be "persons" in this meaning; nor need all "persons" be human organisms. Personhood is a status conferred upon some being by the members of a culture. That conferral depends upon the people's world-view and purposes, including their own ideas of who and what they themselves are. And someone might be reckoned a person for some purposes and not for others. Viewed from outside the culture, personhood is a status "read into" or "imposed upon" a given being; viewed from inside the culture, personhood is a status "given to" the entity, or "recognized" just as the entity's existence is recognized.

Hallowell's (1964) study of Ojibwa ontology and the Ojibwa idea of person illustrates the importance of moral personality as a cross-cultural category, provided we take into account how each culture (and within complex cultures, each sub-culture) recognizes persons in its world. In Western psychology and social sciences, observes Hallowell, persons and human organisms are categorically identified. But to the Ojibwa, this is not so. The Ojibwa treat as persons not only human beings but also a variety of spiritual beings, certain stones and shells, thunder,
beings who appear in myths ("âtísó' kanak" refers both to the beings told about in the narratives and to the narratives as they are being told), the sun, certain archetypal animals, animals sometimes, and dream-personages. The Ojibwa goal of life is pímadáziwin, life in the fullest sense, in the sense of longevity, health, and freedom from misfortune. This goal cannot be reached without help and cooperation from both human and other-than-human persons as well as by one's own efforts. Some of these other-than-human persons are, in Ojibwa ontology, communicated with in dreams and vision quest, and are properly addressed as "grandfathers". These personal relationships mesh one in a network of mutual obligations. This idea is expressed in the ecological relationships of the Ojibwa. Hallowell (1964: 77) writes:

The Ojibwa are hunters and food gatherers. Since the various species of animals on which they depend for a living are believed to be under the control of "masters" or "owners" who belong to the category of other-than-human persons, the hunter must always be careful to treat the animals he kills for food or fur in the proper manner. It may be necessary, for example, to throw their bones in the water or to perform a ritual in the case of bears. Otherwise, he will offend the "masters" and be threatened with starvation because no animals will be made available to him. Cruelty to animals is likewise an offense that will provoke the same kind of retaliation. And, according to one anecdote, a man suffered illness because he tortured a fabulous Windigo after killing him. A moral distinction is drawn between the kind of conduct demanded by the primary necessities of securing a livelihood or defending oneself against aggression, and unnecessary acts of cruelty. The moral values implied document the consistency of the principle of mutual obligations which is inherent in all interactions with "persons" throughout the Ojibwa world.

The Ojibwa do have a term, ánícínábek, for humans as distinct from other-than-human persons.
In the Ojibwa world-view, the Western distinction between "natural" and "supernatural" is meaningless. The terms "natural personality" and "artificial personality" taken literally would therefore also be misleading applied to the Ojibwa. The ətísokanak are certainly not artificial persons in the way a corporation is in Anglican law. They are much more like natural persons, except that they do not ordinarily appear as human bodies in daily, sensory life (but they might!). They do appear this way, however, sometimes in stories and in dreams. Ordinary human beings, or ānícinábek, are natural persons in the strict meaning. There are technical problems in communicating with ətísokanak which are absent in communicating with ānícinábek, and the distinction between the two parallels in this respect the distinction between artificial and natural persons.
Notes to Chapter II

1 To enlarge the meaning further, "organisms" may be substituted for "humans". But I shall be discussing human land and land-tenure, and what I shall write may not be applicable to other organisms besides humans.

2 Thus Paton (1951:411-412) regards land as being both space and material, even though some legal systems and writers define land as three-dimensional space.

3 I use "European" to include cultures historically derived from Europe since the 16th century; so Canadian culture is included.

4 "Possibility for experience" echoes J.S. Mill's definition of matter as "the permanent possibility of sensation".

5 Compare Hyams, Soil and Civilization (1976).

6 Here are some of the definitions of property and ownership offered by jurists, anthropologists, and other social scientists:

    Property is the name for a concept that refers to the rights and obligations and the privileges and restrictions that govern the behaviour of man in any society toward the scarce objects of value in that society. . . . What is owned is property. (Beaglehole 1968:590)

    The concepts of property and ownership are closely linked. Ownership is best defined as the sum total of rights which various persons or groups of persons have over things; the things thus owned are property. (Royal Anthropological Institute 1951:148)
Property in its most general usage denotes ownership or the thing owned. (Floud 1964:549)

As an institution, property may be described as the set of rights and obligations which define the relations between individuals or groups in respect of their control over material things (or persons treated as things). (Ginsberg 1934:181-182; cited in Floud 1964:550)

Property is a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth. . . . In essence property is a conditional equity in the valuables of the community. (Hamilton and Till 1962:528-529)

"Property" is a word of different meanings. It may mean a thing owned (my watch or my house is "my property"); it may mean ownership itself as when I speak of "my property" in my watch which may pass to the person to whom I sell the watch before I actually hand the watch over. . . .; or it may even mean an interest in a thing less than ownership but nevertheless conferring certain rights. . . . In English law, therefore, "property" comprehends tangibles and intangibles, movables and immovables; it means a tangible thing (land or a chattel) itself, or rights in respect of that thing, or rights such as copyright, in relation to which no tangible thing exists. (Vaines 1962:3)

The term 'property' . . . sometimes means ownership or title and sometimes the res over which ownership may be exercised. (Paton 1951:408)

Property is a social institution whereby people regulate the acquisition and use of the resources of our environment according to a system of rules. (Smith 1974:2)

Property is not wealth or possessions, but the right to control, to exploit, to use, or to enjoy wealth or possessions. (MacIver, cited in Lowie 1948:129)

Though Lowie cites MacIver's definition and reflects upon it, he soon falls back into referring to the goods themselves as property. This is the same usage as in his earlier work, Primitive Society (Lowie 1961: 205-256),
which showed that primitive societies had simultaneous communal and individual ownership. In that work, however, Lowie did not explicitly define "property".

In modern law the term 'property' has two meanings, land or chattels, and the legal relations through which human behaviour is controlled in regard to them. (Smith 1976:213)

The word "property" furnishes a striking example. Both with lawyers and non-lawyers this term has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again -- with far greater discrimination and accuracy -- the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious shift from the one meaning to the other. At times, also, the term is used in such a "blended" sense as to convey no definite meaning whatever. (Hohfeld 1966:28)

Wigmore (1936) has used the term "Anglican" to name the family of legal systems including the English common law and arising from that common law, such as the legal systems of the United States, Canada, Australia, and New Zealand. It is a good term for them because "English law" does imply the legal system of England and Wales. New Zealand, Australia, Canada, and the United States, especially the last-named, have long gone their separate ways and we can no longer take it for granted that what is law in one is law in the other. Yet there is a strong family relationship and continual intercourse between the systems. They also all use English as the chief language of the law.

Compare Smith (1974:2), who specifies that a property
system must have at least:

1. a community
2. a quantity of limited or scarce resources
3. a set of rules regulating the acquisition, access to, and use of these resources. This set of rules will be made up of at least the following subsets:
   A. a set of rules which provides the manner in which the property relation is created.
   B. a set of rules which provides for the transfer of this relation from one member of the community to another.
   C. a set of rules which determines how and when the property relation is terminated so that the resources are open to acquisition by others.
4. a set of possessive pronouns such as 'mine,' 'yours,' 'his,' 'hers,' and 'theirs,' etc. whereby this relation can be expressed.
5. a set of rules protecting the property relation by, for instance, providing sanctions when it is wrongfully interfered with.

9. See note 7, above.


11. Generalizing from and modifying Smith (1974:2), who refers to ownership as much as property, and to rules rather than rules and practices.

12. Regarding these criteria as two dimensions, we actually get a four-fold classification, thus:

<table>
<thead>
<tr>
<th>Division into Rulers and</th>
<th>Separation of Sovereignty and Ownership:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>NO</td>
</tr>
<tr>
<td></td>
<td>YES</td>
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<td></td>
<td>------------------------------------------</td>
</tr>
<tr>
<td>NO</td>
<td>Type A &quot;Tribal&quot;</td>
</tr>
<tr>
<td></td>
<td>Type C1 &quot;Proprietorial I&quot;</td>
</tr>
<tr>
<td>YES</td>
<td>Type B &quot;Administrative&quot;</td>
</tr>
<tr>
<td></td>
<td>Type C2 &quot;Proprietorial II&quot;</td>
</tr>
</tbody>
</table>
13 A further complexity would be to have one type obtaining between land-holding units, and another within the units; e.g., a corporate proprietorial type with the corporations following administrative or tribal patterns within themselves.


15 The terms "natural" and "artificial" persons used here as varieties of legal person follow Paton. Allott (1969:183-184) uses "natural personality" to mean individual human personality in contrast to "legal personality":

Recognition of an individual as a legal person is usually the corollary of his recognition as a human being. The model for individual legal personality is provided by natural personality. Similarly, the recognition of artificial legal personality is by extension from the recognition of natural personality. . . . Juristic personality is attributed, and it is attributed by analogy with human personality. The personification of natural forces and the recognition of group personality do not imply a total (and hence necessarily absurd) identification between such entities and natural persons; they mean that for certain limited purposes the legal system and those who operate it treat the entity as if it possessed legal personality. Thus . . . Ibo law will accept the agent of a deity as being an agent for someone; Akan law will permit someone claiming to speak for a 'family' to initiate legal proceedings; Nuer law will recognize that the wife in a ghost-marriage is lawfully married to her dead husband. In each case we have a logical fiction. In each case both law and common sense recognize the limits of the fiction: the Ibo deity must be represented by a priest; the living members of the Akan family are collectively entitled to bind the dead members and those who are yet to be born; the wife in a Nuer ghost-marriage enjoys normal relations with a pro-husband who performs all the usual marital offices.
which the ghost-husband is incapable of doing.

... The attribution of personality is a device used to implement a mental or social reality. The family members feel solidarity, both with one another and with their departed ancestors, which they wish to express in unity of action. The deity is conceived of as a real person, though of a different order of reality from persons on earth. The departed husband may have died, but he is not socially non-existent. In the same way, a limited liability company such as Imperial Chemical Industries, the Crown, or the University of London do not 'exist'; but we behave, for limited purposes, as if they did.

Thus Allott. But I wonder. Did the Ibo, the Akan, and the Nuer respectively really regard the deity, the family or the ghost-husband as fictions? Or did they not rather perceive them as realities which being what they were had to work through agents? The limited liability company was thought of from the beginning of the idea as a fiction, but not the deity, family, or ghost-husband. Allott's analogy, I suspect, there misrepresents the ideas of legal personality as seen from inside those legal systems.
The Dene of our enquiry belong to the family of peoples known to ethnologists as the Athapaskan-speaking peoples of northwestern North America. According to Vanstone (1974:9-20), the northern Athapaskans are divided into five ecological zones, namely, Arctic Drainage Lowlands, Cordilleran, Yukon and Kuskokwim River Basins, Cook Inlet—Susitna River Basin, and Copper River Basin. Within these zones, the people are divisible into groups distinguished by their own variants of the Athapaskan languages. The Dene of the Northwest Territories comprise the following such groups:

A. Arctic Drainage Lowlands:
   1. Chipewyan (overlapping into Manitoba and Saskatchewan);
   2. Slave (overlapping into Alberta);
   3. Dogrib;
   4. Bear Lake; and
   5. Hare;

B. Cordilleran:
   6. Kutchin (extending westward across northern Yukon Territory into Alaska);
   7. Mountain; and
8. Kaska (extending into southeastern Yukon Territory and northeastern British Columbia).

The climate of the Arctic Drainage Lowlands is continental and relatively uniform. Winters are severe. In the Mackenzie basin, snow is on the ground from October until late April or early May. The Mackenzie River usually freezes in early November, and stays frozen until May. The Great Slave Lake likewise freezes in early November, and is not free of ice until mid-June. Mean daily temperatures for December, January, and February, have been \(-12^\circ F/-24.5^\circ C\), \(-18^\circ F/-27.8^\circ C\), and \(-11^\circ F/-23.9^\circ C\) respectively; and temperatures from \(-40^\circ F/-40^\circ C\) to \(-60^\circ F/-51.1^\circ C\) are not at all unusual during these months. The short summer, on the other hand, can be quite warm, with considerable variation within a single day. Vanstone (1974:11) noted that on one July day in 1958 at Fort Good Hope the temperature varied from \(83^\circ F/26.3^\circ C\) to \(40^\circ F/4.5^\circ C\).

The vegetation of the arctic drainage lowlands is mostly coniferous. The commonest tree is white spruce, and there is almost no pine. In swampy parts of the country, are black spruce, tamarack, willow, and alder. Poplar occurs in clumps in better drained areas. At the east of the region, trees are small and scattered, concentrated in sheltered valleys; but the forest density increases as one goes westward. There is heavy ground cover, bush in uncleared areas, and grass in cleared areas and near human settlements. Edible berries, such as blueberries, cranberries, and strawberries, are plentiful in season. During early summer, wild roses, fireweed, Labrador
tea, and other flora bloom profusely.

The animal life is typically northwestern Canadian. The Dene hunt and use moose, caribou, black and brown bear, foxes, muskrat, beaver, porcupine, hare, marten, lynx, wolverine, otter, fisher, wolf, and red squirrel. They fish for whitefish, grayling, northern pike, lake trout, sheefish, suckers, and burbot. Seasonally, ducks and geese appear in large numbers. Loons are very common. (Vanstone 1974:14)

The basic mode of subsistence in aboriginal times was hunting, and especially the hunting of caribou and moose — caribou particularly in the north and east of our area, where the sub-arctic forest or taiga meets the tundra; and moose particularly in the more mountainous southwestern portion. Other animals were also hunted, and fish were caught in lakes and rivers, with which the area is liberally supplied.

Caribou were most notably hunted by intercepting them at key points on the caribou migration routes, and steering them by means of a combination of beaters and caribou fences to places where they could be conveniently caught and killed. Barren Ground caribou move to the tundra in spring and return to the edge of the forests in late fall. The Chipewyan intercepted the caribou by means of caribou drives in open country in late fall or early winter. The animals were urged between two long rows of wooden sticks converging towards a large enclosure of branches. Within the enclosure were set snares of babiche (half-tanned caribou or moose hide), and the caribou were caught in these. Then the hunters killed the animals by
means of bows and arrows. Another way of catching caribou was to drive them into lakes, and there lance or stab them with knives from canoes. (Vanstone 1974:24)

Moose, living in heavier forest country, and not being herd animals, were hunted differently. The Slaveys snared them and hunted them with bows and arrows. In the winter, a hunter coming upon fresh moose-tracks in the snow, would make wide semi-circles to leeward of the track, one after the other like this,

until the moose-tracks disappeared. The hunter would then know that the animal had doubled back and was stopping to feed or lie down. He would then himself double back in smaller semicircles until he found the moose. This type of hunting was best done by hunters as individuals or in pairs. (Vanstone 1974:25; the technique is described in detail for the Western Kutchin of northern Alaska by Nelson 1973:102-106.)

Both fishing and the hunting of small game were also important to the Arctic drainage lowland people, such as the Chipewyan and the Slave. Fishing was done in both the summer and winter (through the ice), fish being speared from canoes, caught in weirs, or caught by gill nets. Animals ranging from black bears and wolverines, through beaver and musk-rat, to hare, ptarmigan, and porcupine, were caught both as food and for fur
(except the ptarmigan, of course) by a variety of methods, such as trapping with deadfalls, shooting with bow and arrow, catching in nets, spearing after being driven from their homes, and snaring. While the hunting of caribou and moose was primary, hunting of other animals and fishing were essential when the numbers of caribou and moose declined, or when these beasts were unavailable because of season or weather. Game numbers fluctuated both regularly and irregularly. It was impossible for the people to be completely assured of any one particular source of food. There were occasional periods of starvation, and sometimes during such times there was cannibalism. (Vanstone 1974:25-27)

Travel was by foot exclusively during winter, and sometimes also by canoe during the summer. Snowshoes made winter travel much easier than it would otherwise have been. Sleds seem not to have been used until post-contact times. (Vanstone 1974:26)

Corresponding to the requirements of subsistence, the people were grouped into regional bands, local bands (or local groups), families, and a number of task groups which came together as necessary. Slobodin (1962:73-74; compare Vanstone 1974:37-41; Helm 1965:34; 1968:118), for example, describing the Peel River Kutchin, distinguishes the following groups: (a) winter trapping party of some 4 to 8 families, concerned to trap marten and fox and to hunt for meat; (b) local group, of some 4 to 8 families, lasting one to two generations, and concerned with trapping, hunting, collective hospitality, and
some collective trading; (c) meat camp, of some 15 to 20 families, lasting part or all of winter, and concerned with caribou hunting and ceremonies; (d) fish camp, comprising 10 to 30 families, lasting all or part of the summer season and sometimes being reconstituted from season to season, concerned with fishing, ceremonies, and games; (e) trading party (now obsolete), fairly large, occurring in winter or early summer, and concerned with trading, ceremonies, and games; and (f) band assembly, consisting of 50 to 70 families and being short in duration, concerned with ceremonies, games, and (formerly) trading. In addition, where groups were large (c, e, and f), men might form specialized war parties (now obsolete) or hunting parties.

Reconstructing the ways in which the groupings of the aboriginal Chipewyan corresponded to the demands of subsistence, J.G.E. Smith (1975:391) concludes:

The major socio-territorial groupings, denoted by names and minor dialect distinctions, were related to the exploitation of the three major caribou herds in their territory; the regional bands to the seasonal migratory paths and major foraging ranges, and local bands to more limited areas within the winter and summer foraging ranges.

He continues (Smith 1975:445):

Hunting and trapping territories do not correspond, in the taiga, to the well-known Algonkian patterns of the boreal forest. The migratory herds of caribou do not lend themselves to a family owned hunting territory, nor without the modern repeating rifle, to hunting by individuals or very small groups. The other large game animal, the moose, is also tracked wherever the trail leads, although the caribou eaters have never apparently been overly concerned with this animal.

Trapping territories did develop, but not to the degree found further south among the Thilanottine and
the Cree. Among the trappers of the Barren Lands band, throughout the twentieth century, a man was free to establish his trapline in any area not in use. If a trapline should not be used, it was open to any other trapper.

Among the Chipewyan, the regional bands had no clearly defined territoriality. The unpredictability of the movements of the caribou precluded the development of concepts of territoriality and ownership (Smith 1975:453).

Given that land as such is important chiefly as that which supports the animals which provide food, clothing, and material, and that the animals are geographically mobile, demographically variable, and not entirely predictable, exclusive land-tenure between members of the same regional or local group, is contra-survival. Access to the animals on the land must be maximized for the whole local community. Each member of the community must be free to move over the land in search of food, to set traps wherever he (or she) wills, and to combine with other members in pursuing and catching animals. At the same time, other members' traps, weirs, and caribou fences must not be destroyed or damaged. If these are abandoned, they may be rebuilt and used again, by anyone, without fuss. Once animals have been caught, they belong to the person who has caught them. At this point the idea that game should be shared enters to increase the effectiveness of the property system. The fluctuations in game supply cause hunters to differ from time to time and place to place in their success. One who is successful now may be, probably will be, unsuccessful later; and one who is unsuccessful now, successful later. If food is shared between them, the survival chances of both are enhanced.
Within the local community, therefore, we have a property system which emphasizes both the individual ownership and responsibility for tools and material (including food) appropriated from nature, and the advantages and goodness of sharing these tools and material (especially food), but which emphasizes common and not exclusive individual access to the land and its resources. ¹

The effective largest local community among the Dene was the regional band, which tended to exploit the resources of a given territory. What happened when members of different communities met? For the Dene of the Northwest Territories, there seems to have been no particular advantage to excluding members of other communities, provided they recognized that they were coming where the home community usually hunted. Indeed, in times of famine at home it would be useful to be able to visit neighbouring communities and share both their hospitality and their resources. So boundaries between the territories of regional bands were not always sharply defined. Still, each regional band seems to have exercised a sense of sovereignty over the land over which its members customarily hunted. This claim could be construed by us as a sort of communal ownership over the land; partly it was so, partly it was a potentiality for becoming so. In this claim, sovereignty and ownership of land are blended but neither are clear. ² In aboriginal times, they did not need to be.

Warfare, under the leadership of individuals possessing the appropriate personal qualities of fighting prowess and ag-
gressive behaviour, was quite widespread among the Athapaskans. Generally, it consisted of retaliation for offences committed by relative strangers, and took place therefore between groups near enough to interact occasionally but not frequently enough to permit other ways of resolving disputes. Warfare between Athapaskan groups and their non-Athapaskan neighbours was common. Within the area of the present enquiry, the Chipewyan fought Inuit (and outside the area, the fought Cree). The Athapaskans who fought Inuit did so to capture their possessions as trophies (Vanstone 1974:48-50).

Facilities, such as caribou fences, which require a measure of cooperation in order for them to be built and maintained, were under the formal supervision of responsible individuals within the community. For example, William Irving reports about the Vunta Kutchin of Old Crow in the northern Yukon:

The question of land tenure in prehistoric times cannot be approached directly with the evidence that we now have. However it is clear from our ethnographic data drawn from such informants in Old Crow as Joe Kikavichik, now deceased; Charlie Peter Charlie and others, that individuals held such important facilities as the caribou corrals in trust as it were for the community that depended on them. This I believe implies the recognition of the right of usufruct.

The formalization of this relationship between the people and the land is exemplified by a series of "owners" and that should be put in quotes, of the Thomas Creek caribou corral reported to me by Kikavichik. The corral was "owned" by six named individuals prior to its abandonment in about 1899. Now, I estimate that each owner or perhaps he should be called a custodian, served in this capacity for an average of ten years and that the fence was in operation continuously from at least as early as 1840.

The aboriginal period turned into the early contact period
after 1700 when trade goods of European origin (meaning thereby also Russian and American) began to appear in the Athapaskan country (Vanstone 1974:90-96). Iron chisels, knives, and axes were among these trade goods. In 1778, Peter Pond established a post near Lake Athabasca and traded with the Chipewyan (as well as with the Cree). The 1780's saw the introduction of European diseases, such as smallpox, and the beginning of consequent depopulation. The Chipewyan, Beaver, and Yellowknife peoples were the first to get firearms from the traders. In 1821 rivalry between fur traders east of the Rockies ceased when the Hudson Bay Company absorbed the Northwest Company.

After 1821, the fur trade stabilized and the missions entered and spread through the country. Contacts of whites with Dene were limited to few representatives of trading company and church. However, over time the Indian standard of living shifted towards greater and greater dependence on items of European manufacture (Vanstone 1974:96-97; Asch 1977: 49-52). The people had direct access to trade goods, but this access depended directly upon their ability to produce furs. The trading monopoly enjoyed by the Hudson's Bay Company until 1900 allowed a stable credit relationship to grow between trader and trapper. The people were free on the land, but became quickly dependent on the trading post for clothing and tools. While wild game and fish remained important for food, European foods were also desired. Housing and transportation devices, however, continued to be made of local materials.
In 1899, the Chipewyan and the Slave, among the Athapaskans, signed Treaty No. 8 with the Canadian government; and in 1921, the Slave, Dogrib, Hare, Loucheux (Bear Lake), and other Athapaskan groups in the Mackenzie District signed Treaty No. 11 (Cumming and Mickenberg 1972:118; Slobodin 1962:40, on the Peel River Kutchin).

Vanstone (1974:101-102) summarizes the effects of the dependence on the fur trade, and of the increase in trapping, in the following words:

Trapping is essentially an individual activity, and although a trapper may work with one or more partners, the traps he sets are his own, as are the proceeds from the skins that he trades. We have noted that individualism was a significant aspect of Athapaskan adaptation, and thus the introduction of commercial trapping did not create as much disruption as it might in a culture that stressed communal subsistence activities. Those cooperative pursuits that did exist, such as the caribou drive, declined in importance, and some changes in patterns of sharing also occurred, but the sharing of big game and other resources in the environment, a deeply rooted concept in traditional Athapaskan culture, has continued to be significant.

Aboriginal subsistence activities did not involve extensive trapping and most of the furbearing animals desired by the fur trade were not suitable for food. Only the beaver was important aboriginally as a source of both food and skins for clothing. It was the need to procure food to support life during periods when animals without food value were being hunted that eventually bound the Indians closely to the posts where they traded.

Trapping effectively signaled the end to exploitation of the total environment. Specialized knowledge of animal behaviour was still an important adaptive strategy, but its emphasis shifted considerably. Knowledge of the habits of furbearing animals and their environment was now of greater importance than a similar knowledge of large game animals and fish. This shift of emphasis and its commercial implications also disturbed the balanced reciprocal relationship between the hunter and his animal spirit helpers, thus undermining a basic aspect of the traditional religious belief system.
Did this change affect land-holding practices among the Dene of the Mackenzie region? Data to answer this question directly are not apparent either in the ethnographic record of in the Berger Commission transcripts.

However, Nelson's (1973:156-159 especially) study of hunting, gathering, and trapping among the Western Kutchin of Alaska suggests what likely happened elsewhere as trapping increased in importance. Among these people, traplines are areas in which individuals or families have exclusive rights to all fur-bearing animals (and only to fur-bearing animals). A trapline is a circuitous complex of trails, plus surrounding territory and bodies of water along these trails. Traplines are established by use, and if left unused for several years, may be claimed by someone else. Traplines are acquired by (a) clearing or reopening trails, (b) receiving them by gift or inheritance, and (c) by purchasing them. People avoid using other persons' traplines, even if possible avoiding travelling upon them; they do not set traps on other persons' traplines; and they do not steal furs from one another's traps. Traplines are thus individual or family property.

Stager (1974:40, 42) describes a similar happening for the Vunta Kutchin of Old Crow, Y.T.:

Trapping introduced and encouraged the concept of individual entrepreneurship, and property. Granted that the old corrals and fish traps "belonged" to certain families or individuals and were handed down, but there was then a strong sharing and cooperative ethic in Kutchin culture. The beginning of trade by individuals required individual traplines and territories. The location of traplines varied from year to year, so that "ownership" of an area applied to the time that a person actually
trapped there. Decisions as to which trapper would occupy which area seem to have been established informally, either through conversation or on a first-come first-served basis, or by repeated use so that the "owner" of a line was common knowledge. There was an established code that whoever breaks trail first had right to trap that trail; he could delegate the use to any part of his trail.

This is a logical response to the opportunities provided by the fur trade, and fits the individualistic side of Athapaskan culture. It would also be encouraged by the Canadian government's practice of trap-line registration, though this does not come about until the mid-1940's. Thus among the Peel River Kutchin trap-line registration was introduced in 1946.

After 1947, trapping was prohibited by the government on territory not registered in the name of the trapper or his family, or without the trapper's express permission (Slobodin 1962:41). Registration was supposed to provide a statistical basis for analyzing muskrat productivity (Stager 1974:50).

After 1946-47, and earlier in some places, the fur trade declined as a major source of income for the Dene, and both government and extractive industry moved in upon the north country (Vanstone 1974:107; Asch 1977:52). Welfare services for the Indians were introduced and enlarged. The extractive industries which entered the country gave only limited opportunities to the Indians. The firms preferred to use imported labour. In most instances, furthermore, the Indians had neither the education nor the skills to take advantage of such employment opportunities as did arise. In some places, Indians did find jobs in fishing, small-scale lumbering, and some mining and construction work.
As the trapping declined, the trading post became a commercial store, selling manufactured goods to the Indians in return for cash.

Nevertheless, hunting, fishing, and trapping continued to be important to the livelihood of the people, far more important than most White observers thought. By the 1970's, however, the "traditional" mode of subsistence was seriously threatened by the increase in prospecting for oil, by an expanding network of roads, by the pipeline proposals, and by the further resource extraction which these portended. Accordingly in 1973 sixteen chiefs representing the various Dene bands in the Northwest Territories applied to lodge a caveat with the Registrar of (Land) Titles claiming aboriginal title to some 400,000 square miles of the Northwest Territories. The caveat sought to forbid the registration of any title except subject to the claim. The Registrar referred the question to the N.W.T. Supreme Court. The federal government objected. Mr Justice Morrow of that court nevertheless held that a *prima facie* case was made out that the Dene had aboriginal rights in the land, that these rights constituted an interest which might be protected by caveat, and that the Registrar had the duty to record and lodge this caveat (*Re Paulette et al. and Registrar of Titles (No. 2)* (1973), 42 D.L.R. (3d) 8). During the proceedings various Dene testified concerning the nature of their use and occupancy of the land, and the judge's decision summarizes and quotes that testimony. Testimony was also given by anthropologists Mrs. Beryl Gillespie and Dr. June Helm, and by Father Rene Fumoleau. Concerning traditional ideas of land and land-holding,
the testimony revealed that the band, i.e. the regional band, was the land-holding entity, that the people of each band knew what places were part of the territory of their band and what part of some other band's territory, that people "respected" other bands' areas but felt free to cross into them if necessary, and conversely that people allowed persons from other bands to come onto their territory to hunt. Dene "did not consider that each of them owned small parcels of land to the exclusion of others" (Ibid.:14).

Then in 1974 came the Mackenzie Valley Pipeline Inquiry. The Dene took the opportunity given by Mr. Justice Berger to set out especially at the community hearings their claims to the land and something of their way of life on the land and their ideas about the land and its dwellers. The testimony focussed on the facts that the Dene had used and occupied the land before the Whites came, and that they were still using and occupying it. While the ways in which they used it were described, there was no description as such of the ways in which they held land among themselves. The thrust of the testimony was directed outwards, against the claims and pressures of White society, rather than inwards, towards the analysis of Dene society. 8

But nonetheless some principles about land and land-tenure among the Dene can be extracted from the testimonies:

(1) Land belongs to the people, individually and collectively, who live on the land and who therefore have the right to use that land and to claim its products accordingly. Residence
as a member of the community of people living on that land confers the right to use that land.\(^9\)

(2) Land is a whole, including the earth, the plants, the animals, and even the people who live on it. It is a part of a whole way of life, and supports that way of life. To think of the land is to think of all these things. Land is food is life.\(^10\)

(3) Going along with this wholeness of land, is an ethic of stewardship or partnership with the land and the animals. Though this certainly does not prevent using the animals and plants for human well-being, the relationship between people and land is a moral as well as a technical one.\(^11\)

(4) The moral order binding land and people, binds the people not only with their land today, but both of these with the ancestors of the people and with future generations.\(^12\)

(5) The products of the land, especially food, and access to resources, are to be shared among the members of the community, so that no one may be in want when another person is rich.\(^13\)

Thus in 1975 the Dene of the Mackenzie Valley were still following much the same ideas of land and land-tenure as their ancestors had followed when the Whites first arrived.

At the risk of some repetition, let me now try to sum up those ideas. Land "belongs" to the whole community of people who live on the land. This "belonging" has in it the possibility of both sovereignty and property. The community has the right and power to exclude from the land persons who are not
members of the community. Any member of the community has the right to live on the land and to use its resources to maintain himself/herself and his/her dependents. Membership is recognized by the community on the basis of kinship and residence. Facilities, such as caribou fences, which enhance the use of the land and its animals and which require some cooperation to build and maintain, are under the custodianship, as it were, of specific leaders of the community, and the passage of this custodianship follows the succession of leadership. Traplines, however, belong to the individual trapper and his family, and he has the right to exclude other persons from his trapline. These traplines, however, are only for catching fur-bearing animals, whose pelts will be sold to traders. Food animals are not affected by this rule. There is also a general obligation of hospitality, food-sharing, and mutual aid in times of trouble.

If the criterion of ownership of land be taken to be the right or the power to exclude other persons from access to and use of the land, then the Dene land-owner is clearly the community, with the important partial exception of traplines, which are individual or family property. What individuals possess is the right to catch game for clothing and food and to appropriate other resources for shelter and fuel. Even traplines are of this kind: what the trapper has is not the land, but the exclusive right to set traps along the path of the trapline.
The data do not indicate, in this system, a clear distinction between ownership and possession regarding land. Given the freedom of access to resources for community members, and the relative ease with which members of other communities could establish residence in the community, there was perhaps no need to develop such a distinction.

Other criteria of ownership, at least concerning land, are absent. Neither individuals nor the community were considered to have the power to alienate the land — the question did not arise —; and the power to leave land by will does not apply to the community, and did not exist for individuals. Furthermore, the Dene did not have any intention to give away the land when they signed the Treaties.

As Rene Fumoleau ([1973]:307) has written,

The Indian did not see himself as owner of land, nor as empowered to bestow ownership on another. He considered that the land and its animals, the water and its fishes, were for his use. He would never refuse to share them, compelled by conviction to do so. Nor did he consider that the act of sharing deprived him of his own right to freely use the land as he had previously done.
The Inuit of the Northwest Territories belong to three of the four ecological types into which the Danish ethnologist Kai Birket-Smith divided the Eskimo. The High Arctic type, represented only by the Polar Inuit, depended upon sea-mammal hunting, from the ice (they had lost the knowledge of boat-building), with bird-collecting in the short summer. The Arctic type, represented by most of the other Inuit in Canada, depended chiefly on sea-mammal hunting all year round, from the ice in winter, from boats in summer. The Caribou Inuit, dwelling inland on the tundra of Keewatin district, depended on the caribou for survival; their interests clashed with the Chipewyan following the caribou onto the tundra. The Subarctic type, found in South Greenland and southwestern Alaska (no Canadian representatives), depended chiefly on sea-mammal hunting by means of boats.

Within these four general types, there were variations. For example, the Netsilik who occupied the northern part of Keewatin district used both seal and caribou; the caribou reached the Netsilik country by mid-April and departed in September. The Netsilik also hunted musk-oxen and polar bears, and caught also various kinds of fish (Balikci 1970:xviii-xix). The Netsilik could hunt seals only from the ice, and therefore only in winter (Balikci 1970:23).
Hunting was extensive, rather than intensive, as the animals tended to be dispersed over the country. Some kinds of hunting and collecting were done by isolated individuals. Other kinds required teams. Balikci's (1970:127-128) summary of Netsilik practices illustrates the variety which could occur:

Netsilik subsistence activities may be classified by the extent and nature of collaboration they entail. First, of course, come the purely individual activities involving the efforts of an isolated, single individual: stalking the seal in spring, trapping sea gulls, collecting eggs, fishing for lake trout, some bow-and-arrow caribou hunting, etc. Second, there are the non-simultaneous but similar activities of people residing together, for example, autumn fishing for salmon trout through the river ice. In this case an extended family may camp together and every adult will have a fishing hole. The men will go back and forth fishing whenever they desire, and no co-ordination of effort is necessary. Third are those activities involving the co-operation of individuals in a synchronized manner without any division of tasks. Stone-weir fishing required a group effort to build the dam, a substantial undertaking. And it was imperative for all present to enter the central basin simultaneously in order to equalize fishing returns. Breathing-hole sealing in winter was a collective activity because of the necessity to control simultaneously the largest possible number of breathing holes. In both cases all the members of the fishing or hunting party performed exactly the same tasks simultaneously. Fourth, activities requiring division of labor and coordination. Such was the case of caribou hunting from kayaks, where beaters directed the caribou toward a crossing point in the lake to be ambushed by kayakers, who did all the actual killing.

Land for the Inuit was, and is, a place to live on and hunt over. Weyer (1932:173), summing up the earlier ethnographies, wrote:

The Eskimos have very little conception of ownership of land simply as land. Their interest, as is typical of hunting peoples, lies chiefly in the animals rather than in territories apart from their faunal life. Hence their land laws are really game laws.
Among the Copper Inuit, land belonged to the community which used it as a hunting and fishing ground. Strangers were not allowed to hunt there unless the community accepted them as members at least temporarily, and they conformed to the customs of the community. Among the Caribou Inuit, no individual or community was supposed to lay claim to any particular hunting territory. Wood, soapstone, and other materials, like game, belonged to the person who first took possession of them. This attitude was also followed by the Greenland Eskimo. The Alaskan Eskimo, on the other hand, sometimes regarded the more productive places as being privately owned. (Weyer 1932:174-5)

Weyer (1932:188) extracted three principles from the ethnographies:

(1) Hunting grounds, or rather, the privilege of hunting on them, is a communal right, except in rather rare instances.
(2) The hunter or hunters almost always have the preferential share in the game secured, but part of each catch is generally divided among the community or among those present at the apportioning.
(3) Stored provisions are normally the property of the family or household; but in time of scarcity there is a tendency towards communalism. Hospitality is stressed under all circumstances.

In Weyer's (1932:189) opinion, in this property regime:

...individual interests rather than group interests are dominant. The group serves as an insurance organization, towards which there is little feeling of righteous responsibility, save in that kinship among its members makes the prosperity of one member the concern of another. Fundamentally, it is not solicitude toward the group as a group that prompts the individual to forfeit his premium; rather it is the conviction that unless he does so he will not derive the benefits when his personal or family interests are at stake.
Houses belonged to families or to heads of families, but often when these houses were no longer used, property rights in them lapsed. Tools, clothes, ritual objects belonged to individuals (Weyer 1932:193-194). These latter could be inherited (Weyer 1932:201).

The Inuit went through stages of contact with White society similar to the stages passed through by the Dene. First came whalers and traders, then missionaries, and finally policemen. The Inuit became increasingly dependent on the fur trade, which collapsed in the 1940's leaving the Inuit in a state of destitution in the 1950's, and dependent on government welfare. In the 1950's, the government increased its concern for the Inuit, and increased its penetration of the north. One move was to establish cooperatives which would produce artifacts and art objects for outside markets. By the 1970's the search for petroleum was reaching the Inuit country. (Brody 1975:14-15, 21-31)\(^ {15} \)

No treaties were signed by Canada with any Inuit.

In 1973 the Inuit Tapirisat of Canada proposed to the Minister of Indian and Northern Affairs that research be done to produce "a comprehensive and verifiable record of Inuit land use and occupancy in the Northwest Territories of Canada." In 1976, this research was published as the Report of the Inuit Land Use and Occupancy Project. This study covered every community of Inuit in the N.W.T. It lists the fauna hunted, trapped, or fished, the places and seasons where and when fauna
are caught, the changes from olden to modern times, and the various territories occupied by the Inuit. The study includes a special discussion, by Hugh Brody, of how the Inuit perceived their occupation of the land.16

Brody's observations are highly relevant to the present enquiry. He notes that throughout the Canadian Arctic, the Inuit fought the Indians whenever they found these latter on Inuit hunting lands. The Inuit feared the Indians. "This one simple fact establishes that Inuit did have a strong sense of the right of occupancy, even though that right was enjoyed by every Inuk and it crossed every local cultural boundary." (Inuit...Project 1976:224)

The Inuit language distinguishes between residing, using, having, and owning things, including land:

There are two main ways of asking where a person is from: "Nani munagarpit?" "Where do you have land?" and "Nanir-miutauvit?" "Where are you of?" The key infix in the first case is qaq, which means "having in one's possession", though it does not imply anything as forceful as ownership. Although neither of the "where do you live" questions is explicitly directed to the idea of ownership, it is possible to discuss ownership in the Inuit language. The word for owning is nangminiq, which, like most Inuit words, can be used in both verbal and noun forms. As a noun, it takes conventional possessive endings: nangminira, my own, or nangminit, your own, etc. And in its verbal form, it can, like all verbs, be conjugated: nangminiung-ituq, it is not my property, or nangminingitara, I do not own it.

Nangimiq is opposed to atuq, merely using. A Pond Inlet man, talking about Qallunaat in the Arctic, said, "Nangminingitanga aturtuinaqatanga", "He doesn't own it, he just used it." When Inuit ask, "Whose are these?" they do so in a way that leaves open the question of ownership. The form of such questions and answers is --

Q: "Kia ukka?" "Whose these?"; A: "Ukkua uvanga", "These
mines"; or Q: "Puaaaluukka takkua?, "My rotten old gloves those?" Such questions and answers do not include a verbal root that indicate any relationship to the objects. They suggest a tendency toward non-designation of ownership. But this tendency is not, contrary to widespread belief, a result of there being no sense of ownership among the Inuit. Here the term nangminiq has its place. Assertion of ownership is likely to arise when the rights of ownership are not being respected, or when the benefits of ownership are threatened. (Inuit...Project 1976: I:234

Thus the Inuit do have an idea of ownership, and words to express that idea. That idea was usually applied to personal goods, but could be applied to land. Aboriginally, the idea of land ownership did not arise very often, because those rights were customarily respected. But today, faced with the loss of their land to the Whites or Qallunaat, the idea that the Inuit own their land has come clearly to the fore.

The Inuit sense of identity both as a people and as individual persons is bound up with their feeling for the land, for hunting as a way of life, and for Inuit traditional customs. As with the Dene, though with a different style and flavour, the land and the people are to the Inuit indivisible. Separate them, or destroy the land, and the Inuit die.

In summary, land among the Inuit belongs to the community whose members make use of the resources, especially game, found on or in that land. The community consists of the people who dwell on the land and use it. Once a resource is caught or appropriated, it becomes the property of the person who has so caught or appropriated. But there is an obligation to share this resource among the members of the community. As Weyer wrote, the land laws of the Inuit are basically game laws.
Let us now, in conclusion to this chapter, apply the set of six classes of land-rights distinguished by Crocombe (1974: 5-7) and quoted in chapter II, section C, of the present enquiry to land-tenure among the Dene and Inuit.

(1) **Use-rights**: among the Dene and Inuit both, rights to use the fauna and flora of the community's land for food, clothing, and shelter for oneself and one's family were granted to members of the community. A member of the community was anyone who had resided there long enough to be accepted as a member. Visitors had a similar guest-right, provided they were accepted as such by some member of the community. Kinsfolk of members were readily accepted as welcome visitors and easily became members.

(2) **Rights of "indirect" economic gain**, e.g. tribute and rent: this category was not applicable in aboriginal times, and is not part of traditional ideas. But in modern conditions, Dene and Inuit are prepared to argue that royalties from resource-exploitation by mining companies, oil companies, and so on, should be paid to the communities which in Dene and Inuit ideas own the land.

(3) **Control rights**: these were held by the community, whose leaders, with popular support, could deny access to persons from outside the community, and sometimes (among the Dene) defined certain areas as reserves closed to hunting.
(4) **Rights of transfer**: use-rights were not transferred, being acquired by residence (as member or guest) in the community. Children acquired them by being born to members of the community; they did not actually inherit them from their parents. Only the community could alienate land, and alienation was not an important aboriginal concern. Rights to traplines, a post-contact phenomenon, could on the other hand be transferred by gift, purchase, or inheritance.

(5) **Residual rights**: this category was not really applicable in aboriginal conditions. If such rights had had to be recognized, the community would presumably have been the holder.

(6) **Symbolic rights or rights of identification**: these were not described in my sources.
Notes to Chapter III

1 Compare summary statement in Driver (1964:250-251):

In the Mackenzie Sub-Arctic most territorial rights were controlled by loose and fluid bands rather than by individuals or families. The kinship structure of these bands followed no regular pattern and they seem to have included members from a number of unrelated families. Trap lines, however, were owned and operated by individuals and families in the western part of the area.

2 This kind of property system is described clearly by Guédon (1974:52, 129, 140, 147, 149) for the Upper Tanana of Teitlin, in west central Alaska. Here the band usually lived in its own territory, but was not bound to it. Boundaries between band territories were not permanently fixed. Territories were not exclusive, for band members only, but the dwellers theron had some right to limit others. A person could move freely wherever he or she had kin. Sharing and hospitality were highly valued. Villages were meeting places for the people of the band. Each village was linked to a hill which stood as a landmark as well as symbol. There was only one such hill per village, whether this "hill" was a mountain, a small hill, or even just a river bank. A person could hunt anywhere within the limit of his band's territory. On another band's territory, one had to go with someone belonging to that band. People might reside for a long time in a given village, but were expected to remember the village where they were raised or where their parents
came from.

The people of Teitlin are outside the territories of the Dene of the N.W.T., and are to the west, where property seems to have been a greater concern and where property rights were more specifically demarcated.

Unless my memory misleads me (as well it might), Kai Birket-Smith in The Eskimos (note 14 below) says that Dene and Inuit fought over access to land and caribou and the use of caribou fences, such fighting taking place if the two peoples should happen to meet during their seasonal rounds.

Dr. Irving, describing his research into the prehistoric way of life of the ancestors of the people of Old Crow, was testifying at the formal hearings of the Berger Commission in Yellowknife. The quotation is from Transcripts, pp. F23052-23053. Irving's complete testimony occupies pages F23042-23081. The passage cited is the only passage concerning native Indian and Inuit traditional land-tenure practices which can be retrieved from the formal hearings using the index provided. The information indexed under land-tenure and land-use mostly concerns Canadian land-tenure or land-tenure in other parts of the world.

The Yellowknife group has since disappeared.

Guédon (1974:129), referring to the Upper Tanana in Alaska, noted that there the old balance between strong individualism and the feeling of solidarity within the community had been lost. Individualism was accentuated by new
hunting weapons and by the cash economy. Nonetheless (p. 140), sharing and hospitality remain highly valued.

Slobodin (1962:36) dates what he calls the Musk-Rat Period of Peel River Kutchin history from 1917 to 1947.

Transcripts of Mackenzie Valley Pipeline Inquiry Hearings, henceforth in these notes cited simply as Transcripts.

The community hearings are contained in volumes C1 to C77. Since pagination is continuous from volume to volume, citations will be by page number only, preceded by the capital letter C, thus: Transcripts, p. C886

Since pagination is continuous also for the formal hearings, citations from the formal hearings will also be by page number only, thus: Transcripts, p. F21917

There is an index. But using the index (as already remarked in note 4, above), one can retrieve only one passage concerning traditional Indian and Inuit land-tenure.

The full list of specific testimonies for this principle from the first thirteen volumes of the community hearings, is as follows:

(The people, meaning the whole community and its leaders) "... are the owners of the land and that what they decide should happen on the land." Joe Naedzo, at Fort Franklin, 24 June 1975, Transcripts, p. C605

"He says the native people are on this land before the whitemen came by right, and when we say we own this land, he says its ours because we're the first one that was here before the white man." William Martel, at New Indian Village, Hay River, 30 May 1975, Transcripts, pp. C510-511
"We were born in one world. The Almighty did not build this world to fight over it. I don't think it is fair for either of us to say it is your land or my land because nobody owns it." Louis Blondon, at Fort Norman, 27 June 1975, Transcripts, p. C967.

A full list of specific testimonies for this principle, from the first thirteen volumes of the community hearings, is as follows:

"Native people find meaning in the land, and they need it and they love it. They love not only the land but the things God put on it. . . . In the winter you see flowers, trees, rivers and streams covered with snow and frozen. In the spring it all comes back to life. This has a strong meaning for my people and me, and we need it." Ray Sonfere, at New Indian Village, Hay River, 30 May 1975, Transcripts, p. C552.

". . .When they refer to food, it means the land." Joe Naedzo, at Fort Franklin, 24 June 1975, Transcripts, p. C604

"My father really loved his land and he says that we too loved our land. The grass and the trees are our flesh, the animals are our flesh. He says we do not have any money, we will never be rich, but the animals that eat off the grass, the animals that eat off the birches and the barks and stuff like that, that we live off. . . ." Suza Touchou, at Fort Franklin, 25 June 1975, Transcripts, p. C684.

"This land is our blood. We were born and raised on it. We live and survive by it." Joe Bistape, at Fort Franklin, 25 June 1975, Transcripts, p. C761

"We call this land our grub." Fred Wido, at Brackett Lake, 26 June 1975, Transcripts, p. C855.

"This land is your food bank. . . ." Terry Blonden, at Willow Lake, 26 June 1975, Transcripts, p. C867

The land is compared to a bank. The Indians go to the land to get food, just as the white people go to the bank to get money. Various people, Transcripts, pp. C891, C952, C990, C1129, C1263.
"To the Indian people our land really is our life. Without our land we cannot or we could no longer exist as people." Richard Nerysoo, at Fort McPherson, 10 July, 1975, Transcripts, p. C1184.

"Why we talk about the land so much is because we can grow more animals." Charles Koe, at Fort McPherson, 10 July 1975, Transcripts, p. C1236.

"Here, we too, the Crow Flat, is just like a farm or a land that we own, where we can go and make a living from." John Moses, at Old Crow, Y.T., 11 July 1975, Transcripts, p. C1337

A full list of specific testimonies for this principle, from the first thirteen volumes of the community hearings, is as follows:

Parts of the countryside were set aside as game reserves where there would be no hunting or trapping. Chief T. Somfere, at New Indian Village, Hay River, 30 May 1975, Transcripts, pp. C522-523.

The woods were the Indians' fuel, and the Indians didn't have to destroy the woods. Jim Lamalice, at New Indian Village, Hay River, 30 May 1975, Transcripts, p. C565.

... you must always keep your food good. If you treat your food good, the food in return will treat you good. ... When they refer to food, it means the land. ... Whatever the animals eat, the brushes, the bushes, the mud, anything that the animal eats, they themselves eat of it too. Like it is a sort of cycle. ... always keep your food good. Protect it from any fires that might occur. Because the fires destroys the food for the animal, and therefore you wouldn't have animals to feed off." Joe Naedzo, at Fort Franklin, 24 June 1975, Transcripts, pp. C604-605

The old people passed on the words, "if you keep your land good, the land will treat you good." Joe Naedzo, Transcripts, p. C641

"... respect the land. ..." Lucy Vaneltsi, at Fort McPherson, 10 July 1975, Transcripts, p. C1154.
"Being an Indian means being able to understand and live with this world in a very special way. It means living with the land, with the animals, birds and fish as though they were your sisters and brothers. It means saying the land is an old friend and an old friend that your father knew, your grandfather knew, indeed your people have always known." Richard Nerysoo, at Fort McPherson, 10 July 1975, Transcripts, p. C1183.

"We will always see ourselves as part of nature." Richard Nerysoo, Transcripts, p. C1188

"We love our land, because long before us, for many years, our ancestors they have been living on this land and made their living on this land and that is the reason why we talk so much about our land nowadays." Charlie Abel, at Old Crow, Y.T., 11 July 1975, Transcripts, p. C1331.

The distinction between moral and technical orders is, of course, from Redfield (1957:20-21).

A full list of specific testimonies for this principle, from the first thirteen volumes of the community hearings, is as follows:

"We have like, our fathers have helped us survive until today. Then we must in turn help our children for the future." Joe Bayah, at Fort Franklin, 24 June 1975, Transcripts, p. C657.

When the people go out fishing, hunting, trapping, "we don't try and clean the country, we always leave [a] little for next year. . . ." We want to keep the land undestroyed for future generations. Chief John Charlie, at Fort McPherson, 8 July 1975, Transcripts, p. C990.

"For thousands of years, we have lived with the land, we have taken care of the land, and the land has taken care of us. . . . We have lived with the land, not tried to conquer or control it, or rob it of its riches. That is not our way. . . . We have been satisfied to see our wealth as ourselves and the land we live with. It is our greatest wish to be able to pass this on, this land to succeeding generations in the same condition that our fathers have given it to us. We did not try to improve the land and we did not try to destroy it. That is not our way." Phillip Blake, at Fort McPherson, 9 July 1975, Transcripts, pp. C1084-85.
A full list of specific testimonies for this principle, from the first thirteen volumes of the community hearings, is as follows:

Food is shared among the community, with those in need. Rosie Savi, at Fort Franklin, 24 June 1975, Transcripts, p. C614.

"He says when you go to a different community the native people receive you and they really welcome you. They give you tea and the give you food..." Suza Touchou, at Fort Franklin, 25 June 1975, Transcripts, p. C684.

Hospitality is practiced among all the native people of the north. This was taught by the ancestors. Joe Naedzo, at Fort Franklin, 26 June 1975, Transcripts, pp. C810-811.

"In them days people used to go all over wherever they know there is caribou and they go all over the country living off the land." Chief Johnny Kay, at Fort McPherson, 8 July 1975, Transcripts, p. C1008.

Kai Birket-Smith, The Eskimo. Since the book is not presently available to me, I cannot give publication data; and my account is given from memory.

On cooperatives, Paterson (1976:49) wrote:

The first attempt to assess the economic situation of the Canadian Inuit, with declining fur fox population and low market prices, was in 1946. The report proposed (a) to assimilate the Inuit where they lived close to white settlements, (b) where game was abundant, to encourage the Inuit to continue their old hunting and trapping existence, and (c) where local resources were insufficient, to re-settle the Inuit in areas where game was more abundant.

Brody (1975) describes present-day White and Inuit societies in the North.

Inuit Land Use and Occupancy Project (1976), 3 vols.
henceforth referred to as Inuit ... Project (1976). The study of Inuit perception of land is Hugh Brody, "Land Occupancy: Inuit Perceptions," in vol. one, pp. 185-242.
IV

IDEAS OF LAND AND LAND-TENURE IN CANADIAN LAW

A

Contexts

The method set out in the first chapter of the present enquiry proposes that in displaying the ideas of land and of land-tenure of a society in order to compare them with the corresponding ideas in another, one should begin with a sketch of the cultural ecology of the society. That sketch begins with the environment and resources used by the people, and then proceeds to their techniques and work organization and finally to the relevant parts of their social organization and worldview. Such a sketch was easily enough done for the Dene and the Inuit. Their societies aboriginally depended upon hunting and fishing and gathering from the immediate local environments of the communities of people, did not depend upon trade, and did not have a long chain of activities mediating between the raw material and the final good to be consumed or enjoyed by the people. The coming of the fur-trade and later of wage labour and welfare services and the cooperatives added to this aboriginal system (in the main) rather than entirely displacing it: the people were drawn into the economic system of Canada and became a subordinate part thereof, but did not give up their former mode of subsistence. All this could be relatively
simply described. But to sketch the cultural ecology of Canada would at first glance seem a much different task. Canadian society is part of a world-wide system. Local communities in Canada do not depend for their subsistence merely on local resources, but must interact with other communities both inside and outside Canada. Organization spans the country, and there is a complex economic division of labour as well as a complex structure of government quite different from the societies of the Dene and Inuit. Among the Dene and Inuit, one local community was much the same as another. In Canada, local communities differ in size from small camps to large metropolises. To describe this simply might seem an impossible task.

Upon a second look, however, the cultural ecology of Canada turns out to be relatively simple. The complexity of the system is real, but may still be simply characterized. Canadian society may be largely understood from a cultural ecological viewpoint as a system for extracting primary resources, processing them in a preliminary manner, and selling the results of the processes outside the society. In return for the goods exported, goods are imported which are essential to the continuation of the system, or which can be used to expand the system, or which meet other wants of the people. The people, that is to say, live off a process of converting Canadian land-as-the-resource-factor-in-production and dispatching those resources outside the land-as-territory. Energy, drawn from the land itself as hydroelectricity, petroleum, natural gas, coal, wood, and animal
and vegetable calories (i.e. food), or imported as petroleum and food, is used to power and maintain the humans, machines, and technical operations which transform the raw materials of animals (fur, hides, bones, meat, milk), fish, wheat and other agricultural products, soil (used up in agricultural production, water (used in food production and also as an industrial material, trees (lumbering being Canada's most widespread industry), and minerals (including not only metals and industrial materials such as sulphur and potash but also petroleum (source of both fuels and materials for plastics) and uranium) into products some of which will be used to maintain the system directly (e.g. being eaten by Canadians) but a significant amount of which is sold (largely -- some is given in aid) abroad in Europe (including U.K.), the United States, and, increasingly, eastern Asia. Some of the machinery used to extract and process these resources is made in Canada; much that is essential, however, is made outside and imported. Though the system and processes which I sketch here certainly do not exhaust what goes on in Canada, they have stamped themselves so much on Canada as to give it a major part of its distinctive structure.

That structure may first be seen in the cultural and economic geography of Canada (e.g. Taylor 1950; Camu, Weeks, and Sametz 1965; Putnam and Putnam 1979; Horwood 1966, for B.C.; also see Cartographic Department of the Clarendon Press 1967, esp. pp 76ff). The largest population centre in Canada is the St. Lawrence lowland, running, say, from Quebec City in
the northeast to Windsor, Ont., in the southwest. Secondary centres of population occur at Winnipeg, Edmonton, and Calgary on the Prairies, and in the southwestern corner of British Columbia. Elsewhere population thins out, but still is mostly found in the southern parts of the country, away from the Canadian Shield and the Boreal forest. Population is scattered fairly evenly over the Prairies, which are the largest agricultural area in Canada. Railways and roads link these areas of population from east to west, and from these main communication lines, roads and a few railways reach north like fingers reaching to grasp. Roads form a fairly dense criss-cross network only in the St. Lawrence lowland and in the agricultural prairies; otherwise such networks are confined to the population centres and the lands immediately around them. (Logging roads form an additional network.) The agricultural parts of Canada are, foremost, the Prairies and the St. Lawrence lowland, with secondary areas in southwestern B.C. and the Okanagan valley, Prince Edward Island, and some parts of New Brunswick and Nova Scotia. (Agriculture is found, however, even as far north as Hay River, N.W.T.) Forestry, producing lumber and pulpwood, is found chiefly in New Brunswick, portions of Ontario and Quebec north of the agricultural lowlands, in the woodlands north of the Prairie agricultural lands, and over most of British Columbia. Timber is more important in B.C., pulpwood more important in eastern Canada. Manufacturing is concentrated in the St. Lawrence lowland area, with some lesser centres in Winnipeg, Ed-
monton, Calgary, and southwestern B.C. Thus the population centres of Canada appear like base-camps from which from time to time expeditions are made into the hinterland to forage for resources. (The maps of the Canada Land Inventory are precisely a survey and assessment of those resources and of their exploit-ability.) The biggest camp of all, as it were, is still the population centre of the St. Lawrence lowlands, the centre of what the historian Creighton (1956; 1972:157) called "the empire of the St. Lawrence".

The kind of economy which this cultural geography reflects, is what Canadian economic historians since the 1920's have called "the staples economy" (see papers collected in part one of Easterbrook and Watkins 1967, esp. that by Watkins at pp. 49-73). Such an economy is devoted to the production and export of a few materials, such as fish, fur, timber, wheat, and minerals in the Canadian instance. Manufacturing is, in such an economy, chiefly devoted to processing these materials for export. As a corollary, the profits from the sale of these materials abroad are used to buy other goods from abroad, thus reducing the need for the population to devote their energies to subsistence as such and allowing them to specialize in producing staples for export. Improvements in communication and refrigerated transportation facilitate such specialization. The development of local industries in such an economy depends very much on the costs of imported goods, because the cheaper the imported goods are, the greater is the temptation to rely on imports and not
produce them at home (Herein is the dilemma of Canadian tariff policies; cf. the arguments for and against tariffs in Bellan 1967:292-312.); but the more the society relies on imports, the more it specializes as a producer of staples and the more it becomes dependent on buyers abroad. Such an economy is not a subsistence economy, and cannot be understood except as part of a larger system. It is at the mercy of international markets. Should those falter, profits will decline, and the people will be forced (on the average) to reduce their standard of living accordingly, or to develop cheaper ways of extracting and processing the staples, or else to move to a different kind of economy.

From the beginnings of Canadian history (see Eccles 1969; Easterbrook and Watkins 1967), the staples economy has been the dominant choice of Canadians. Canadians have chosen, as a net effect of all their actions, to extract and process the resources of the country for sale abroad, first to France and Britain, later to the United States, now increasingly also to Japan and Asia and the rest of the world. This choice was probably very much influenced but not wholly determined by the relative scarcity and difficulty of agriculture in Canada. A large population could arguably not subsist in Canada except by processing resources and selling them abroad. But the west of Canada, for instance, was settled in order to produce wheat for sale to the growing populations of Europe and the United States, and so eventually to pay off the builders and organizers of the Canadian Pacific Railway (see, e.g., Fowke 1957:59-61).
From the outset, Canadians were exploiting resources for sale in a money-and-market economy. Land was not merely a place to live on -- although it was this too --, but it was a place of commodities. It was itself something which could be bought and sold. Land speculation is a well-entrenched part of Canadian culture (e.g. Berton 1974:269-285 on the Manitoba land-boom of 1881-1882; Gutstein 1975, on the role of land speculators and developers in shaping Vancouver).

This pattern of the staples economy is reinforced when we look at the kinds of communities to be found in Canada. Marsh (1970) has assembled sources describing these communities, and has classified them under five headings. Under (1) frontier communities, he mentions Inuit and Indian settlements; dispersed rural communities and ranches; and one-industry resource-extracting settlements or towns. Under (2) rural or farming communities, he mentions dispersed farming communities with a centre where school, community hall, and the like are to be found; village-based communities; the parishes of former rural Quebec; and the post-fifties depopulation of rural areas. Under the heading of (3) small towns, Marsh describes a Prairie town; urbanization in Quebec; and resource towns in Newfoundland, Ontario, Alberta, and B.C. Under the heading of (4) city and suburbs, he has materials on suburbs; urban renewal; deteriorated neibourhoods in the "inner city"; housing projects; and town centres: the common theme running through all these might be called the urban and suburban neighbourhood. Under
the heading of (5) metropolis, Marsh looks at large cities and metropolitan areas; urbanization; and metropolitan planning: the scale is larger than the neighbourhood. Clearly we are dealing with a single system in which the country is divided effectively into three zones: centres where population is concentrated and where the exploitation of the other zones is organized; farming zones, producing food for the people in the urban areas and for export, and becoming increasingly extractive and capital-intensive; and the resource zone, marked by one-industry resource-extraction centres and temporary communities. The resource zone occupies the greater part of Canada. These zones also contain remnants of earlier kinds of human occupation and use of Canada.

Along with this pattern of resource exploitation, namely, the extraction, processing, and sale abroad of staple products, partially supported by a domestic economy protected by tariffs and a determination not to be absorbed by the growing American economy and polity (a recurrent theme in Canadian history), has grown up an economy marked by an increasing division of labour or specialization of occupations and a recurrent tendency to be dominated in each sphere of production by a few large firms (on tendencies to monopoly and oligopoly, see Hardin 1974:173-224; Fowke 1957:256-278). Both public enterprises (constituted and supported by provincial and federal governments) and private enterprises exist in Canada; sometimes the distinction between the two is blurred -- thus, e.g., a privately owned
firm in a monopoly position will have its fees and prices and its services regulated by some government instrumentality (e.g. B.C. Telephone Co.). Along with this division of labour, and a multitude of different firms, goes a property system suitable to the extraction, processing, and sale of products on both domestic and foreign markets.

So much, therefore, for the ecological context of the Canadian system of land-tenure. Much more could be written, and the sketch I have given is necessarily incomplete. One could, for instance, view Canadian literature as part of the people's coming to terms with and exploring their relationships between themselves and the land (cf. Atwood 1972). The history of immigration policies, social stratification, and the ethnic interactions within Canada are part of the whole which should be recognized (cf. Porter 1965, and some of the materials collected in Blishen, Jones, Naegele, and Porter 1961, and in Ramu and Johnson 1976). But enough has been said to outline a cultural ecological interpretation of Canada, and to show that materials already exist for such an interpretation.

(A cultural ecological interpretation, properly conceived, is not one of environmental determinism, nor indeed of any moncausal reductivism. Rather, it insists on the interaction between land and people, and between the people and their socio-cultural environment as well as their natural environment. The approach also has to be historical, emphasizing human choices as well as the constraints on those choices and the consequences
of those choices. Each party to the interaction both has its own character and is what it is because of the interaction.)

The Canadian system of land-tenure is governed by rules and precedents contained within the legal tradition of Canada. "Law" is a folk-category of Canadian culture, and also corresponds to a sub-system of Canadian society which is concerned to regulate the affairs of the whole society. That sub-system is sufficiently complex that few Canadians (perhaps none, even professionals) have a fully detailed knowledge of the entire tradition. Even lawyers specialize in branches of the law, and part of "knowing the law" is knowing, not necessarily the particular content of the law in any particular instance, but where to look to find the particular content when one needs to know it; another part of "knowing the law" is knowing the sort of things one needs to look up. It will not be necessary, however, in the present enquiry to try to describe even cursorily the whole of the Canadian legal system; instead, only those parts of the tradition concerned with regulating the use of and claims to land will be required, and of those only the general structure. (A useful description of the Canadian legal system, as seen from within by a lawyer, is provided by Gall (1977).)

With the exception of Quebec provincial law (sometimes called "the civil law" in contrast to the English-derived "common law"), the legal tradition of Canada is derived from the law of England (not of Britain, for Scotland has its own distinct legal tradition). Each of the colonies which later be-
came the several provinces and territories of Canada developed its own legal tradition distinct from but having a family re-
semble to the law of England. The date at which a particu-
lar colonial tradition becomes distinct from the law of England, and the colony becomes a distinctive legal entity with its own juris-

Quebec, of course, was established originally as the French colony of New France, and took its legal tradition from France. After Quebec was conquered by the British, English civil (private) law and criminal law were introduced by the Royal Proclamation of 1763. In 1774, however, the Quebec Act reinstated French civil law. In 1866, Quebec (then Lower Canada) adopted its own code of laws modelled closely upon the French Civil Code or Code Napoleon. The criminal law, however, continued to follow the English tradition.

In 1791 the Constitutional Act divided Canada into Upper Canada (later to be called Ontario) and Lower Canada (Quebec). A legislature was duly created in Upper Canada and in 1792 its first statute made English civil law applicable in Upper Canada. The date for the reception of English law in Ontario is therefore 15th October 1792.

The Maritime provinces were established by settlement, and therefore the date for the reception of English law is the
date at which each of the colonial legislatures was instituted. For New Brunswick and Nova Scotia, this was 1758; and for Newfoundland, 1832. In Prince Edward Island, though the colonial legislature was instituted in 1773, English law was actually received in 1763 pursuant to a royal proclamation.

For the Prairie provinces and the territories the date of reception of English law is 15th July 1870. In that year, under the combined effect of the Rupert's Land Act, 1868, the Manitoba Act, 1870, and the Order-in-Council of 23rd June 1870, the Hudson's Bay Company surrendered Rupert's Land and the North-Western Territory to the Dominion of Canada and the province of Manitoba was created. In 1905 the provinces of Alberta and Saskatchewan were formed, and they continued the English law established in the territories from 1870.

British Columbia acquired English law by settlement. The English Law Act (R.S.B.C. 1960, c. 129) provides for the reception of English law as it existed on 19th November 1858.

By the terms of the British North America Act, 1867, now the Constitution Act, 1867, which established Canada as a federal state, "Property and Civil Rights in the Province" (by sec. 92, sub. sec. 13) were included among those concerns over which the provincial legislatures were given exclusive jurisdiction. Since Canada now has ten provinces and two territories (the territories being under federal jurisdiction), there are now twelve possible distinct traditions of land-tenure in Canada, none of which are necessarily legally bound by any other. Eleven are based on the English law as that was formerly. The
other, Quebec, as already noted, has its own variant of European or Napoleonic Civil Law. One cannot simply assume that the precise content of one province's land-law is always the same as another's. But in the main, the structure or basic principles, and much of the content, of one English Common Law province's land-law closely resembles that of another's.

English statutes and cases before the dates of reception will be binding on Canadian courts, unless countered by Canadian legislation or the decisions of courts of higher authority; and cases decided after are frequently accepted as persuasive though not binding. Therefore English cases, as well as Canadian, may be used as illustrations in the present enquiry.

The account which follows will be based upon the law of British Columbia, which is the law I studied at the U.B.C. law school in 1972-75. But except where otherwise noted, the same principles apply to the law of the Northwest Territories, where the Dene and Inuit live.
B

The Law of Real Property in the Common Law

"Real Property" is a category within the Common Law tradition. It covers less than an anthropologist would want to include under the heading of "Canadian land law" (see below, secs. C and D), but nonetheless affords a convenient place to begin. The description which follows will be partly based upon Todd and McClean (1968), which was in 1972-73 used for the first-year course in real property at the U.B.C. law school. The chapter headings of this casebook show how two teachers of law considered it most helpful to organize materials in order to teach first-year law students. They discuss in turn (I) the legal concept of land, (II) the general principles of land law, (III) the creation of interests in land, (IV) the fee simple estate, (V) the life estate, (VI) co-ownership and concurrent estates, (VII) future interests, (VIII) incorporeal interests, (IX) licences, (X) family property, and (XI) the registration of title. (Merely recording such a table of contents tells us at once that we are in a very different thought-world from those of the Dene and the Inuit.) Let us follow their outline (mostly), although including materials (such as Blackstone) which they did not.

1. The Legal Concept of Land.

"Land", in the Common Law, is (a) land, and (b) anything which the law agrees to treat as land. Blackstone's definition
of "land", though now archaic in flavour (it was published first in 1766), gives the idea clearly (Ehrlich 1959:1:123-124):

For land comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable meadows, pastures, woods, moors, waters, marshes, and heaths. It legally includeth also all castles, houses, and other buildings: for they consist of two things; land, which is the foundation, and structure thereupon: so that, if I convey the land or ground, the structure or building passeth therewith.

It is observable that water is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and therefore I cannot bring an action to recover possession of a pool or other piece of water, by the name of water only; either by calculating its capacity, as, for so many cubical yards; or, by superficial measure, for twenty acres of water; or by general description, as for a pond, a watercourse, or a rivulet; but I must bring my action for the land that lies at the bottom, and must call it twenty acres of land covered by water. For water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, property therein; wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land which that water covers is permanent, fixed, and immovable: and therefore in this I may have a certain, substantial property; of which the law will take notice.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. He who owns the ground possesses also to the sky, is the maxim of the law, upwards; therefore no man may erect any building, or the like to overhang another's land; and downwards, whatever is in a direct line between the surface of any land and the centre of the earth, belongs to the owner of the surface; as is every day's experience in mining countries. So that the word "land" includes not only the face of the earth, but everything under it, or over it. Therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. The particular names of the things are equally sufficient to pass them, except in the instance of water; by a grant of which, nothing passes but a right of fishing; but the capital distinction is this; that by the name of a castle, messuage, toft, croft,
or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of, but by the name of land, which is the most general name, everything terrestrial will pass.

The conception of land represented by this passage is still the baseline for the idea of land in the law today, even though modern developments, such as aircraft (which the law in Blackstone's time did not have to worry about), have compelled modification of the landowner's claim to own all above his land to the heavens and below to the earth's centre. This right is qualified by statutes which reserve mineral rights to the Crown, by rulings which decide that aircraft passing overhead are not committing trespass, and the like. But these are still modifications on the basic idea. In summary, "land" includes (1) the surface of the earth, (2) the soil beneath the surface and the right to the airspace above the surface, (3) buildings and chattels which have by sufficient attachment to the soil or to buildings, become fixtures, and (4) fructus naturales (or natural crops), in contrast to fructus industriales (or industrial growing crops) (Harwood 1975:21). The term "land" may also be extended to include any interest in land which is treated as a property interest (Harwood 1975:21).

Land so conceived comes with boundaries. These boundaries ought not to be crossed without the owner's permission. But persons and things do enter upon the land without permission. Thus there arises the wrong or tort of trespass to land or trespass quare clausum fregit ("breaking the close") (Blackstone, in Ehrlich 1959:II:129-134; Salmond 1969:48-63). Since land thus
comes in parcels with boundaries, there come also to be lands which adjoin one another, and the people who respectively own and use these lands may, without trespassing, still act so as to interfere with the adjacent land-owner's use and enjoyment of his land. Thus there arises the wrong of nuisance to land (Blackstone, in Ehrlich 1959:II135-136; Salmond 1969:64-115).

Land, in this conception, is a site for productive activities (originally agricultural), is a possible factor of production (again originally agricultural), is a piece of bounded space to whose contents the owner is prima facie entitled, and is something the rights to which may be bought and sold or otherwise alienated. Of these various meanings, the elements of site and space come to the fore when it is necessary to define what piece of property the land-owner owns, the element of space comes into fore when the concern is to protect whatever activities the owner is doing upon and with the land, and the element of land as the subject of a transaction comes to the fore when land rights are transferred from one person to another. The common law of real property does not concern itself directly with land as a factor of production; although that concern is always in the background. If land has to be valued, however, the value with which the law will be chiefly concerned, is the market-value of the land.

To make a long story short, the law is not primarily concerned with the upward or downward extension of the land-owner's rights, but with the protection of the land-owner's full "use and enjoyment" of his property (see Jack E. Richardson, "Pri-
The landowner's horizontal boundaries are protected. His neighbour may not undermine his land; nor may he by removing soil from his own land, cause his neighbour's land to collapse (see the cases excerpted in Todd and McClean 1968:1-40ff). Other persons may not enter his land without his permission (to do so would be trespass), nor act on their own land so as to interfere with his activities on his (to do so would be nuisance), nor allow potentially dangerous substances (or other things) to escape from their lands onto his and do mischief there (the rule in Rylands v. Fletcher, see Salmond 1969:401-430). At common law, the landowner owned the standing water and minerals (excepting gold and silver) on the land, and owned the bed of streams of water flowing across his property; in Canada, these rights have been extensively changed: thus in B.C., Crown grants of land have reserved base metals other than coal since 1897, coal and petroleum since 1899, and natural gas since 1951 (Todd and McClean 1968:1-17), and since 1892 the right to use water is vested in the Crown and
must be acquired by obtaining or holding a water licence (with
the exception of using "unrecorded" water for domestic purposes)

For our purposes, the key idea is that land is something
which can be parcelled and bounded and (as we shall see) made
the object of complex bundles of alienable rights. Even space
can be so divided and owned (for example: Strata Titles Act,
S.B.C. 1966 c. 46 (am 1968 c. 54; 1970 c. 58 s. 17); and Air
Space Titles Act, S.B.C. 1971 c.2, but still not yet proclaimed
in force.).

This is quite different from the idea of land among the
Dene and Inuit.

2. The Idea of Estate

The concept of "land" in the common law links the actual
earth, the actual land, with the land as an object for "real pro-
PERTY" rights. In other words, the concept of "land" in the
legal tradition links the the legal tradition to the land. The
concept of "estate" categorizes the rights of the property holder
within the legal tradition itself, and links "rights" and "re-
medies" to the "title" to the given portions of land. All
"estates" are groups of "rights" concerning land, but not all
rights concerning land fall (as we shall discover) within "es-
tates". Nevertheless, the idea of "estate" is a key concept
to understanding the common law of real property. (The account
of tenure and estate which follows is taken from Todd and McClean
1968; Cheshire 1972; Megarry and Wade 1966; Potter 1948:}
The land law, writes Potter (1948:470-471), is not very much concerned with land, but with interests in land that have only a notional existence. No man ever saw a fee simple, which is the greatest interest which any citizen can hold and is usually described as ownership of the land. In fact, what is owned is not the land but the legal estate in fee simple. Again, the same piece of land may be subject to a number of different interests owned by different persons. Thus, Blackacre may be owned in fee simple by Jones, but his interest may be subject to a lease of Blackacre to Smith for ninety-nine years who may in turn have underlet the premises to Robinson for twenty-one years. Here are three people who will talk of Blackacre as "his". In fact each is an owner, but each owns an interest and does not own the land. Each has an "estate". But Blackacre may also be subject to a right of way, in favour of the owner and occupiers of the adjoining property of Greenacre and subject to a right to light enjoyed over Blackacre by the owner and occupiers of Yellowacre. This right of way and right of light are interests, forming part of the "land law", enjoyed in Blackacre. Consequently, the land law must be looked upon not as the law relating to land, most of which is concerned with the rights of user and enjoyment, and forms part of our law of tort and contract, but as the law of interests in land which may confer rights over the land. We are concerned, therefore, mainly with the facts of their creation and transfer and transmission on death.

Todd and McClean (1968:II-4f) remind us also that the law relating to land is very wide, wider than the law concerning interests in land. "The study of land law could thus encompass contract, tort, tax, the law of wills and succession, municipal by-laws and statutes regulating the use and even the expropriation of land." The law of estates, however, is concerned chiefly with "conveyancing", namely the creation and transmission of interests in land. Todd and McClean distinguish four main basic principles, namely (1) tenure, (2) corporeal and incorporeal interests, including the concept of the estate, (3) legal versus
equitable interests, and (4) freedom of alienation (1968:II-6ff). (Corporeal interests entitle a person to possession of land; incorporeal interests entitle a person to some rights concerning a piece of land but fall short of a claim to possession.)

In legal theory, the only owner of land in Canada, as in England, is the Crown. Everybody else holds land, again in theory, from the Crown on condition of service or payment. This goes back to medieval feudalism. But through English history, and latterly Canadian history, the number of conditions, or tenures, on which land might be held has been reduced to one alone, namely freehold tenure, and the conditions themselves have vanished as well. Thus the fee simple tenant of today holds for all practical purposes in unconditional ownership; that is to say, his holding is not contingent on his performing specific services. (Yet the advent of land taxes, zoning laws, and the like has taken away the promise of near-allodial ownership which the reduction of tenures seemed to give. Potter (1848:488) dubs English planning legislation "the new tenures"; I shall notice briefly the Canadian equivalents in section C.)

The importance of the idea of tenure is that it led to the idea of estate. If one holds land from the Crown — and when the doctrine of estates was developed, the kind of tenure and its associated duties were important considerations —, but is not the owner, what does one have? The answer of the lawyers was that one held an estate, or a time in the land. One held not the land, but certain rights to the land; and these rights
would run for an indefinite time.

Today in Canada the estates are chiefly of three kinds: the **fee simple**, the **life estate**, and the **leasehold**. A fourth kind, **fee tail**, is not important, and has been abolished in some jurisdictions.

A **fee simple** estate is an interest in the land which will be inherited by the heirs of the "owner" if he does not otherwise dispose of the land by grant or sale or by making a will. A **fee simple absolute** is one in which no condition would terminate the interest before the full period of time for which it might possibly continue. A **determinable fee simple** is one which could come to an end before the full period of time (example: a grant of premises to a society *for so long as* the premises are used solely for the purposes of the society).

The **life estate** is a time in the land granted for the lifetime usually of the holder of the estate, and it ends when the life ends. A variety of the life estate is the **estate pur autre vie**, where the time is measured by the life of some person other than the holder of the estate.

Both fee simple estates and life estates are **freehold** estates, and their duration is indefinite: that is, there is no way of saying until the event itself in what year the estate will end. **Leasehold** estates are interests in land which run for a specified interval of time, usually in return for a specified rent. Non-payment of rent then gives the grantor of the lease good reason for ending the grant.

Next, there are what are called "**future interests**", or
"interests in expectancy". These are interests which convey the possession of the property not now but at some future time. For example, A. might convey Blackacre to B. for life and then on B.'s death to C. in fee simple. C.'s interest is an example of a future interest. C. will gain control of Blackacre after B. dies, but in the meantime C. cannot enjoy or use or do anything with the property, except ensure that B. does not "waste" or unduly diminish the value of the property before it comes to C. However, C's interest is still a definite one which C. can convey or mortgage and which will pass (if C. still has it) to C's heirs after C.'s death.

The life estate, leasehold estate, and the future interests if these latter are less than the fee simple absolute, are all carved out, as it were, from the unencumbered fee simple absolute estate, and the holder of that original estate is the person to whom as the other estates expire the interests thus granted return.

Let us take Blackacre again. J. acquires Blackacre in fee simple absolute — perhaps he purchased it, or was given it, or inherited it, or obtained it as a Crown grant. He leases one-quarter of Blackacre to K. for ninety-nine years, and gives a second quarter to L. for life. He then sells his entire interest in Blackacre to M., and disappears from the story. M. has purchased, therefore, a present fee simple absolute estate for half Blackacre plus the rights of reversion for the other two quarters. The sale does not extinguish K.'s leasehold nor L.'s life estate. M. then draws up his will. In it he provides
that when he dies, Blackacre will go to his wife N. for life and thence in fee simple absolute to his son, or if M. should die without a son, then to P. At this time, M. has no son. At this point neither N. nor P. has any interest in Blackacre. It is still possible for M. to change his will or to convey Blackacre in any way he pleases. M. then dies, leaving his wife N. but no son. At this point, N. receives the life estate in Blackacre, and P. receives a future interest, viz. the fee simple absolute in expectancy. L. dies. Title to the one quarter of Blackacre which he had enjoyed then reverts to, not P., but N. N. duly dies, and P. enters into possession of Blackacre, except for the one quarter which is still leased to K. (the ninety-nine years are not yet concluded). Suppose M. when he died had had a son. Then Blackacre would have gone first to N. for life and then to M.'s son, who until N. died would have had the fee simple absolute estate in expectancy. P.'s interest would have terminated still-born, as it were. If M.'s son died before N., the estate would go not to P. but to M.'s son's heir, whoever that might have been, unless M.'s son had already conveyed his interest, say, to R., who would then duly take Blackacre. And so Blackacre's history continues.

Though the discussion so far has spoken of the owner or estate-holder in the singular, it is possible under the common law and frequent in practice, for two or more legal persons to have simultaneous rights to possession of the same land. They are then known as co-owners, and are said to have concurrent interests (Todd and McClean 1968:VI-1ff, X-4). The common law
distinguished four kinds of co-ownership: coparcenary, joint tenancy, tenancy by entireties, and tenancy in common. Coparcenary was the sharing jointly by the deceased estate-holder's daughters in the property. It occurred when the deceased owner had no male heirs (who would have taken the property), and has been abolished by statutes which changed the rules of inheritance. Joint tenancy is having a common right to possession subject to the *jus accrescendi* or right of survivorship. If A and B own Blackacre jointly, then if A dies, B becomes automatically the sole owner of Blackacre, provided that neither A nor B has acted in his or her lifetime to "sever" the tenancy and turn it into a tenancy in common. Tenancy by entirety arose when a joint tenancy was created between a husband and wife. Tenants by the entirety could mutually agree to dispose of the property during the marriage but neither could unilaterally sever the tenancy and destroy the right of survivorship. Various statutes concerning the family and the rights of married women have probably made tenancy by entireties obsolete today. The fourth kind of co-ownership is tenancy in common. Here the co-owners each have the right to possession, but there is no right of survivorship. A co-owner in a tenancy in common may without consulting the other co-owners sell or give or otherwise alienate his estate in whole or in part to a third person who then becomes co-owner wither in place of or in addition to the alienator, depending on the details of the conveyance.

Thus according to the common law of real property, the owner of land may so split up his fee simple absolute interest
that ownership (of the land) in the sense of full exclusive control with right of alienation is reduced almost to nothing, and the land becomes the object of a collection of rights some of which are presently exercised and others of which are, as it were, waiting in the wings until their time comes to step on stage. And (thinking of time) notice the role of time and of contingency or hypothesis (if... then) in this complex of rights.

The doctrine of estates separates land from rights to the land, and allows these rights, even future interests, to be conveyed. Ownership and possession are clearly separated in this system. The land becomes the object, or even merely the occasion, for a network of notions about rights, including hypothetical rights, which can be created and alienated even though the persons involved never see or step onto the land. (Thus K., in the example earlier, could be an absentee lessee, putting S. in actual possession of the quarter leased; and P., once his estate in expectancy became an estate in possession, could have decided to lease that out too.)

All this is very different from Dene and Inuit ideas about land-holding.

3. Other Interests in Land

The name "incorporeal interests" is used to label interests in the land of another person falling short of a claim to possession (cf. Todd and McClean 1968, c. VIII; Cheshire 1972, Book II; Megarry and Wade 1966). Examples of such incorporeal
interests are: easements, profits à prendre, and covenants. Each of these deserves some description.

Easements may be defined as positive or negative easements. Positive easements give the owner of the land benefited (known as the "dominant tenement") the right to enter the land burdened (the "servient tenement") for a purpose which must fall short of taking away from the burdened land anything of value and which will enhance the use and enjoyment of the dominant tenement. The commonest example is a right of way. Negative easements (which are sometimes hard to distinguish from restrictive covenants) do not convey a right of entry on to the servient tenement, but restrict the owner's use of that tenement in a way which benefits the dominant tenement. The right to light enjoyed over Blackacre by the occupiers of Yellowacre, in the quotation from Potter at the beginning of section B2, is an example. Among the characteristics of an easement are that the burden on the servient tenement must have a "necessary connexion" with the normal use and enjoyment of the dominant tenement; and that the burden does not compel the owner of the servient tenement to do anything, but rather to allow something to be done or himself to refrain from doing something. Easements are created by "grant", but the "grant" may be "express" (i.e. conveyed to the owner of the dominant tenement by a deed), "implied" (i.e. necessarily following from what the owner of the servient tenement does transfer to the owner of the dominant tenement), or "presumed" (i.e. established by "prescription", or continuous and unquestioned use for not less than a certain set period of
time); they may also be created by statute, but this introduces another set of concerns into the real property law.

A profit à prendre is "a right to enter on the land of another person and take some profit of the soil such as minerals, oil, stones, trees, turf, fish or game, for the use of the owner of the right. It is an incorporeal hereditament, and unlike an easement it is not necessarily appurtenant to a dominant tenement but may be held as a right in gross, and as such may be assigned and dealt with as a valuable interest according to the ordinary rules of property. It is in effect a grant of the ownership of such portions of the land as are conveyed."


A covenant is a deed under seal, and as such is considered a contract enforceable in the courts as such between and by the covenanting parties. Under some circumstances, a covenant between a land-owner and someone else (usually but not necessarily another land-owner) to do or to refrain from doing something concerning the land, may be passed on to the subsequent owners of those pieces of land to bind these latter. The covenant is then said "to run with the land". For example, S. owns land subject to flooding, and covenants with D. that D. would prevent the flooding and that S. would contribute to the cost of the work. S. conveys title to J.S. The land is badly flooded. J.S. sues D., contending that D. has breached the agreement. D. argues that there is no covenant running with the land and that J.S. has no standing on which to sue. The court decides
that the original covenant did benefit the land, that it was understood and intended by the original covenan tors to benefit the land, and that the covenant thus ran with the land. J.S. therefore has standing to sue D. (Simplified from Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board, [1949] 2 K.B. 500 (C.A.); [1949] 2 All E.R. 179; as excerpted in Todd and McClean 1968:VIII-46ff.) A covenant restricting use of a portion of land may be imposed for the benefit of adjacent lands, and the owners of such other lands then have the right to have the covenant enforced by the courts on the other owners' behalf.

Another class of interests relating to land is that labelled "licences" (Todd and McClean 1968:ch. IX; Cheshire 1972, Book II; Megarry and Wade 1966). The licensee is a person who occupies and uses land with the permission of the owner or licensor. This is not considered to be in law an interest in land, since the licence as such does not grant permission to the licensee to appropriate any part of the land as property; and the licensor may at any time revoke the licence. One example of a licence is permission to enter upon land in order to watch some entertainment or other spectacle (but if the licensee has purchased a ticket to do so, then the licensor has also entered into a contract with the licensee to let the latter watch the entertainment, and since the licence is necessary to the performance of the contract, the licensor may not revoke it until the entertainment paid for is over -- see the several cases excerpted in Todd and McClean 1968:IX-1ff). Other examples are permission to enter on land and hunt over it for game; or a right to advertise on the walls of a
building; or the manager of a shop being allowed (but not required) by the owner of the shop to live in a flat above the shop. The licence may sometimes permit exclusive possession, but usually it does not.

Another kind of interest is the mortgage. In this situation, A., the owner of the land, transfers the title to the land to another person, B., usually in return for a sum of money which A. undertakes to pay back by a certain date. In return, B. undertakes to return the property to A. when A. pays back the money. If A. fails to pay back the money within the stipulated time, title remains in B.'s hands and A. loses the right to "redeem" his property. Thus a mortgage is a transfer of land as security for a loan (or other purpose), with the right to regain the land by repaying the loan (or whatever other consideration might be arranged). The loan need not, of course, actually be money; but money is by far the commonest thing so loaned.

Easements, profits à prendre, covenants running with the land, licences, and mortgages are thus different kinds of interests, besides estates, which may be attached to a piece of land. Profits à prendre and mortgages may be alienated by the holder of them to another person. B. in the above example may transfer the mortgage to C., who thus becomes the holder of the legal title to the land. Easements and covenants, on the other hand, go with the land.

For our purposes in the present enquiry, it is sufficient to note that these kinds of interests exist, that in the Canadian
legal tradition land can be made the object of the various kinds of rights contained under these terms. The rights to use and occupy the community's land which the member of a Dene or Inuit community has, most closely resemble a licence, except that these rights are not revocable so long as he or she is a member of that community -- but the Dene and Inuit would not themselves conceive their relationship to land in terms of licences and rights.

4. "Legal" and "Equitable" Interests; "Trusts"

The Common Law also distinguishes between "legal" estates and "equitable" estates, especially in the legal relationship known as a trust (on trusts, see Maudsley 1969; Megarry and Baker 1973; McClean 1970). The trust is a distinctively Common Law device, arising out of the separation in mediaeval and early modern English law between courts of law (in a narrow sense) and courts of equity. While modern English and Canadian law now fuses the two systems, courts being simultaneously courts of "law" and of "equity", the distinction remains in the tradition. A good definition of the trust is given in Hanbury's Modern Equity (Maudsley 1969:85-86):

A trust is a relationship recognized by equity which arises where property is vested in (a person or) persons called the trustees, which those trustees are obliged to hold for the benefit of other persons called cestuis que trust or beneficiaries. The interests of the beneficiaries will usually be laid down in the instrument creating the trust, but may be implied or imposed by law. The beneficiaries' interest is proprietary in the sense that it can be bought and sold, given away or disposed of by will; but it will cease to exist if the legal estate in the property comes into the hands of a bona fide purchaser for value without notice of the beneficial interest. The
subject-matter of the trust must be some form of property. Commonly, it is legal ownership of land or of invested funds; but it may be of any sort of property — land, money, chattels, equitable interests, choses in action, etc. There may also be trusts where there are no ascertainable beneficiaries. There is no difficulty where such trusts are for charitable purposes; such trusts are enforced at the suit of the Attorney-General. But there is much doubt and uncertainty as to the status and validity of trusts for non-charitable purposes.

Let us see how these distinctions would work with Blackacre. A., the owner of Blackacre, suddenly learns that he has only a little time longer to live. He has two small children, B. and C., to provide for after his death. He therefore in his will devises Blackacre to D. in trust for B. and C., and shortly thereafter dies. The legal owner of Blackacre thus becomes D., but D. is bound to use Blackacre for the welfare of B. and C. who are the beneficiaries. In this particular instance, when B. and C. reach their majority, they can request that the trust be ended and the property, Blackacre, be turned over to them; and if nothing in A.'s will prevents this, then their request will be granted. If D. sells Blackacre to E. (whether or not A.'s will allows him to do so), D. will be responsible to B. and C. for the money or other consideration which he received by the sale; and if B. and C. are the losers in the end, D. will be obliged, when the trust ends, to make up the loss. If E. purchases Blackacre without knowing of B.'s and C.'s equitable claims to it, and could not reasonably be expected to have known, then E. gets Blackacre free and clear of the trust upon it. But if E. knew of the trust, or reasonably ought to have known about it, then E. is held to have purchased only the legal title to Blackacre, and B. and C. still have their equitable interest in
it, and when they reach their majority may request E. to transfer the legal title to them just as D. would have been obliged to do. (If E. then felt that he had been hard done by, he would have to sue D. for compensation.)

Alternatively, A. might have been childless, and have decided instead to set up a charitable purpose trust for the education of poor children. He would then have willed Blackacre to D. in trust for that purpose, and D. would have been obliged to use Blackacre to support the education of poor children; if Blackacre were sold, the proceeds of the sale would have to be applied by D. to that charitable purpose. In this alternative, there would be no beneficiaries, no B. and C., who could sue if they thought that D., as trustee, was not using the property for its intended purpose; however, the Attorney-General, representing the public interest in the charitable purpose, could sue D. And of course, one of D.'s obligations as trustee would be to see that after his death someone else carried on the trust.

The duties and rights (with emphasis on the former) are quite closely specified in the common law (including equity). The device of a trust provides one way in which a single property may be managed for the benefit of several persons whether or not these latter are considered fully legally responsible. However, the beneficiaries' equitable interests, may be alienated by the beneficiaries once these persons reach their legal majority. (Much, though, would depend on the provisions of the instrument setting up the trust.) Thus B. and C. could have sold their equitable interests to F., who then if he chose could
have perhaps sought to end the trust. The trustee's role in the common law bears only a superficial resemblance to that of the Dene leader who might be described as custodian or steward of the common facility of a caribou fence; or to the role of and African "tribal" chief or of a Polynesian chief or lineage head who might be described as the chief steward of the land for his people. To describe the latter as "trustee" and import into the description the common-law notions of trustee, would be misleading and would cause distortions of the African or Polynesian or Dene ideas. The notion of trusteeship will not help to reconcile Dene and Inuit ideas of land and land-tenure with those of Canadian law. Though there is an overall moral similarity, the legal niceties connected therewith are too different to allow translation of one into the other without distortion. (If the possibility of distortion is kept in mind, however, then perhaps Dene and Inuit could cautiously use trusts, or other equitable ideas, as a means of protecting particular interests; but for the story of how the device failed to protect the Menomini, see below in chapter VI, section A2.)

5. Gaining and Losing Interests in Land

Logically and comparatively considered, there are five ways in which any community as a whole, or any person within a community, can gain property in land, or conversely lose it. (These ways are logical slots which may or may not be filled by a particular social system.) These are by appropriating land which nobody already owns (it may never have been owned,
or the previous owner may have abandoned it); (b) by taking land already owned from an owner without his consent; (c) by being given the land by the previous owner; (d) by inheriting land from its previous owner (inheriting it implies that one has some right to receive it because of one's relationship to the previous owner); and (e) by buying the land from the previous owner (buying it implies giving something of value in exchange for the land) (cf. Smith 1974:3). Conversely, the ways of losing title are: (a) by abandoning the land, so that it becomes unowned land; (b) by having it taken from one; (c) by giving it away; (d) by dying, so that it passes to one's heirs; and (e) by selling it. Which of these ways are recognized by the system of real property law which I have just been outlining?

(a) Appropriation: In Canada, all land not owned by private persons is legally owned by the Crown. (This includes lands reserved to the Indians, as well as lands over which "aboriginal title" has not been extinguished. Aboriginal title is a proprietary right, but it is not ownership. See below, section D.) If there were land outside Canada not claimed by any other sovereignty, the Crown could claim that land by extending its sovereignty over that land, as indeed it has done so recently by extending its claims over the continental shelves adjacent to Canadian shores, beyond the traditional three-mile limit. Within Canada, therefore, there is in theory no unowned land for private persons to appropriate. Squatting on and using otherwise unoccupied and unused lands under the Crown's
sovereignty does not give a private person title. Private persons must acquire the land by grant, for example when Crown land is thrown open for homesteading.

(b) Taking: The Crown, as the sovereign authority in the polity, may take land from previous land-holders (whether owners or occupiers) without their consent. There are two possibilities: the previous holders are outside the polity, or they are inside the polity. If they are outside the polity, then the land is taken over as an incident of the extension of sovereignty by the Crown over territory; and there are again two possibilities. The first is the Crown's recognition of the original occupiers' right to the continued use and occupancy of the lands in question: one variety of this is aboriginal title, and will be examined in section D. The second is by conquest. Taking land by conquest, the Crown may expropriate those lands and extinguish the occupiers' and owners' titles, or it may confirm those titles, as it sees fit. However, the proper legal doctrine is that the Crown will respect the property rights of the people, and if property is expropriated, will pay compensation therefor. (See statements by Lord Denning, Oyekan v. Adele, [1957] 2 All E.R. 785, at p. 788, and by Chief Justice Mansfield, Campbell v. Hall (1774), 1 Cowp. 204, 98 E.R. 1045, at p. 1047, both quoted by Mr. Justice Hall, Calder et al. v. A.-G. B.C., [1973] S.C.R. 313, at pp. 402-3 and 388 respectively.) Once the Crown has extended its sovereignty over the land, the Crown's taking becomes equivalent to the taking of land from previous owners within the polity.
Such expropriation by the Crown is then controlled by the common law which says that expropriation should be compensated for by suitable payments, unless the legislature has specifically enacted that no compensation be paid.

Private persons may not take land from other persons within the polity. That is theft. Private persons may not take lands from people who are not subject to the Crown unless the Crown previously or concurrently acquires these lands and gives them to the actual taker (cf. Cumming and Mickenberg 1972:29).

(c) Being given: Both the Crown and private persons may give land and receive gifts of land from previous owners without hindrance.

(d) Inheritance: At one time, the Crown, being identified with kings or queens who were natural persons, could inherit land. Today, however, the Crown is not a natural person, but a corporation sole and does not die, so does not inherit land. Of private persons, only natural persons and not artificial persons (such as corporations) can inherit land. Land owned by a natural person who dies without heirs and otherwise has not disposed of his land, "escheats" to the Crown. (Todd and McClean 1968:II-37) (Artificial persons can, of course, be given land by a natural person's will; this is not what I mean by inheritance.)

(e) Buying land: Both the Crown and private persons may buy and sell land with little or no hindrance. This includes mortgaging one's land.

Thus as far as the ordinary law of real property is con-
cerned, the private person may acquire land only by gift (including Crown grant), inheritance, or purchase. He may lose it by gift, inheritance (as it were, seen from the deceased's side), sale, or taking (expropriation) by the Crown. He may neither appropriate it nor take it. (For aboriginal title, see section D., below.)

6. Persons, or Who May Hold Rights to Land.

As discussed in chapter II, any land-tenure system presupposes some decision as to who may hold rights to land. Such right-bearers may be called "persons", and the idea of "person" as a right-bearer is also essential to any legal system. The common law of real property is no exception. In chapter II, I distinguished "natural persons" and "artificial persons". Both kinds are recognized by the common law. In this system, the persons who may hold rights to land are (a) natural persons, (b) artificial persons, such as corporations, and (c) the Crown, which is a special kind of artificial person.

Natural persons have to be distinguished into persons with full legal rights -- all adult men and women who have reached the age of majority (which can vary), and who are neither insane nor criminals --; and persons who for some reasons are under the guardianship of others -- e.g. minors (under parental or other guardianship), the insane, and criminals.

Of the possible kinds of artificial persons, the two kinds recognized in Canadian law are the corporation and the Crown. By "corporation", however, I mean something wider than the cur-
The first division of corporations is into aggregate and sole. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue forever: of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors in some particular station, who are incorporated by law, in order to give them such legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation: so is a bishop: so is every parson and vicar.

Since Blackstone wrote, corporations sole have disappeared into the background, to become survivals of an older age, and corporations aggregate have expanded in numbers and kinds to become one of the characteristically modern kinds of organizations. Corporations aggregate in Canada today include such entities as Crown corporations, municipal corporations, private companies of diverse kinds, non-profit societies, trade unions, professional associations, as well as universities and some religious bodies. Some are created by charters or by statutes specifically and directly, some by powers conferred on people generally by empowering statutes, and some by contractual agreement among persons. (Cf. the section "Corporations" in Halsbury 1954:1-107 or 1974:713-823 for a comprehensive but compact summary of the English law on corporations.)

For our purposes, however, we need chiefly to remember the following: (a) corporations last across the generations of natural persons and do not die natural deaths; (b) corporations can hold property in land, including estates, incorporeal and other interests, and equitable interests; (c) corporations
can give to their members such rights over the corporations' properties as those members, in accordance with the constitution or articles of the corporation, may decide; and (d) corporations must have written constitutions or articles stating how the corporations make decisions and appointing the officers of the corporations. Furthermore, when we come to chapters V and VI and to the idea of the community land-holding corporation as a means for "reconciling" Dene or Inuit ideas with Canadian ideas, we should have in mind something of Blackstone's understanding of corporations rather than the more specific modern applications.

7. **Summary: Comparative Classification of Land-Rights**

In chapter II, on the idea of land-tenure, I quoted Crocombe's (1974:5-6) list of six classes of rights relating to land. Which of these classes of rights are represented by the rights of real property which we have just described?

(1) **Use-rights:** Any estate which confers upon its holder the right to present possession of the land specified in the estate, confers rights to use the land. Future interests (estates in expectancy) do not. Equitable interests may permit the beneficiary to use the land, or they may not. Trustees, as holders of the legal title, have the rights to use the land if the estates are in possession, but that use is circumscribed by the interests of the beneficiaries. Easements (especially positive easements) and sometimes covenants confer use-rights on persons relative to the land; or easements (negative ease-
ments) and covenants may prevent certain uses of the land. Profits à prendre are a particular kind of use-right. Licences are another, and a very weak, kind of use-right. Statutes may confer upon the Crown or its agents or other persons rights to use the land in specific ways even if the land is already privately 'owned'.

(2) Rights to "indirect" economic gain: The lessor's right to receive rent from a lessee, of a leasehold estate, is an example here. It depends on the contract between lessor and lessee. The beneficiary of a trust may have similar rights, depending on the terms of the trust. The Crown, or a subordinate agency such as a municipal corporation, may, depending on empowering statutes, claim taxes on the land (this introduces another set of concerns, which will be dealt with below in section C.).

(3) Rights of control (held by person other than the person who holds the use-rights): The holder of a future interest may have some rights of control. Thus if A has a life-estate re Blackacre, and B holds a fee simple estate in expectancy re Blackacre, B may intervene to prevent A "wasting" Blackacre so that B would receive nothing of value. The beneficiaries of a trust can likewise intervene (i.e. ask the courts to intervene) to prevent the trustee, the holder of the legal estate, from wasting the properties involved. Negative easements and restrictive covenants confer rights of control over the use of the land, upon persons who do not possess the land. The Crown or its agencies may, by statute, enjoy some considerable
control over the land, for example, by way of zoning by-laws, planning regulations, pollution control regulations, and so on.

(4) **Rights of transfer:** The holder of an estate can freely transfer by gift or sale between living persons or by will, the whole or a part of his estate, whether that estate be "in possession" or "in expectancy", "legal" or "equitable". If the land is burdened by easements or profits à prendre or covenants, these will normally bind the successor in title. Joint tenancies are easily severable, and tenancies in common (severalty) are easily alienable by the holder. Estates, unless limited in time so as to prevent inheritance, are usually inheritable.

(5) **Residual rights:** When a lesser estate is carved out of a fee simple absolute estate, the holder of the remainder possesses the reversionary right. If the holder of a fee simple estate dies without heirs and intestate, the estate escheats, or reverts, to the Crown (whence in theory it originally came).

(6) **Symbolic rights or rights of identification:** These are not recognized nor at all considered in the common law of real property.

In this welter of rights, we can determine two sets of interests at work and potentially in conflict. First, there are the interests of private proprietors. Second, there are the interests of the Crown. The Crown can be both a proprietor among proprietors, and a sovereign authority representing in some sense the whole society and acting on that basis. As
sovereign, the Crown overrides the more particular interests of the proprietors. To each of these two sets of interests, correspond distinct sets of land-tenure rules. The Crown's interest will be discussed in the next section. The interest chiefly reflected in the law which we have just reviewed is proprietorial.

8. **Summary: The Proprietary System**

To sum up, then, the Common Law concerning land and land-tenure was developed in and suits a society whose chief modes of subsistence are agriculture, trading, and manufacturing. Land is regarded chiefly as a resource to be used, and it is parcelled and bounded among owners enjoying the rights to use it (in the main) as they see fit and to exclude others from possession, in order that the land may be efficiently used both for productive purposes and as security for commercial enterprises. Rights to land are a creation of the will of the society, represented by Crown and Parliament (Blackstone, in Ehrlich 1959:155, 57), which in turn has recognized or conferred upon private persons the right to acquire and transfer and subdivide land-rights, and indeed to create them through the ability to make a contract. Natural persons have also been given the power to create artificial persons, or corporations, which may in turn hold rights to land. The foundation of these land-rights is comprehended in the idea of estate. The idea of estate separates land rights from the lands themselves, and allows land-tenure to be a considerably abstract relationship.
The conception of "land" in the Common Law of today, though not formally defined, serves to link the land law, with its abstract notion of estates, with the physical or corporeal land itself. This concept, too, has a measure of abstraction in it, specifying that land can extend into air-space and even allowing today that space to be subdivided.\textsuperscript{10}

The land-holding unit is a legal person, whether the Crown, a natural person, or a corporation, whom we may call a "proprietor". All land is held by one or more of these proprietors, who have in principle the right (unless they have given it away) to exclude all other persons, including proprietors, from that land. (This right is qualified by various rights conferred upon Crown agents (and sometimes others) by Parliament directly and indirectly to enter upon private property; but the proprietorial basis of land-law remains.) The system therefore also implies a distinction between proprietors, who hold land, and non-proprietors, who do not.
C

The Second System: "Administrative" Elements in the Canadian Law of Land-Tenure

The real property law just described arose from the transformation of a feudal system of land-tenure into a proprietorial system very nearly completely proprietorial. In such a system the role of the Crown, or of sovereignty, is to provide the framework of law which supports the rights of property, and to organize the collective defences against outsiders who would intrude and take away property. Otherwise the role of the government is (ideologically at any rate) to leave people alone, to let them do as they wish. This ideology (along with others) is present in Canada today.

But there is another system of land-law also operating in Canada today. This system rests upon two principles. First is the idea that Parliament (which in Canada includes provincial legislatures) as the sovereign authority can change both case-law and statute law as Parliament in its wisdom as the representative institution of the whole society sees fit. The Crown in this respect is the executive arm of Parliament, and its agents act according to the authority granted them by Parliament. Insofar as those agents act within their authority, their acts cannot be challenged. (But there is a division of law concerned with reviewing the acts of Crown agents to ascertain if they have acted within their authority: cf. de Smith (1973) for the English law on such, and Laux (1973) for a Canad-
ian casebook thereon). In addition, Parliament may make laws, and set up bodies with powers to make by-laws and regulations which control the uses which private owners may make of their lands. (In B.C., municipalities and regional districts provide examples of this. Planning and zoning by-laws are specifically directed to land-use control. In B.C. the old municipality of Point Grey enacted the first Canadian zoning by-law in 1926. Point Grey was subsequently absorbed by the City of Vancouver in 1929 (Todd 1971:XI-4.) Environmental care laws and regulations, including pollution control, are another kind of law which restricts the uses to which a land-owner may put his land.

The second principle is the idea that all land in Canada not expressly owned by private persons is owned by (not merely under the sovereignty of) the Crown. The ownership-power may in particular instances be very lightly exercised, but it is there to be used when the Crown or its agents deem it necessary.

Together, these two principles prevent the Canadian law of land from being that of a purely proprietorial system, and allow Canadian land-tenure to be moved away from the traditional Common Law system (nearly purely proprietorial) to a system in which land-holders or land-users are in effect (at least) servants of Crown or Parliamentary policies, enjoying their lands just so long as they satisfactorily serve these policies. The latter system would be an "administrative" type (Type B), and would belong in the same overall class as the feudal system from which the Common Law emerged (cf. Potter 1948:488-489 for a comment on modern English planning laws.)
A perusal of any collection of cases and materials concerning natural resource law in Canada will reveal what has happened (for example, Lucas 1970; see also Todd and McClean 1968:1-21 to1-40; and Elliott 1978). First, in granting land to settlers, Canadian governments increasingly retained water, mineral, oil and gas, and forest rights for the government. Since the land-owner no longer enjoyed the full sub-surface rights granted by traditional Common Law doctrine, he would have to permit persons, properly authorized by the Crown, to enter upon his land to exploit those resources to which the Crown had retained rights. At the present day, in fact, the Crown, whether federal or provincial, seems to be reluctant to grant fee simple estates to settlers, and instead prefers to grant limited leases and licences to exploit Crown land.

Second, as the country grew more and more settled, and industrial activities grew more and more pervasive, complicated, and interconnected, the need for regulation (as well as bureaucratic desires for more regulation) increased and indeed accelerated. Zoning regulations in municipalities, water law, air traffic regulations, pollution control regulations, game laws and regulations, may all be cited as examples. Thus the proprietor — who could never in law do everything with his land which he wished to do — can do still less than before, and is more and more bound by regulations.

The latter changes are, of course, not unique to Canada, but occur in other Common Law jurisdictions, and beyond.

Together, the reservation of Crown rights to land and the
increasing regulation of the uses of land imply a change in the respective roles of government and proprietor. The protection of property and the provision of an economic and social environment wherein proprietors may pursue their own ends, becomes less and less the rationale of government. Instead, the government becomes the director of the whole purpose of the whole society (as the government sees it), and the proprietor becomes a sort of servant or agent implementing that purpose and allowed to have property as an aid to or a reward for his work.

Canadian law and practice have not reached the extreme described in the last sentence of the preceding paragraph. They may never do so. But the potentiality for this is present in the social structure.

Another aspect of the "administrative" order is taxation. There are two chief problems. First, there are taxes on land as such — for example, municipal and provincial taxes. If these taxes are not paid, the government is allowed to seize the property and sell it to realize all or part of the taxes owed. Second, there are capital gains taxes and income taxes levied by the federal and provincial governments. These bear upon the profits, actual or deemed, realized by the vendor when land is sold: the government wants its share. They also bear upon the uses to which the land-holder may want to put his land: the taxes which he must pay, add to the costs of whatever enterprise involves his land.

In terms of the six classes of land-rights distinguished by Crocombe, this second or "administrative" system comes out
as follows:

(1) **Use-rights:** Users may be Crown agents acting on Crown land or on privately owned land according to authority conferred upon them by Parliament; or they may be licensees and lessees using Crown land according to the terms laid out in the licences and leases.

(2) **Rights to "indirect" economic gain:** The Crown and some of its subordinate agencies, such as municipal corporations, have the right to tax land.

(3) **Rights to control:** By means of planning laws and other laws, made by the legislature or with its authority, the Crown and its agencies can control whatever use land-holders make of the land.

(4) **Rights of transfer:** The Crown has the right to purchase or to expropriate private land, and to grant licences, leases, or even freehold estates out of its own lands. It can also transfer sovereignty over its territory to another sovereign.

(5) **Residual rights:** Privately owned land which has no heir or other private person to take up its ownership, escheats to the Crown. The Crown has the ultimate right of reversion.

(6) **Symbolic rights or rights of identification:** Not considered in the law.

For completeness' sake, we should notice the establishment of land title registration (e.g. *Land Registry Act*, R.S.B.C. 1960, c. 208). This is a way of simplifying the recording of title and the ascertaining of just what kind of land-rights,
and charges upon the land, which a particular landowner has, or which are attached to a particular piece of land. Its main change is to provide that registered titles prevail over unregistered titles, for the most part.
Canadian Law Concerning Native Rights to Land, including Aboriginal Title

Canadian land-law is further complicated by the existence within it of law relating to Indian and Inuit lands. This law follows somewhat different principles than the law of real property, or than the administrative elements just outlined; and yet these several sorts of law are connected to and interpenetrate one another. Exclusive legislative authority over "Indians, and lands reserved for the Indians" is assigned by the British North America Act, 1867, now Constitution Act, 1867, sec. 91, sub-sec. 24, to the federal government. The Supreme Court of Canada has ruled that the word "Indians" in the B.N.A. Act includes Inuit (Re Eskimos, [1939] S.C.R. 104; Sigeareak El-23 v. The Queen, [1966] S.C.R. 645, 57 D.L.R. (2d) 536).

As Lysyk (1967:515) has pointed out (in an article which well shows the complexity of Canadian law relating to Indians), "Indians" and "lands reserved for the Indians" are separate concerns. In the present enquiry, I shall be discussing only the second concern.

Native land-rights in Canada depend chiefly on two sets of ideas: first, the law of "aboriginal title" or "aboriginal rights", and second, the treaties signed between Canada and various Indian peoples. There are other complicating elements which entail that in any matter concerning Indian land-rights the specific histories of the specific peoples and jurisdictions
involved must be taken into account (cf. Lysyk 1967; Cumming and Mickenberg 1972:65ff); but aboriginal title and treaties form, as it were, the two chief foci. The treaties were intended by the Canadian government to cede Indian lands or interests in land to Canada, and to extinguish aboriginal title on (at least) lands other than those included in Indian reserves. Much depends on the specific terms of the specific treaties, and the circumstances of their signing, as to how much of the aboriginal title survives. As I noted in the first chapter of this enquiry, there is serious doubt as to whether Treaties 8 and 11 actually did extinguish aboriginal title for the Dene of the Northwest Territories; and no treaties were signed with the Inuit.

So for the purpose of the present enquiry, I shall concentrate on the law of aboriginal title. This was usefully reviewed and summarized by Cumming and Mickenberg (1972:13-50); and shortly thereafter the question of the extinguishment of aboriginal title was dealt with at considerable length by the Supreme Court of Canada in Calder et al. v. Attorney-General of B.C., [1973] S.C.R. 313, (1973), 34 D.L.R. (3d) 145. In that case, three judges held that the Nishga had had and still had aboriginal title to their land, three judges held that the Nishga had had aboriginal title but that this had been extinguished, while the seventh judge rejected the Nishga's appeal for procedural reasons and made no comment on aboriginal rights. The account of aboriginal title which follows is based chiefly on these two sources.
The topics of aboriginal rights and aboriginal title (the two should not be confused) are more complex than my use of only two sources might suggest, and the literature is now appreciably larger (cf. Asch 1984:141; Indian Claims Bibliographies 1975, 1979). But in the present enquiry, the two sources chosen suffice to state the concept of aboriginal title as it is expressed in Canadian law. Furthermore, the present enquiry is not a discussion of aboriginal title, much less of aboriginal rights, and to pursue these into the detail which they intrinsically deserve would be much too digressive. The present enquiry focusses on the Common Law of real property rather than the law of aboriginal title, although both, from a wider point of view, have to be regarded as part of Canadian land-law.

In summary, aboriginal title as it is recognized in Canadian law is the right possessed by a native community and its members, to continue to occupy and use the land which they and their ancestors were using when the sovereign authority of the Crown vis-a-vis other dominant (mainly European or Euro-American) societies was extended over that land. Aboriginal title is a legal right, part of the common law, recognizing the moral right of the people to their lands and livelihood.

... the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever

In St. Catherine's Milling v. The Queen (1887), 13 S.C.R. 577, several judges of the Supreme Court of Canada expressed the view that the law of aboriginal title described in the early American cases applied equally in Canada (see discussion in Cumming and Mickenberg 1972:33-34, 39-41). This view was followed by the Judicial Committee of the Privy Council, in Saint Catherine's Milling v. The Queen (1889), 14 App. Cas. 46 (P.C.), which, at p. 54, described the title of the Indians as a "personal and usufructuary right dependent upon the good will of the sovereign." This meant that under Canadian constitutional conditions, when aboriginal title is extinguished within a province, the proprietary right in the land goes to the Crown in the right of the province, not to the federal Crown. There are two great limitations on aboriginal title: (a) aboriginal lands can be alienated only to the Crown, and (b) aboriginal title can be extinguished by the Crown (see Cumming and Mickenberg 1972:39-40). Aboriginal title (as well as title to reserve lands) has been treated as belonging to communities or groups of Indians, however, and is not personal in the sense of belonging to individuals; although by ceasing to belong to the community, individuals can give up their rights to benefit from aboriginal title. Mr. Justice Morrow, in Re Paulette and Registrar of
(No. 2) (1973), 42 D.L.R. (3d) 8, at pp. 27-28, summed up the legal incidents of aboriginal title as:

1. Possessory right — right to use and exploit the land.
2. It is a communal right.
3. There is a Crown interest underlying this title — it being an estate held of the Crown.
4. It is inalienable — it cannot be transferred but can only be transferred to the Crown.

(Cumming and Mickenberg (1972:41) are wrong, therefore, in saying that "with the exceptions noted above, Indian title should be viewed as having all the incidents of a fee simple estate." The exceptions make the conclusion meaningless.)

Calder et al. v. A.-C. B.C. was concerned chiefly with extinguishment of aboriginal title by means of unilateral government action. Mr. Justice Judson, focusing essentially on the dependence of aboriginal title upon "the goodwill of the Sovereign" (at p. 328), concluded that (at p. 344)

... the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for occupation.

Mr. Justice Hall held (p. 352) that the Nishga claim was not a claim to title in fee but was in the nature of an equitable claim or interest, "a usufructuary right and a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams," and as such could be extinguished without compensation only by "express words to that effect in an enactment." He continued (at p. 402):

The appellants rely on the presumption that the British Crown intended to respect native rights; therefore, when the Nishga people came under British sovereignty ...
they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province, after Confederation, enacted legislation specifically purporting to extinguish the Indian title nor did Parliament at Ottawa.

The division of the court in Calder et al. v. A.-G. B.C. meant that the Nishgas lost their appeal, but that the question whether or not their aboriginal title had been extinguished was still wide open.

In summary, aboriginal title can be extinguished (a) by treaty, in which title is surrendered to the Crown for such compensation as may be agreed; (b) by sale to the Crown (thus in effect much the same as by treaty); and (c) by appropriate legislation. (The Supreme Court of Canada divided on the question of what legislation was appropriate.) Aboriginal title can be alienated only to the Crown, and not directly to private subjects of the Crown.

Looking over the judgments in Calder, I think that if one followed Hall's line of argument, conquest would not necessarily extinguish aboriginal title. Conquest would entail loss of sovereignty, as far as the conquered were concerned, but their property rights, their original rules and practices of use and occupation, would still be entitled to protection, and to compensation for expropriation, unless legislation were passed which expressly abolished those rights and expressly declared that no compensation was due. Judson's argument is consistent with this, except that he would not require express mention of abor-
original rights, and would allow extinguishment by legislation which was merely inconsistent with the recognition of aboriginal title.

As the law of aboriginal title has so far been applied in Canada, that law does not require the Crown to recognize and uphold aboriginal land-law (or its aboriginal equivalent), whatever it may be, either among the aborigines or natives themselves, or between natives and non-natives. Yet logically, recognizing that the natives or aborigines have a right to the peaceful use and occupancy of the lands which they have used and occupied, implies recognizing their right to use those lands according to their own rules, and therefore recognizing their right either to enforce those rules in their own way, or to seek redress in the courts of the dominant society. This "recognition of native law" (as we might loosely term it\(^{15}\)), except for recent recognitions of Dene and Inuit adoption customs (for example, Re Wah-Shee (1975), 57 D.L.R. (3d) 743), has not occurred in Canada; nor is it consistent with the assimilationist thrust of the federal Indian Acts (cf. Tobias 1976; Treaties and Historical Research Centre 1978).

Still another problem emerges when we consider the legal nature of the interest which Indian groups and individuals have in the lands reserved to them after they have signed treaties and surrendered aboriginal title. How much of their former rights continues on the reserves set up under the Indian Act? What titles or interests do they have in these reserves? The Supreme Court has apparently concluded that the Crown holds
both reserve lands and Indian funds for the "use and benefit" of the bands. This is a trust relationship, and if the Crown breaches this trust, it is liable to the Indian beneficiaries (Miller v. The King, [1950] S.C.R. 168; discussed in Cumming and Mickenberg 1972:237-238).

In his paper on "The concept of native title," Smith (1974: 15) argues that we need to distinguish

. . . between the inter-societal property institution incorporated within international law and dealt with in terms of sovereignty, the intra-societal property institution of the dominant society incorporated within its legal system and dealt with in terms of ownership, and the inter-societal institution of property which was established, albeit in a less formal and structured way, between the dominant and servient societies.

If we accept these distinctions, the concept of aboriginal title is that part of the Common Law which enters the third of these relationships, as viewed through the legal eyes of the dominant society. The fact that native institutions of property are not (presently) justiciable in the courts of the dominant society, takes aboriginal title out of the second class distinguished. The fact that aboriginal title can be extinguished by the sovereign takes it out of the first class. Only the third is left.
Notes to Chapter IV

1 Note the conclusion of the B.C. Legislative Assembly's Select Standing Committee on Agriculture (1978:186) report on Land Productivity in British Columbia that, "Enough agricultural land exists in the Province to produce the volume of food required to meet current levels of consumption, but such an undertaking would require the intensive development of almost all the Province's agricultural land resources." But B.C. of course has its own special conditions. Other parts of Canada differ, some being more favourable to agricultural production (e.g. Alberta) and some less (e.g. Newfoundland).

2 The term "civil law" has more than one meaning. It may mean the Quebec Civil Law tradition, based on the European Civil Law tradition, in contrast to the "Common Law" or Anglican tradition (to use Wigmore's useful label). Within the Common Law tradition, however, the term "civil law" is used in contrast to "criminal law". "Civil law" in this latter usage is the law governing disputes between private persons, for example, suing one another in what is called a "civil suit" (not a "trial"). "Criminal law", on the other hand, governs persons being "tried" before the court for "crimes", and the prosecution is done by the state rather than by a private individual. One speaks of a "criminal trial" and not of a "criminal suit". In a civil suit, one speaks of "plaintiff" and "defendant", but in a criminal trial of "prosecutor" and "accused".
To complicate this neat distinction, however, there are offences against federal and provincial statutes which are not reckoned in law as "crimes", although the state's representatives prosecute the accused before the courts; and there are also a variety of matters which are "heard" and "decided" not in the "law courts" but before "administrative tribunals".

The contrast between civil law, or the law of torts and wrongs against private individuals and groups, and criminal law, or the law of crimes or offences against the whole community, is used by Radcliffe-Brown (1952: 212-219) to characterize primitive law according to the mode of intervention by the whole community in settling disputes. However, in both civil and criminal law so defined, the dispute is settled according to rules and principles generally adhered to by the whole community. These rules and principles are collective representations of the values and world-view of the whole community, and maintain solidarity by giving each member of the society the same mental map, as it were, to follow. This is, I think, still one of the functions of law in Canada.

This qualification is necessary. Not only have the Canadian provinces each made their own additions and emendations to English tradition, but English land law was thoroughly revised in 1926, and the new English land legislation is "completely irrelevant to Canadian lawyers" (Todd and McClean 1968:II-38).

Harwood (1975) on English land law has also been useful.
Casebook materials have to be used with discretion. Sometimes cases are included not because they are authoritative precedents, but because they pose horrible examples, as it were, and arguments for debate.

But the problem of aircraft was being discussed in 1815, when Lord Ellenborough in *Pickering v. Rudd* (1815), 4 Cowp. 219, 171 E.R. 70, at p. 71, questioned whether "an aeronaut is liable to an action of trespass quare clausum fregit, at the suit of the occupier of every field over which his balloon passes in the course of his voyage."

*Fructus naturales* are the natural products of the soil, e.g. grass, timber, fruit from fruit trees, which do not require annual labour to produce a crop. *Fructus industriales*, e.g. wheat and potatoes, require annual labour for their production and are not as such regarded as part of the land (Harwood 1975:22).

Smith (1974:15): conquest recognized by most property systems as a way in which title to land may be extinguished. Within limits regulated by statutes, depending on the particular jurisdictions. Blackstone (Ehrlich 1959:I: 107), for instance, related certain limits, in the 1750's, on the powers of corporations to acquire land. But these limits do not remove the general principles enunciated in the body of the present enquiry; and the principles are what we are after.

E.g. *Strata Titles Act* and *Air Space Titles Act*, in B.C., as already noted in text, above.
11 Lysyk's remarks on this separation were applied by the Supreme Court of Canada, per Beetz J. in Four B Manufacturing Ltd. v. United Garment Workers of America and Ontario Labour Relations Board, [1980] 1 S.C.R. 1031, at p. 1050.

12 See also Slattery 1983.


14 Johnson v. McIntosh is described by Mr. Justice Hall, [1973] S.C.R. 313, at p.380, as "The case most frequently quoted with approval dealing with the nature of aboriginal rights. . . . the locus classicus of the principles governing aboriginal title."

15 Compare a South African definition of "Native law" as "those parts of the indigenous system of customary jurisprudence existing among the various Bantu tribes of South Africa, which are recognized by the South African Courts." (Whitfield 1948:1)
THE TWO SYSTEMS COMPARED

A Comparison

The Dene and Inuit systems of land-tenure are about as close as one can get to having no system of land-tenure while still having one. But they clearly belong in the class labelled "tribal" (Type A) rather than those labelled "administrative" (Type B) or "proprietary" (Type C). The Canadian system, on the other hand, is clearly proprietary, although with administrative elements.

1. The Idea of Land

In the Dene and Inuit systems, land is the scene or stage of which humans and animals live, and which feeds the animals which in turn feed and clothe the humans. It is also a source of fuel and materials for shelter and tools. Criss-crossed by trails and migration-routes and streams, it is a place on which happenings are; and it has within it places of special significance where memorable events happened, where people live, or where facilities such as caribou fences may be set up.

The most important resource is, however, the animals on the land. These move over the land in regular but variable routes and numbers. Some, such as the caribou, require cooperative teams for their catching. Others can be caught by individ-
uals or by pairs of hunters or trappers.

Except for the boundaries between the territories claimed by different but neighbouring communities, land is not bounded nor delineated. The only land-lines are trap-lines, and these are rather pathways and not boundaries enclosing land. Land is, in a word, not parcelled.

In short, to the Dene and Inuit land is a field for activities, perhaps even a field of activities.

In Canadian law, land is something which can be used as a site for productive and other activities, or as a resource in productive activities. These activities are diverse, and land is an object of competition and of ownership. It is divided into parcels, and made the subject of a multitude of claims. It is thought of as a material subject to various technical processes and social relationships. It is not a field for activities, so much as an element in activities, and (as people think it) a passive element at that.

2. Ownership and Possession Regarding Land.

If we take ownership to mean the right, recognized within the society, to exclusive control over the land or portion of land, subject only to whatever sovereign which the society may recognize, we can highlight a major difference between the two systems.

In the Dene and Inuit systems, the only such unit claiming the right to exclude others from the land is the local community. Among the Dene, this would be the regional band rather
than the local bands within the former. Among the Inuit, this would be a more vaguely defined group which Weyer called the "association unit". Aboriginally, these were also the social groups which could be said to possess political sovereignty, in at least an inchoate sense.

Among the Dene, furthermore, following the coming of the fur-trade, trap-lines were, for the limited purpose of catching fur-bearing animals, under the exclusive control of individual trappers and their immediate families. They could thus be regarded as a special form of land-rights.

Facilities, such as caribou fences, among the Dene, were taken care of, on behalf of the whole community, by leading persons in the community.

The particular land-rights (all use-rights) which the members of the Dene or Inuit communities enjoyed, were acquired by membership in the community, and were not transferable, but expired with their holders (though children could claim a parent's trap-line when the latter no longer used it, and the holder of a trap-line could give or sell it to whomever in the community he chose).

In the Canadian system, on the other hand, owners are legion, ranging from natural persons through artificial persons such as corporations to the Crown itself. Sovereignty is clearly distinguished from ownership, though the Crown is both sovereign and owner. In addition, by means of estates of limited duration, exclusive control can be limited in time.

In the Canadian system, because the ownership of land
can be split into the difference between holding a limited estate (whether in possession or in expectancy) and holding a right to the residue after limited estates have been carved out of the fee simple estate, it makes sense to distinguish between ownership, rightful possession, and possession simply. To own something is to have rights entitling one to rightful possession, even if one is not enjoying that rightful possession at the time one has the entitling rights. (Of course, the member of a Dene or Inuit community also enjoyed rightful possession of his community's land: what he did not have was the index of full ownership, namely the right to exclude other persons from the same community.)

The distinction between the ownership and the rightful possession of land did not arise in the Dene and Inuit systems simply because aboriginally ownership and sovereignty were combined and held by the whole community. But the notion of ownership as distinct from wrongful possession was at least found among the Inuit, and became important with regard to land after sovereignty was taken away from them by Canada.

In the Canadian system, interests in land are freely transferable, and indeed "freedom of alienation" is a cardinal principle of Canadian land-law. This is a natural corollary (though not an inevitably logical one) of the division of land into parcels and the multiplication of particular land-rights.
3. **Persons Holding Rights to Land**

The distinction between natural and artificial persons is fundamental to Canadian law. It is not part of Dene or Inuit ideas. The community among the Dene or Inuit is not something distinct from the particular members of the community. The Dene and Inuit community is the people, and both Dene and Inuit sought consensus among community members to express the decision of the community. In other words, the Dene and Inuit communities are "aggregate persons" and not artificial persons, even though in Dene and Inuit ideas they include persons not yet born as well as those presently living.

The closest equivalent in the **common-law tradition** to the aggregate person of the Dene and Inuit community is perhaps the unlimited partnership (which is not a corporation) where each partner is the agent of all the other partners and each partner is liable for the acts of all the others. There is also a lesser resemblance and a significant difference between the Dene and Inuit community and the corporation aggregate of the common law. Both community and corporation make decisions binding the whole. But the corporation aggregate is an artificial person distinct from the natural (or the separate artificial) persons of its members. There is a corresponding distinction between the members in their capacities as members of the corporation and the members in their capacities as private individuals other than members. The corporation is a postulated entity, matched by what F.S.C. Northrop called a "concept by postulation", and it is epistemically correlated with the
members, in the aggregate, by means of such devices as a membership list, a general meeting, rules of procedure, and motions expressing the will of the corporation. In the common law, indeed, corporations and other artificial persons may, via their representatives, be members of a corporation. Such a possibility was quite outside the Dene and Inuit conceptions of the community.

A further point to remember is that, aboriginally at least, the community among the Dene and Inuit was also the sovereign political group, or as close to such as might be identified. The corporation of the common law is, on the other hand, not a sovereign unit but is the dependent creation of a sovereign larger and more inclusive than the corporation.
Reconciling the Two Systems

We come now to the problem of reconciling the two systems. Is it possible for communities living according to the traditional Dene and Inuit land-ways to be embodied into the Canadian legal system without serious distortion to those traditional ways? Put more abstractly, is it possible for the servient "tribal" or Type A system, mobile hunting variant, to be fully taken into the dominant proprietorial or Type C system of land-tenure without the servient system being destroyed?

The problem arises from a combination of distinct factors. First, for both Dene and Inuit, though not in precisely the same ways, hunting, the protection of the game, and the control of the lands over which the game animals move, are considered by the two peoples to be essential to their survival as peoples controlling at least part of their own destinies. Second, this system of land-tenure is part of a larger system of family structure, community cooperation, consensual authority (coupled with individual enterprise), and ideals of identity, which would be weakened if the system of land-tenure were to change. Third, the Dene and Inuit are the subordinate systems, powerless against the dominant system if the latter should choose to exercise its power. The Dene and Inuit have in practice lost sovereignty. If they are to preserve their ways of life, they must either regain sovereignty, or they must find a way of translating their systems into Canadian law concepts with-
out destroying those systems. (This enquiry explores the second alternative.)

The problem is both political and legal. The political problem is for the people to retain, or regain, control over their own lives, and to have this control recognized and supported by Canadian law and polity. The legal problem is to find a way in which Dene and Inuit conceptions of right and property (or their equivalents) can be matched with Canadian conceptions so that the Dene and Inuit structures will be maintained by the Canadian legal structure. If they can find such a matching, the effort of maintenance will be much easier, for they would then be better able to use the Canadian courts to defend themselves against encroachments. One of the purposes of the common law is, after all, the defence of property.

If the matching is not correctly made, however, translation of Dene and Inuit structures into Canadian law concepts would destroy those structures. The courts will necessarily interpret cases according to the ideas of Canadian law, and their decisions will impose the corresponding structures. So unless the Dene and Inuit have already anticipated the impositions by aligning Canadian law structures with their own, the divergence could press the servient structures out of shape.

However, if the thrust of the Canadian law, whether by case or statute, is to break up the communal land-tenure (or so we may call it) of the Dene and Inuit, to individualize it, and so to foster its alienation, then in order to preserve
their interests in the land, the Dene and Inuit must find Canadian law concepts which they can use to block the fragmentation and loss of their land and their interest concerning it.

There is a substantial conflict of purpose between most Canadians, on the one side, and Dene and Inuit, on the other, concerning the land.¹ For Dene and Inuit, the land is a means of cultural and economic survival. They do not want to lose it, though they do not object to "developing" the resources of the land in order to improve their living conditions, as they view them. Land is not something easily to be bought and sold, but rather is something getting in persons' identities and sense of self. For most Canadians, however, land is something fundamentally to be bought and sold and used as a factor of production in profit-making enterprises. Only the wealthy can afford to take much land out of the economy. Other persons must either use it as an element in a money-earning enterprise, or have a monetary income or savings in order to pay the taxes which governments will claim on this land, or else they will lose their lands, even the houses in which they dwell.

The question posed in this enquiry asks if it is possible to preserve Dene and Inuit concepts of land and land-tenure by means of legal concepts from a legal tradition whose concepts of land and land-tenure are, as we have now seen, very different from the Dene and Inuit concepts. Or, would the attempt to defend the traditional system by means of Canadian law concepts inevitably change the traditional system?
How might such change occur?

The first possibility is defective translation. On the assumption that there are equivalences in the two traditions, those equivalences might still not be correctly identified. If, for example, the land-owning unit in the Dene/Inuit system were considered to be the natural individual, and these persons were considered to have fee simple estates, then either the land would have to be cut up into parcels each individually held, or the land would have to be held either jointly or severally in common. If the individual's interest is held jointly with others, on his or her death that interest disappears into that of the survivors, and is not inherited. New members can easily be given correspondingly new interests held jointly with the interests of the members already in the community. This pattern of joint tenure would then resemble the traditional pattern. On the other hand, if the interest is held in severalty with others, that interest can be inherited and does not automatically disappear on its holder's death. Furthermore, an estate held severally can be alienated by its holder. It would therefore be possible for individuals to sell their interests to other individuals either inside or outside the community, without the community's consent, and in this way the community could be dispossessed against the will of a sizeable portion of the community. (An attempt to prevent such alienation by, e.g., restrictive covenants, would go against the general policy of the common law in favour of freedom of alienation.) The posses-
sion of interests in severalty would thereby tend to dissolve the community's bonds, but joint tenure would be less likely to do so. However, since joint tenures in the common law are easy to sever, i.e. to change into tenures in severalty, any attempt to equate Dene/Inuit individual use-rights with joint estates would have to clearly declare this essential difference: Dene and Inuit "joint tenures" could not be "severed".

Another form of defective translation would be to recognize the community as the land-holding corporation indeed, but to regard each member's interest as being like a share in the corporation. These shares could then be sold or otherwise alienated, so that once again an outsider could gain control of the community against the will of a substantial minority, or perhaps even a majority, of the original community. Even an option clause, requiring shares first to be offered to the corporation or to its members, would not suffice.

Both shares and fee simple estates held by individual natural persons, are means whereby land-owning can be individualized and realized for marketing.

The second possibility is deliberate re-interpretation. The effects are similar to those of defective translation; the chief difference is the presence of a deliberate policy to induce change.

The causes of the distortion of one system by another may be sorted out as follows. First, if the two systems are built on different principles, translation of one in terms of
the other must necessarily pose the threat of defective translation. Therefore, the nature of the distortion depends on the ideational and logical characters of the two systems; and on the care taken in translation.

Second, the distortion depends on the power relationships between the two systems. The more powerful system can intervene in the subordinated system and impose its concepts on the other. The less powerful system still have a constant struggle to have its own concepts even understood, let alone accepted, by the other. Furthermore, the power of the dominant system becomes a resource to be used, via the threat of its interventions, in power struggles among the members of the subordinate society.

Third, the distortion depends on the ways in which the various persons and groups in the dominant society selectively enforce and emphasize those parts of their legal system which reward their interests. If the subordinate society does not have strong allies within the dominant society, then those persons who want its lands will get them. To meet this pressure, the subordinate society must be able to express its interests in the legal concepts of the dominant society, in order that the menace to those interests appear clearly illegal in the dominant system's own concepts.

In the strict sense of the word, the Dene/Inuit and the Canadian systems of land-tenure cannot be "reconciled". The two systems simply cannot be matched piece by piece and trans-
lated one into the other. Their basic structures are too different. There is, however, one point of contact. The Dene or Inuit community, which holds the property right to land in traditional ideas, can be matched with a corporation in Canadian law, and this corporation can hold the land of the community vis-a-vis the larger society according to the ideas of the dominant land-tenure system, while the members of the community continue to regulate the access to land among themselves according to their traditional patterns. The community land-holding corporation thus encapsulates the Type A systems of the Dene and Inuit within the Type C system of Canada. This encapsulation by means of the community land-holding corporation (CLHC) might be called "reconciliation" of a strained sort. It is the only way available within the concepts of land-holding in the Common Law — and even then it depends not on the ideas or land or of ownership, but on the idea of person.

This conclusion does not mean that there is no other way in which Dene and Inuit ideas of land and land-tenure might not be fitted into the Canadian legal system as a whole. The constitutional division of powers allows each province to develop its own land-law, and especially Quebec to preserve its own civil law tradition. A similar solution could be applied to the Dene and Inuit, and has indeed been asked for in the Denendeh and Nunavut proposals (to be sketched in the next chapter, section A1). These proposals set up separate jurisdictions within Canada wherein Dene and Inuit would preserve their own
ways of dealing with land, or change these ways as they deem fit.

The community land-holding corporation tries to achieve a similar result, but on a smaller scale and by using the common-law idea of the corporation within a common-law jurisdiction. In the next chapter, I shall try to detail the characteristics of this community land-holding corporation (abbr. CLHC), and also to distinguish it from a number of possibilities for which it must not be mistaken.
Notes to Chapter V

1 So much, indeed, is intimated by the title of Berger's (1977) report, Northern Frontier, Northern Homeland.

The conflict came out rather nicely in the contrast between white and Indian testimonies before the Berger Commission at Hay River and Hay River New Indian Village: Transcripts, pp. C180-C595.

2 The kinds of pressures against which the Canadian Indians have had to contend, and their responses to these, are traced in the history by Patterson (1972). The various Canadian policies towards Indians, and their expression in the Indian Act, have been put together in Treaties and Historical Research Centre (1978).

The Maori of New Zealand afford an instance of a "tribal-administrative" type (intermediate between tribal and administrative corners of the triangle but in the tribal rather than the administrative part) meeting a proprietorial type, indeed one belonging to the same tradition as the Canadian. However, the idea of land among the Maori is closer to the Canadian idea than is that of the Dene and Inuit. For a detailed history of the encounter between the two systems, see Ward (1974). For the old Maori system, see Firth (1959), especially chapters 10 and 11. A shorter summary of 19th century contact between Maori and whites is Miller (1940), and
(in the same volume) of Maori land-holding vis-a-vis the whites, Ngata (1940). The law concerning Maori lands, as that law was developed by New Zealand courts, is authoritatively given in Smith (1960). A very short summary of the position of the Maori in New Zealand law is given by Hooker (1975:331-338).

As a means of countering the effects of fragmentation of Maori freehold tenure, the Maori Affairs Act of 1953 provides that four or more owners may incorporate. The body corporate holds the land in fee simple in trust for the incorporated owners. It has the power to alienate land, subject to confirmation by the Maori land court. The law is conveniently summarized in Smith (1960:158-174), ch. 13. This is not a community land-holding corporation as I propose in the present enquiry, but strictly a creation under the statute, and its objects or purposes may be varied at the discretion of the Court. Note that the owners who have joined together to form the corporation are described as having equitable interests.

Hooker (1975:345), describing the encounter of Australian law with traditional ways in Papua New Guinea, noted that there was recently proposed there "the idea of setting up bodies which are corporate in the common law sense and in the native sense based in traditional obligation. . . ." At that time, however, the idea was still embryonic.
VI

THE IDEA OF THE COMMUNITY LAND-HOLDING CORPORATION (CLHC)

A

What It Is Not

The basic idea before us is simply stated. If the Dene or Inuit local community as the land-holding entity can be matched with the common-law corporation, the resulting land-holding corporation can hold the land of the community on behalf of the members of the community against persons and interests in the larger society, and the members of the community can arrange among themselves the use and holding of their land in whatever ways they consider right.

As the discussion in the preceding chapter intimates, however, not any corporation will serve the purpose of supporting Dene and Inuit traditional ideas of land and land-tenure. The community land-holding corporation, or (for short) "CLHC", must have certain specific characteristics if it is to achieve its purpose, and must carefully avoid falling into other kinds of corporation recognized by Canadian law.

We can gain a clearer idea about what the CLHC is if we first explore some of what it is not.
1. Not a Juridically Sovereign Unit

As proposed here, the CLHC is not a juridically sovereign unit. It is not an independent government, setting its own laws and regulations unscrutinized by a superior authority. It is an attempt to come as close to this as Canadian law will allow a subject of the Crown to go.

In the aboriginal practice and the traditional ideal, the local community (not always precisely defined) was and is both the politically sovereign unit and the main land-holding unit. Given the ways of subsistence of the people, such a combination was a practical necessity for their survival.

With the coming of the Canadians, however, political sovereignty passed away from the Inuit and Dene to the Canadian government. As far as the native people were concerned, there was now a new presence in their country, and that presence steadily increased its power over the country, and its interference in their lives. Some of this interference was welcomed, and some of it was not. Whether the interference was or was not welcomed, the people felt that control of their own existences was slipping away from them as the whites increased their presence on the land.

(a) The Denendeh Proposal

Matters were brought to a head with the increase of petroleum exploration in the north and the presentation of proposals to build oil and gas pipelines along the Mackenzie valley from
the Arctic to southern Canada. This was in the late 1960's and early 1970's. In 1970, the treaty Indians of the Northwest Territories formed the Indian Brotherhood of the N.W.T., and in 1973 the Metis and Non-Status Native Association was formed to represent Dene not covered by the Indian Act. This was before the Mackenzie Valley Pipeline Inquiry Commission was commissioned in 1974. In 1973, some of the Dene chiefs applied for permission to file a caveat on the lands in the Mackenzie district used as traditional hunting grounds by the Loucheaux and Slavey. If this caveat were granted, it would prevent any transmission of land without Dene permission, except as subject to the Dene claims. This application was heard by Mr. Justice Morrow in the N.W.T. Supreme Court. He ruled that the Dene had not lost their aboriginal rights beyond doubt and that the caveat might be filed. The Crown appealed, and the Appeal court, without ruling on the question of aboriginal rights, reversed Mr. Justice Morrow's decision on the caveat. The chiefs appealed to the Supreme Court of Canada. In July, 1974, Dene leaders met and declared that the Dene, both treaty and non-treaty, would make one land claim for all the Dene. In July, 1975, the leaders met again and issued the Dene Declaration. The Declaration claimed that the Dene are a distinct people within Canada and have the right to self-determination within Canada. In October, 1976, another meeting proposed a new settlement between the Dene and the Canadian government, and stated that there should be "within Confederation, a Dene government with jurisdiction over a geographical area and over
subject matters now within the jurisdiction of either the Government of Canada or the Government of the Northwest Territories."¹

By 1981, Dene ideas matured to proposing a governmental structure for a new political entity occupying the Dene areas in the N.W.T. and to be known as Denendeh. The Denendeh government would have those powers possessed by existing Canadian provincial governments plus some powers now held by the federal government. Within Denendeh, the Dene people would have a special protected position. They would have exclusive ownership, use, control, occupancy, and resource ownership over large areas within Denendeh. Existing private property rights would be maintained, but future property interests would be by way of long-term leaseholds granting occupancy and use rights but not resource ownership. There would be two layers of government, namely provincial and local community. While any resident could speak at local community meetings, voting and eligibility for office would be restricted to Canadian citizens who (1) had resided in Denendeh for at least ten years, (2) pledged to uphold the Charter of Founding Principles, and (3) had resided in the local community for two years. The "provincial" government would be in the hands of a national assembly elected by Denendeh voters. Only persons could vote and hold office provincially who were Canadian citizens who (1) had resided in Denendeh for at least ten years and (2) pledged to uphold the Charter of Founding Principles. The assembly would instruct the executive. Both assembly representatives and the execu-
tives might be chosen by various ways. (CJL Foundation 1982)

In this way, the Dene consider that they could protect themselves from resource exploitation by southerners which would both destroy traditional values and thrust the Dene further into dependence and poverty. This proposal, if accepted by Canada, would give the Dene power to maintain their own ideas of land and land-tenure on a territorial or regional scale as well as on a local scale.

(b) The Nunavut Proposal

In February 1976, in advance of the Dene territorial proposals, the Inuit Tapirisat of Canada presented to the federal government a detailed proposal for settling the Inuit land claims. The proposal included establishing a new territory to be called Nunavut, in which the Inuit would predominate.

The proposal stated that each Inuit community should organize as a non-profit corporation, whose members are to be determined by the articles of incorporation. These community corporations should then combine into regional non-profit corporations. These local and regional corporations would hold real property interests, but would be exempt from taxation. Each local corporation would have the power to determine its own membership.

Voting in local and territorial elections in Nunavut would be limited to persons who had resided for at least ten years in Nunavut.

Several sections of the proposal provide for territorial
and Inuit control over hunting and trapping, with conservation as a chief goal.

Lands would be divided between Inuit lands and public lands. Inuit lands would be held by the local community and regional corporations "in fee simple, including the subsoil except for any rocks, oil and gas or minerals or any other resources situated more than 1,500 feet vertically below the surface" (sec. 601 of Nunavut proposal: see Kupsch 1976). These lands would be protected from encroachment and exempted from property taxes.

There would also be established "as a business corporation pursuant to the laws of Canada" an Inuit Development Corporation (sec. 801). The voting shares would be limited to Inuit Community Corporations, one share to each community corporation.

Public lands would be owned by "Her Majesty in Right of Canada" and controlled by a Land Use Planning and Management Committee directed by representatives from the Government of Canada, the Nunavut government, national environmental and conservation associations of Canada, and the Inuit Tapirisat of Canada.

The sections on existing alienations provide for existing leases for oil, gas, and minerals, and existing land-use permits to continue except where these affect Inuit lands, where they may be extinguished or continued subject to conditions set by the local community corporations. Inuit who have purchased from governments any interest in lands in the N.W.T.,
would have their purchase prices refunded; but the land right so obtained would be retained by the Inuit. Previously existing fee simple ownership of land by non-Inuit is not mentioned in the proposals, presumably because such ownership is insignificant in the territory.

The land-tenure system thus proposed by the Inuit Tapirisat of Canada amounts to a communal-administrative type (or Type AB), with ownership held chiefly by local communities and regional corporations or by the government (or more exactly the Crown). Leases for resource-exploitation and land-use permits are contemplated, but not fee-simple ownership by individuals or by corporations other than the local community or regional corporations. The result is a departure from the proprietorial concepts of the common law towards a much more administrative system.

Both Nunavut and Denedeh proposals claim a degree of political sovereignty over the land, and move in the direction of a sort of communal-administrative system of land-tenure rather than a proprietorial one. Clearly, both the Denendeh and the Nunavut Proposals allow the Dene and Inuit to keep their traditional ideas of land and land-tenure, and also to change these ideas as the peoples see fit. The territories or jurisdictions which are thus proposed, namely Denendeh and Nunavut, would be very like provinces under the B.N.A. Act, but with perhaps somewhat more autonomy in the instance of Denendeh. Under the B.N.A. Act matters of land-tenure are already provincial matters, as sec. 92, sub.sec. 13, "Property and Civil
Rights in the Province," states. Quebec, as we have already noticed, has its own civil law, stemming from the continental European legal tradition and not the English Common Law. The Denendeh and Nunavut proposals, if accepted by the federal government, could be made law and Denendeh and Nunavut established by Parliament just as Alberta and Saskatchewan were established in 1905. Appropriate legislation at that time could define what particular laws of land-tenure were to apply. Aboriginal rights, whatever they might then be deemed to be, could be secured or provided for by the same legislation. Thus Canadian constitutional law allows for Dene and Inuit ideas of land and land-tenure to be recognized and preserved by means of the "Property and Civil Rights" subsection in the B.N.A. Act 1867, now Constitution Act 1867, s. 91 (13), by means of such jurisdictions as Denendeh and Nunavut umply, and by means of the selfsame administrative elements in Canadian law described in chapter IV, section C. From the viewpoint of Dene and Inuit, indeed, Denendeh and Nunavut are the best solution, combining local control with membership in and protection by the larger sovereignty of Canada.

The Community Land-Holding Corporation which I am proposing here, however, is a more modest proposal. It does not suppose that Denendeh and Nunavut come into being. It supposes that the real property law of the territory continues to be the proprietorial system (with administrative elements, admittedly) described in chapter IV, sections B and C. It does not suppose that aboriginal title as such is, indeed, either recog-
nized or extinguished, provided only that the community is recognized as having some land-rights which it or its members may exercise.

The CLHC as here proposed is not primarily a device for preserving aboriginal rights or aboriginal title. It would, I hope, assist communities having such rights to preserve them; but it is applicable even if such rights are lost. The CLHC is a device for allowing a community of people to follow among themselves a pattern of land-holding different from that of the larger, majority society among which the people find themselves. It is a device fairly conformable with traditional Dene and Inuit ideas, and yet also conforming to the ideas of Canadian law.

However, if the Denendeh and Nunavut proposals are probably the best alternative for the Dene and Inuit, better than the CLHC, the next alternative, the share-holding corporation, is probably the worst — a veritable highroad to destruction.

2. Not a Share-Holding Corporation

The community land-holding corporation proposed in the present enquiry is not a share-holding corporation in the modern sense. Its purpose is to conserve the land for the community and to enable the people among themselves to follow, if they so choose, a system of land-tenure and a conception of land different from those of the common-law tradition.

The share-holding corporation, on the other hand, is primarily a device for accumulating capital and apportioning con-
trol in order to carry out a business enterprise for profit. It can also be used as a device to limit the liability of shareholders to the extent of their investment in the company. If the enterprise is risky, the share system allows the rewards of successful enterprise to be apportioned according to the size of the capital which a shareholder is prepared to risk in the enterprise.

The modern business corporation, as a legal entity, is a specialized development of the common-law corporation. The CLHC of the present enquiry harks back to the older idea of the corporation, to the more general mediaeval and eighteenth century sense set out in Blackstone's *Commentaries* and (therefore) quoted above in chapter four, section B6.

What might happen to a group of people, whether Dene, Inuit, or other, who adopt the joint-stock company as their land-holding entity, is clearly shown in the story of the Menomini Termination.

(a) The Menomini Termination

The story and structure of the termination is set out in Lurie (1972), from whom this summary is largely taken. Further information on the Menomini, shortly before the termination, is given by Spindler and Spindler (1971), who also discuss briefly the effects of termination.

Lurie describes the Menomini termination as resulting in an exact replication of a colonial situation, with the Menomini as the dependent people and the State of Wisconsin as the colo-
nial power. The federal Bureau of Indian Affairs had at least provided a buffer protecting the Indians from an unmanageable penetration by White interests. The Bureau gave some protection to the Indian land base and its resources. With termination, this protection, even though imperfect, was completely withdrawn.

Termination of the Menomini reservation in northeastern Wisconsin was legislated by the U.S. Congress in June 1954, against Menomini opposition and in spite of Menomini fears. Originally scheduled for 1958, termination finally occurred in 1961. Because of Bureau of Indian Affairs' miscalculations and the decision of Congress that the Menomini should pay the costs of legal experts and half the expenses involved in termination, the tribal treasury was in deficit when termination became final.

At termination the reservation became a county and the tribe's land and assets were converted into a corporation, Menomini Enterprises Incorporated (or MEI).

At the beginning of termination, the new county, the smallest in the state in population as well as area, was owned entirely by a single corporation (MEI) with one major industry that was in serious financial atraits. It comprised, however, a large and valuable stand of timber and undeveloped lakes, creeks, and bosky dells in the heart of an important summer recreational area. Wisconsin's view was that if this new county could not put more money into the state coffers than it received (a possibility actually contemplated at the beginning of termination), it should at least pay its own way. The tax schedule was set accordingly. (Lurie 1972:262-263)

The corporation, MEI, as the owner of the land, was of course responsible for paying the taxes. These taxes were the county's contribution towards educational, law-enforcement,
and welfare services which were provided by the state government or were expected to be provided by the county government.

MEI was set up both to manage the Menomini land and other assets and to protect the Menomini from their own relative ignorance of financial matters. Each of the 3,280 Menomini, enrolled in the tribe as of 1954, received a bond with a face value of $3,000 paying 4% interest and reaching maturity in the year 2000, and 100 shares of common stock. The bonds were negotiable with MEI having the first option to buy them, and the stock was non-negotiable until 1973 and negotiable thereafter.

However, there were two classes of stock holders. There were the individual adult certificate holders, and there was the large block of stock certificates held in trust by the First Wisconsin Trust Company on behalf of Menomini minors and incompetents. At the beginning of MEI, the Trust company controlled over 40% of the stockholders' vote, and by 1971 had still 15%. Because of deaths and inheritances, the 100 shares per adult have become less evenly distributed, some persons having more, and some less, and some of the stock coming to be held by non-Menomini spouses.

The stockholders did not vote directly for the Board of Directors, but rather for the MEI Common Stock and Voting Trust which technically held the shares on behalf of the stockholders. The Voting Trust elected the Board of Directors who manage the corporation. The Trust became increasingly Menomini as time went on, and was set to expire in the year 2000. The stockholders also could vote at ten-year intervals to abolish the
Voting Trust.

MEI was faced at the outset with severe financial difficulties. The tribal treasury had been operating at a deficit. Taxes had to be paid. The bonds constituted a debt which would eventually have to be paid to the bondholders, as well as requiring annual interest payments to the bondholders. The county's major industry, the saw-mill, had been left dangerously antiquated by the BIA, and expert advice could suggest only that the mill's labour force be reduced. But to reduce the labour force increased the number of people on welfare and the tax burden on the county.

In order to redistribute the tax burden, and to retire the bonds with a lesser cash outlay, MEI encouraged people to buy their homesites from the corporation. But as unemployment rose, the people who did this could no longer pay their taxes and faced foreclosure. They sold their bonds. In addition, state law forced welfare recipients to forfeit their bonds.

The reservation had had its own utility company and hospital. Following the change to county status, MEI got rid of the tribally owned utility because it was unprofitable, and closed the hospital because the corporation did not have the money to bring the hospital up to state requirements.

Finally, in order to meet tax requirements, MEI leased and later sold land to non-Menomini. Some of the lakes in the area were to be developed as recreational and home-sites and sold hopefully at a profit to both MEI and the developer. This also was supposed to draw more taxpayers into the county.
There were, circa 1971, about 500 Menomini families in the county. The proposed land development would draw as many as 2,500 non-Menomini families, with decidedly higher expectations concerning government services and therefore comprising a pressure towards increased taxation, thus compelling the MEI to sell more of the Menomini land. Development therefore threatened to make the Menomini, or most of them, an impoverished minority dwelling on fragments of the land which had once been theirs.

This experience provoked the emergence, by 1970, of DRUMS, or Determination of Rights and Unity for Menomini Stockholders. This protest movement sought to return Menomini County to federal jurisdiction, to restore Menomini eligibility for BIA services, to rearrange the political and economic institutions so that Menomini could rule their own affairs, and to stop the land development and the loss of land to non-Menomini. As of 1972, there were prospects of qualified success for these purposes.

There are a number of lessons which we may draw from the Menomini story.

The most obvious, of course, concerns the role of taxation. Once the reservation became a county and subject to the tax laws of the State of Wisconsin, a burden was placed on the people regardless of whatever system of land-tenure they followed. Taxation forced both the corporation and individual land-holders to seek money-making activities. Lack of capital forced the corporation to fall back on the only resource it had, namely land, and to start selling land to non-Menomini as well
as to individual Menomini. Lack of jobs forced Menomini who had bought land from the corporation to give up their land again to others. Nevertheless, the corporate ownership of the land was better able to meet that tax burden, than were the individual homesite owners.

Another factor is the placing of control of the corporation's assets in the hands of a small group of people only partly Menomini. This was done ostensibly in order to protect the Menomini from their own ignorance of the financial ways of the larger society. But its effect was to take away from most of the Menomini the decisions over how the land was to be used, and to subject the land to non-Menomini purposes. Given full Menomini control from the outset, the story might have been different, although the State's tax demands would have been much the same.

The assignment of bonds and stocks to individual Menomini individualizes the corporation as a land-holding device, not at the level of control over the land itself, but at the remoter level of control over the corporation. Bonds from the outset and stocks after 1973 could be sold to non-Menomini as well as to other Menomini. Persons who sold their bonds, lost their claim to interest; persons who sold their stock (although the account given by Lurie does not relate that any Menomini did sell their stocks), lost voting rights in the corporation. Thus the assignment of bonds and stocks provided a way for unfortunate or financially inept Menomini to lose their shares of the corporation's assets.
(b) The Alaska Native Claims Settlement

The notion of the corporation was used also in the Alaska Native Claims Settlement Act of 1971 (Baker 1982:26ff, from whom the following account of the Settlement is taken). The Act extinguished all outstanding Native claims to land or to compensation arising either from previous treaties and statutes or from aboriginal title based on land use and occupancy, in return for a grant of money and a grant of land to protect the ways of life and future prospects of the Native people.

In particular, the Act provided the following:

First, a non-taxable grant of $962.5 million was to be made to the Alaska Natives, partly from the federal treasury, and partly from a 2% royalty on state and federal mineral revenues.

Second, 40 million acres of land not already otherwise owned or allocated to state and federal purposes, were to be granted in fee simple ownership to Native regional corporations, village corporations, and individual natives. (In addition, villages on existing reserves could receive full title to such reserves by giving up reserve status and foregoing all other benefits under the Settlement. Seven village corporations on five reserves chose to do this, and gained title to 3.7 million acres.)

Third, twelve Native regional profit corporations were established. These regional corporations received sub-surface rights to all the land received under the Settlement, plus full
title to more than 16 million acres.

The money received under the Settlement was given directly to the regional corporations on a per capita basis, and these corporations were obliged (for the first five years) to distribute at least 10% of the claims money directly to individuals and at least 45% to the village corporations, also on a per capita basis. Thereafter, 50% or the income of the regional corporations was to go to the village corporations.

These regional corporations were to be set up as business corporations, and each Native member was to receive 100 shares. These shares could not be sold or transferred until December 1991.

The regional corporations were to share with other regional corporations 70% of the revenues which they would receive from timber and subsurface rights, again to be distributed on the basis of per capita enrollment. These revenues were taxable. Regional corporations were in turn obliged to distribute 50% of their timber and subsurface receipts to the village corporations within their regions.

For Natives not residing in any of the twelve regions, a thirteenth corporation was set up. This would receive Settlement monies, but no land.

The only Natives who would not belong to a regional corporation, were those who lived on the reserves which received full title to those reserves in return for foregoing all other benefits under the Settlement.
Fourth, over 200 village corporations were established, and they received a surface estate of approximately 20 million acres. The number of acres to which a village was entitled depended on the number of Natives resident in the village. Some of this land was then to be transferred to individuals for residences, businesses, and the like, to private groups such as churches, and to federal, state, and municipal governments. Until 1992, the villagers were to pay no property taxes on land, unless it were leased or developed.

Part of the money received in the Settlement by the village corporations was to be further distributed to the individual members of the village corporation.

Some Natives lived outside the villages and were not members of the village corporations. They were labelled "at-large" members of regional corporations, and received larger cash payments from the regional corporations.

Villages were to incorporate either as "profit" or "non-profit" corporations.

The Alaska Native Claims Settlement Act also contained provisions concerning land set aside for conservation, the establishing of easements over Native land, and a transportation corridor within which Native land selections were forbidden.

Essentially, therefore, ANCSA consisted of a grant of money to compensate Natives for lands lost and aboriginal rights extinguished and a grant of land with which to protect their lifestyle and build their future. By giving individuals land ownership for their residences and businesses and by vesting the rights to the remainder of Native land in Native corporations, ANCSA instituted the concept of property ownership by the Native community
of Alaska on a mass scale. The act itself provides no means to ensure that historic communal uses of land persist. Individuals are free to sell their land, and land use planning and development occur through the interaction of Native corporations and the laws and regulations of federal, state and municipal levels of government. (Baker 1982:28-29)

The act, furthermore, guarantees the continuation of no existing programs or rights enjoyed by Natives before 1971. No provisions are made for subsistence hunting on federal lands (approximately 60% of the total land area in Alaska (Baker 1982:79)). State hunting and fishing regulations apply to both subsistence and sport hunters.

The Alaska Native Claims Settlement was, formally at least, a purely economic settlement, carefully separated from the political system of Alaska. It contained no provisions for native self-government, and expressly stipulated that none of the funds distributed by the Settlement might be used to further "any political campaign on behalf of any candidate for public office." (Baker 1982:30)

In structure, therefore, the Alaska Native Claims Settlement reveals the same impulse as the Menomini termination. That impulse is assimilation of the Natives into American culture and the freeing of their land for economic exploitation by outside forces. The Alaska settlement was more favourable to the Native people, than was the Menomini termination to the Menomini. In neither instance, however, is the preservation of the people's culture and collective self-determination a concern. If the people can compete successfully in the American business world, then they are to be praised and commended; if not, then let
their resources (legally) pass into the control of outsiders who can use them profitably.

The importance of taxation is evident in both instances. In the Menomini situation, taxation became a burden immediately. In the Alaska settlement, a temporary relief from taxation was granted.

The concept of land in both instances is the common-law concept (American variety). Land is parcelled and divided and considered primarily as an element in production. Land is owned by individual persons or by corporations in fee simple, or in qualifications thereof.

Corporations are controlled by their shareholders in proportion to the number of shares held by each person, and those shares are negotiable (after a temporary transition period) and therefore alienable.

Ten years after the Alaska Native Claims Settlement Act, the outcome was still unclear. Baker (1982:vii-viii, 31-52) provides a summary of the main results. (1) Both the village corporations and the regional corporations were hampered by lack of experience, on the part of natives, in running such organizations. The corporations found it necessary to look outside the Native communities for senior employees. The regional corporations were further hampered, though not insurmountably, by the size of the regions and the sparseness of settlement in the regions, and the dispersion of shareholders among several small villages. The corporations invested in stocks, hotels, office buildings, construction firms, and shipping firms.
(2) The regional corporations were legally required to make profits for their shareholders. This requirement clashed with conservative purposes such as preserving the subsistence economy, protecting the environment, and enhancing traditional culture. Balancing profit-maximization with conservation remains problematic.

(3) The 1971 Settlement was conceived as economic and not political. But the sheer amount of land and resources controlled by the Native corporations has notably increased Native political influence, especially at regional and local levels. Except for the North Slope, regional corporations have become the leading political influences in the Native areas of Alaska.

(4) In July 1972, the North Slope Borough was incorporated as a municipality within the state of Alaska. (It is the only Native-controlled regional government in the U.S.A., notes Baker (1982:vii).) The Borough in 1973 adopted a home-rule charter (under the Alaskan state constitution) which allows it to go beyond the state municipal code to design special taxes for Prudhoe Bay, and to restrict the sale of municipal property to non-Natives. The Borough has powers over education, planning, zoning, and taxation, over an area coinciding with that of the Arctic Slope Regional Corporation. The Native people of the North Slope consider the result to be responsive to their demands.

(5) The passage of the Alaska Native Claims Settlement Act was promoted by "southern" U.S. demands for resource exploitation. The pressure for the development of Native lands
led to the generosity of the settlement with the Natives. Settle quickly, was the developer's drive, so that the resources can be got at quickly. But nonetheless, there is a real possibility that after 1991, when the transitional protections are removed, Native corporations may have to sell land to outside investors, and that non-Natives may take control of the regional corporations. Native leaders are well aware of this threat.

(6) On balance, ANCSA was favourable to the Native people. Both capital and wage employment increased at the village level. Most rural Alaskan Natives are economically better off in the 1980's than they were in the 1960's. But the compatibility of capitalist development with maintaining a distinct Native culture remains a moot point.

3. **Not a Municipal Corporation**

   A municipal corporation, in Canadian law, is an agency established by a provincial or territorial government to perform a variety of public tasks of a local nature and given the power to raise local taxes to pay for those tasks. It confers limited powers of local government upon the people of a given place; these powers are delegated to the municipal corporation by the provincial or territorial government, not by the people. The municipal corporation is established either by a special charter of incorporation, or by a special or a general act of the legislature. It has no more powers than the charter or the legislation allows. (See, for examples, Todd 1971, esp. ch. I.)
The municipal corporation is usually given the power to own land in order to perform its allotted tasks.

The CLHC, as I envisage it, is not an agency of any governments. It does not exercise political authority over the people on its land — at least, not more than any landowner. It would, however, have the power to expel non-members from the land belonging to the CLHC: they would be trespassers. It would, as any corporation does, also have the power to penalize its own members (nobody else) for breaking the rules of the corporation. But it would be the agency of those members, and not of a superordinate authority. (Although, as a corporation recognized by law, the CLHC would exist as a privilege granted by the superordinate authority, and could not legally go contrary to the laws laid down by that authority.)

4. Not a Band Under the Indian Act

For the sake of completeness, and since the Dene, whose traditional ideas of land and land-tenure we have examined, are considered to be Indians mostly subject to the Indian Act, we should note that the CLHC is not envisaged here as a band under the Indian Act.

In the Indian Act (R.S.C., c. I-6, am. c. 10 (2nd Sipp.), 1974-75-76, c. 48, s. 2 (1), art. "band"), "band" is defined as meaning:

• a body of Indians
(a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951,
(b) for whose use and benefit in common, moneys are held
by Her Majesty,
(c) declared by the Governor in Council to be a band for the purposes of this Act; . . .

As several sections of the Indian Act reveal (Sections 18-28, 34, 36, 37, 53-60, 73), the band's use and enjoyment of its land are under the control of the Minister of Indian Affairs, who may within wide limits determine how this land is to be used. The band is unable to dispose of its lands as it sees fit without the Minister's permission. The band is in a state of tutelage.

The Indian Act (Sec. 112) provides for the members of a band becoming "enfranchised" simultaneously, the funds and lands of the band then being disposed or divided accordingly, and the band becoming a municipality or part of a municipality. The band would disappear as an entity under the Indian Act, the individual members would cease to be status Indians and would be "enfranchised" as individual Canadian citizens (the Act is behind the times), the funds and lands of the band would be divided among the individual members, with the exception perhaps of community property like meeting halls, and these individuals would then be allowed to form themselves, as municipal electors, into a municipal corporation, which presumably could then own such things as meeting halls.

Band councils, and the powers given them by the Act (esp. secs. 74-86), as portrayed in the Act, are similar to municipal councils, and the powers enjoyed by municipal councils. 4

Membership in the band is determined according to the statute (secs. 5-17; see also secs. 109-110, concerning "en-
franchisement"), not according to rules or practices of the actual group of people concerned.

The CLHC proposed in the present enquiry has full legal title to its land and does not have to get any one else's approval for its land transactions. It also determines its own membership according to its own rules.
The Structure of the Proposed Community Land-Holding Corporation

The hypothesis of this chapter is that the idea of the corporation provides a means whereby the Dene and Inuit system of land-tenure may be reconciled (in part, at least) with the proprietorial system found in Canada and deriving, for all of Canada except Quebec, from the English common law. The corporation would hold the lands of the community in the appropriate Canadian legal title vis-a-vis outsiders, i.e. persons who are not members of the community, while the members of the community would distribute the community's lands among themselves according to whatever set of rules they have adopted. These rules would bind only the members among themselves: as far as the outside world is concerned, the corporation would hold the land. Thus by the device of the community land-holding corporation, a Dene or Inuit group could encapsulate its traditional idea of land and land-tenure within the alien Canadian system.

This hypothesis arises from the observation that Canadian law allows the formation of "corporations aggregate" as artificial persons, by means of which an association of individuals can consequently hold property as a single unit against the world. This property-holding feature of corporations was noted in the discussion of Canadian land-law (chapter IV, section B6). The partial analogy (not identity) between a corporation aggregate in English and Canadian law and the "aggregate person" which is the traditional Dene and Inuit community, is
the only point of resemblance between the land-holding systems of the two traditions, and is therefore the place where we must begin if we are to find a way of reconciling or mutually adapting the two systems. In exploring this hypothesis, however, we must deal with two distinct questions. First, what characteristics must the community land-holding corporation (CLHC) have if it is to allow the people of the community to practice their own ways of land-holding? Second, do existing notions and rules about corporations in Canadian law already permit such a CLHC to exist; or would the CLHC have to be established by special legislation? The first question can be answered logically by drawing out and analyzing the requirements for the community to survive as a single entity within the environment of the Canadian law. The second question requires us to make some sort of an excursion into the realm of the law of corporations, and to explore the idea of corporation in rather more detail than was necessary in chapter IV, section B.

"Corporation" must be understood in its wider meaning, however, such as is evidenced in the quotation from Blackstone given in c. IV-B6. It must not be reduced to the meaning of a commercial company such as is governed by the B.C. Company Act (R.S.B.C. 1979, c. 59). (This Company Act, in sec. 1, itself distinguishes between "company" and "corporation" by stating, "In this Act . . . 'company' means a company incorporated or continued under this Act. . . . 'corporation' means a company, body corporate, association, or society, or body politic and corporate, however and wherever incorporated, but does not in-
elude a municipality, or a corporation sole; . . . "

The basis of the law concerning corporations matured in England in the fifteenth and sixteenth centuries and found its chief expounder in Sir Edward Coke (Davis 1961: II:210). Blackstone's account of corporations does little more than assemble and summarize Coke's ideas. Though this idea has been modified by legislation and judicial decision in Britain, the United States, and Canada since 1850, it still remains at the bottom of the law of corporations. According to this conception (Davis 1961:II:211ff; Ehrlich 1959:I:103ff), corporations were created, with the consent of the state (i.e. Crown or Parliament), by common law or by prescription (neither of these would probably apply today), or expressly by royal charter or by legislative enactment (today the last-named would include a special act or an act of general incorporation, such as the Company Act, allowing persons to combine and request an appropriate certificate of incorporation). Corporations might be dissolved by act of Parliament, by the death of all their members (in the instance of corporations aggregate), by surrendering their franchises to the Crown, or by forfeiting their franchises by neglecting or abusing them. Corporations were formed in order to advance some public interest, and might not be created for illicit purposes. Corporations enjoyed perpetual succession, existing so long as there were any members, and having the power to recruit new members to fill vacancies. Corporations aggregate might make by-laws or special statutes to regulate their own affairs, but could not in doing so go contrary to the laws of the land or to statutes provided by their founders. The corporate will
was determined by majority vote; Blackstone (Ehrlich 1959:I:107) expressly notes that the Statute of Corporations, 1541, enacted "that all private statutes shall be utterly void, whereby any grant or election, made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more, being the minority: but this statute extends not to any negative or necessary voice given by the founder to the head of any such society." Unless this statute be overruled by later legislation, therefore, a corporation cannot be governed by a rule requiring unanimous consent by its membership. The corporation can act only through its organization, i.e. the officers and other persons specified as necessary by its constitution. Corporations were artificial persons, and as such were distinct from the natural persons of whom they were comprised. They had, as a result, to have their own corporate names. Since "A corporation aggregate is invisible, immortal, and rests only in intendment and consideration of the law" (Coke?, quoted in Davis 1961:II:214; compare also Ehrlich 1959:I:105-106), a corporation must have a common seal and appear through its human agents. Since the personality of the corporation and the personalities of its members were distinct, the debts owed by or to a corporation were extinguished by its dissolution. Nor, while the corporation existed, could its members be charged in their natural capacities with the debts of the corporation. "The chief distinction," writes Davis (1961:II:215),

between the natural persons that composed corporations and the natural persons with whom they came in contact lay in the capacity of the former to "take by succession." Those who took lands, goods or chattels by succession, whether individual persons or groups of persons, were
conceived to form, together with their predecessors and successors, the ideal, immortal person of the corporation. . . . "Continuance of blood" in ancestors and heirs was replaced by "privity of succession" in corporations.

(Davis further observes (1961:II:215n), "Many of the expressions found in the older law of corporations justify the query whether the lawyers would not have been more consistent if they had called a corporation an 'artificial family' (in the sense of a series of generations) instead of an 'artificial person' . . . . " If we emphasize the artificial personality of the corporation, and its distinction from its natural members, we get the modern idea of the corporation. If we were, on the other hand, to fuse the corporation with its natural members, we would get the "aggregate person" of which the Dene or Inuit community is an example.)

Viewing the corporation as a social form as well as a legal entity, Davis (1961:13–34) in his history of English and American corporations, distinguishes the following generic attributes of the corporation aggregate. (1) The corporate form holds together the activities of individuals in association with one another. (2) The corporate form is created by the state, or if the association arises independently of state initiative, is approved by the state with the same legal effect as if it was originally created by the state. (3) The assumption by a group of the corporate form, and the acceptance by individuals of membership in the group, are voluntary; but once the group is incorporated and membership in it is accepted, the corporate form becomes compulsory and enforced by the state. (4) The group of members within the corporation is (a) autonomous, (b) self-sufficient, and (c) self-renewing. That is to
say, within the limits of the particular charter or empowering legislation for the particular corporation, the group sets its own rules and chooses its own direction; the corporation has all the powers needful to ensure its own continued existence, e.g. by choosing its own officers without superordinate interference; and it has the power continually to recruit new members and so ensure its continued existence and the continuance of its purposes. (5) With respect to the rest of society, the corporation acts and is acted upon as a unit. (6) The corporation is motivated by private interest (being voluntary in its inception). (7) On the other hand, the functions performed by the corporation are considered to effect (not merely affect) the general public welfare, as well as being functions appropriately carried out by groups or associations. Putting these various characteristics together, Davis (1961:34) defines a corporation as follows:

A corporation is a body of persons upon whom the state has conferred such voluntarily accepted by compulsorily maintained relations to one another and to all others that as an autonomous, self-sufficient and self-renewing body they may determine and enforce their common will, and in the pursuit of their private interest may exercise more efficiently social functions both especially conducive to public welfare and most appropriately exercised by associated persons.

The corporation, both as social organization and as legal person, thus exists in the middle zone between activities organized as departments of the state's administration, on the one side, and activities organized by groups of people apart from the state and unregulated by the state, on the other. The corporate form represents the state's attempt to regulate associa-
tions and associate activities which it cannot fully control, and also represents the attempts by associated persons to gain state support for their association and activities. The corporation, being a creature of the state, is at once "strong" because it may rely on the protection by the state of the corporation's exceptional rights, and "weak" because it depends on the higher power of the state for its existence (Davis 1961: II:206).

The common law being based on the natural person as its basic unit (Davis 1961:II:239), corporations must be a sort of concession granted by the state or sovereign, and must also be regarded as in some sense artificial persons, entities created by some sort of useful legal fiction. A corporation takes its being, therefore, from a charter or statute which grants the corporation existence, gives it its powers, and defines the limits within which the corporation may exercise those powers. The statutes may incorporate the corporation either specifically, by an act establishing the particular corporation, or generally, by acts of "general incorporation".

So much, therefore, for the general idea of the corporation. If we apply this conception to, say, British Columbia, we find that statutes such as the Company Act (R.S.B.C. 1979, c. 59), allowing the incorporation of profit-making, limited-liability companies, the Society Act (R.S.B.C. 1979, c. 390), allowing the incorporation of non-profit societies, the Cooperative Association Act (R.S.B.C. 1979, c. 66), allowing the incorporation of cooperative businesses, and the Condominium Act (R.S.B.C.
1979, c. 61), allowing the incorporation of "strata corporations", set up entities corresponding to corporations aggregate as we have described them here. Municipalities, on the other hand, are not precisely corporations but sub-governments, agencies of the state cast for reasons of convenience and tradition into a quasi-corporate form.

I shall next outline the characteristics which a Community Land-Holding Corporation must have if it is to enable a Dene or Inuit community to continue traditional land-holding. Such a CLHC corresponds to no existing corporate form, and would require special legislation in order to come into existence. The legislation setting up CLHCs could in principle be either provincial or federal; but if the CLHC were to be adopted by a Dene or Inuit community, federal legislation of some sort would be necessary since the community would be an "Indian" one. The CLHC most closely resembles a "society" or a "cooperative association", but has characteristics which belong to neither of these.

The CLHC must first of all be established as a single legal person in the terms of the dominant legal system. It is a "corporation aggregate" (matched to the "aggregate person" which is the traditional community). As such, it can hold all the lands of the community as a single unit viv-a-vis outsiders.

The CLHC can hold these lands in fee simple, with all which that title entails. It can also hold more restricted tenures, such as leaseholds, grazing and hunting rights, easements, covenants, various licences, and others.

The boundaries around the lands held under these various
titles and rights can therefore be made to correspond with the boundaries of the land used and occupied by the whole community.

The CLHC can hold these lands either singly or jointly or in common with other legal persons. Thus the particular claim over a piece of land (whether as territory or as resource) which the community makes, can be precisely adjusted to the needs and desires both of the community and of other interested persons (supposing good-will on all sides). This adjustment could be quite flexible; it could include ecological and conservation requirements.

As a land-owner, the CLHC can grant leases, easements, covenants, licences, and so on to outsiders.

Furthermore, as a legal person within the dominant system, the CLHC has the power to acquire land and interests in land, and as well to alienate these.

Internally, the CLHC must have the power to assign land or the rights to use land to any members of the community corporation as the community corporation sees fit, without any lands passing out of the CLHC's control. Thus, among its membership, the CLHC should be able to maintain any relationship to the land which its members choose. The only constraints on the members' collective choice are ecological, namely the requirements of subsistence and the demands of outsiders.

Since the corporation is legally a distinct person from the natural persons of its members, one way in which the above internal land regulation might be achieved, might be for the
corporation expressly to devise the land-rights to the particu-
lar members, by means of deeds or other instruments setting
out the nature and duration of the rights and the conditions
on which those rights are held. One of the incidents of mem-
bership in the corporation would be the right to receive such
land-rights. In this way, or in equivalent ways, the rules
according to which the CLHC assigns land and the use thereof
to community members, would thus become a private system of land-
law by which the members regulate their use of land among them-
selves. Because of this, either the statute or charter estab-
lishing the CLHC as a legal entity, or the constitution of the
CLHC, or both, would have to define the relationships between
the corporation, the members, and the land held (as far as the
outside world is concerned) by the corporation. Those same
definitions would have to allow the members of the corporation
to change, by appropriate procedures, the rules by which they
held land among themselves.

The problem at this point in the enquiry looks like this.
On the one side we have a community of people, specifically
Dene or Inuit, holding land according to a particular traditional
way which is not recognized by Canadian law. On the other side,
we have a corporation, a legal entity which is recognized by
Canadian law. We are trying to match the corporation with the
community in such a way that the corporate form both protects
the community and its lands from outside pressures and allows
the members of the community among themselves to practice tradi-
tional ways of land-holding, or at least ways of land-holding
different from that of Canadian real property law. The qualification "among themselves" is essential. We are supposing that a CLHC could be set up under appropriate legislation (not in fact existing at present, but not in principle impossible), and we are asking what characteristics that legal entity must have in order to fit the characteristics of the traditional Dene of Inuit community as a land-holding entity.

This problem is different from recognizing native land-law or land-practices as law. If it is possible for Canadian courts to recognize Dene or Inuit customs of adoption as valid and to support them, it is surely possible for them to recognize Dene or Inuit customs concerning the use of land as valid at least among Dene or Inuit on "Indian" lands, and to enforce them should the occasion arise. To do so would be to recognize (or to legalize) native custom as law, and so create a sub-category of "native land law" within Canadian land law. The law of aboriginal title, at least at present, does not do this. If such native land-law were recognized, with its own rules and categories of thought, the courts would have to recognize the community as a legal entity of some sort. That legal entity would have to be recognized as a special kind, and not as a corporation in the ordinary sense. The CLHC as envisaged here supposes that native land-law is not recognized by the courts, and is being explored here as a device whereby Dene and Inuit might preserve their own ways of dealing with land in spite of non-recognition. However, the characteristics proposed here for a CLHC are relevant to considering what a native community needs in order to remain a land-
holding entity.

The problem of matching corporation with community is a dual one. On the one hand, the corporation is a legal or juristic entity within a system of rules and ideas, namely that ideal system called "the law", while the community is a perceivable group of humans living on the earth and acting together in various observable ways. When the community becomes a corporation, the phenomenal entity of the community is "epistemically correlated" or matched to the juristic entity of the corporation, and will be shaped in some measure by that correlation. By becoming a corporation, the community opens the possibility for its activities to be scrutinized by the courts of the dominant or outside society, which will interpret those activities according to its, i.e. the dominant society's, ideas. Those interpretations will then affect the community through court decisions and the sanctions which follow them. Thus the juristic epistemetic correlation or matching of community and corporation will have practical, active consequences for the community. By identifying itself with the corporation, the community will open the way to becoming shaped by the corporate form which it has adopted. Now the other part of the problem emerges. The corporation is an entity of Canadian law, while the community is an entity of Dene or Inuit culture. Not only do we have a problem of correlating a juristic entity with phenomenal activity but a problem of correlating one culture with another. We can achieve the intercultural correlation if we can ensure that the structure of the corporation matches the structure of the com-
munity, and if the courts are instructed, by the terms of the statute which established the CLHC, to follow the ways of the community in such matters as assigning land rights, ascertaining members, making decisions, and choosing officers and representatives of the community/corporation.

The juristic correlation begins when the community makes a formal act constituting itself as a corporation in terms of the dominant legal system, in order that the legal system's functionaries may be able to recognize that the community is now also a legal entity. By this act of identification, the members of the community would become the members of the corporation. But the constitution of the corporation must specify who these members are, or how they are to be ascertained. Is everyone who resides with or near the undoubted members of the community to be reckoned a member of the corporation? Is the criterion residence in a place, or relationship to persons, or an act of adhesion such as signing a covenant or purchasing a share, or a combination of these? Whatever the criteria are, they must be clearly set out so that both members and non-members and especially the courts of the dominant society can know, in a manner which suits the community, who is and who is not a member.

The CLHC must have the power to determine its own membership, that is, who its members are and how membership is to be gained or lost. Following Dene and Inuit tradition, membership would usually depend upon descent, marriage, and residence, and would include both adults and children, males and females.
If the CLHC is to match Dene and Inuit notions, the members of the corporation must be the natural persons who are the members of the community. The CLHC is thus, as I noted earlier, much more like an incorporated society or a cooperative association than a company. We now run into another problem with the idea of the corporation. In traditional Dene and Inuit ideas, no distinction is apparently made between the community and the members of the community, and the community is both small enough and so organized that any member can have an appreciable voice in shaping the decisions of the community. The community is the members, all the members together. Decision-making is by discussion and consensus. The community is an aggregate person and not an artificial person. But the corporation is an artificial person, and as such is separate from the legal personalities (whether natural or artificial) of its members. That is to say, the members of the corporation have a double role. They are persons in their own right distinct from the corporation; and they are occupants of the role of members of the corporation possessing only the powers granted to members by the founding statute and constitution of the corporation. In the instance of a company whose members are ostensibly the shareholders, the role and power of members can be reduced almost to vanishing point; and it is possible to view the corporation as a device for allowing the common activity to escape from the control of its members. Davis (1961:II:277) describes an oligarchic tendency, or process of "corporate shrinkage", as he calls it. The other side of this difference between members
in their private capacity and members in their capacity as members of the corporation, is that the corporation does not usually try to regulate the whole lives of members, and may not try to regulate them at all. The Dene or Inuit community, on the other hand, is willy-nilly a more total and life-encompassing organization, and its patterns of land-holding are part of the community's whole way of life. The problem is not unsurmountable: the constitution of the CLHC must simply provide the members a full say in deciding the affairs of the corporation, just as it grants them access to and control over the lands held by the corporation.

Now let us suppose that some members of a CLHC decided to leave the community for ever and, desiring to take some property with them, claimed some of the land owned (as far as the outside world is concerned) by the corporation. When Dene and Inuit communities were sovereign, they had the power to decide whether or not to allow such claims (which would in any event then been unthinkable), and their decisions would have been final. But the corporation is not sovereign, and the way might be open for a dissatisfied member or ex-member to appeal to the courts for a portion of land or a monetary equivalent of his interest in the corporation or its lands. The question would then arise, what interest does or should a member of the Community Land-Holding Corporation have in the lands held by the corporation. The usual answer would be that a member had no interest in the land until the corporation was dissolved. The Dene or Inuit answer would be that a person had no interest in the
land of the community unless he or she is a member of the community, and if the person ceased to be a member, any interest would likewise cease. The interest which a member of the CLHC therefore has is to use and enjoy the land of the community along with the other members, and does not include the power to take away portions of that land nor to claim monetary equivalents. This would imply that a member of the community (and so of the corporation) has the right to use the land at least in the customary way, or according to the rules adopted by the membership, and not to be unfairly discriminated against. In this way, the idea of the corporation protects the land against dissolution or dispersal by an individual member. Land, and interests in land, must be inalienable to outsiders except by the appropriate act by the corporation duly authorized by the whole membership.

A corporation aggregate cannot speak for itself, but must always do so through an individual or individuals, i.e. natural persons, empowered to speak for it. It cannot decide, but its membership in general, or else specific members, must decide for it. The constitution of the CLHC must therefore designate representatives and spokespersons, and must also set out the approved ways of deciding the affairs of the corporation.

These are standard problems for any corporation, and there are standard answers to these problems. But a CLHC encapsulating a culture different from that of the dominant society has a special dilemma. The rules for appointing and empowering representatives and for guiding affairs must on the one hand
fit the community's own way of dealing with affairs, and on the other hand not call for practices which are forbidden by the laws of the dominant society. The first horn of the dilemma is illustrated by Dene experience. To advance Dene concerns for the preservation of their land, culture, and people, the Dene have organized themselves into the Dene Nation. The Dene Nation is a society incorporated according to the laws of the Northwest Territories. These laws prescribe a particular structure of executive officers, elections, and business procedures. But the Dene who have been involved in the Dene Nation find that these procedures are uncomfortable and say that they are not really in accord with traditional Dene notions of leadership and deciding affairs. However, if the CLHC is established by legislation (and since it does not fit into existing kinds of corporations, it would have to be so established), it should not be impossible for the statute to permit alternative procedures more in accordance with Dene and Inuit ideas. The statute would need only to permit the members of the corporation to make their own by-laws setting out such procedures.

If any disputes arose between members of the CLHC concerning the use of the lands of the corporation (which has been juristically matched to the community) or the management of the corporation's affairs, and these disputes could not be resolved by community members among themselves, some member would be tempted to call upon the courts to resolve the dispute. Unless the courts were instructed by some high authority to follow community ideas (perhaps called "traditional" Dene or Inuit ideas)
to resolve the dispute, they would necessarily apply ideas from the Canadian legal tradition. (They would have to do so in order to secure their decisions from being overturned by higher courts: we are not here considering the explicit recognition of "native law".) However, since the CLHC has in any event to be established by legislation, the same instrument which creates the CLHC could set out the general rules which should govern the settlement of disputes within the corporation. Those rules should indicate that the community's notions of fair-dealing and proper procedure should prevail, at least ordinarily, and that the community context should be taken note of in deciding disputes.

Such, then, are the characteristics which the proposed CLHC should have if it is to allow the members of a Dene or Inuit community to preserve, among themselves at least, their traditional ideas of land and land-holding. Although the idea of the corporation is a recognized part of the Canadian legal tradition, the particular structure of the CLHC corresponds to none of the existing kinds of corporation currently recognized. A CLHC would have to be established either by specific legislation creating it, or under a new general statute enabling people to form CLHCs.

Something of the concerns with which a CLHC would have to deal, are shown empirically in the case of Hofer et al. v. Hofer et al., [1970] S.C.R. 958. This case concerns a Hutterite colony, and is thus not strictly within the specific problem of
the present enquiry (but see below, ch. VII, sec. A). But though the colony involved was not in fact incorporated, some other Hutterite colonies have been, and the details of the case do bear on the possibilities of a CLHC.

We should first note that in 1931, 1935, and 1938 the Manitoba legislature passed thirteen acts each incorporating a Hutterite colony under the name of "... Hutterian Mutual Corporation" (Ibid., pp. 986-7). Each act named the first members of the corporation, and provided for other persons to become members. The purposes included worshipping God and engaging in the industry of farming. The land of the colony was vested in the corporation. Then three sections of the act specifically provided that "No individual member of the corporation shall have any assignable or transferable interest in the corporation or in any of its property, real or personal," that the private property of members would become common property upon their admission to membership, and that expelled members would not be entitled to any property of the corporation. In 1948, however, the Legislature expressly repealed the latter three sections in each of the thirteen acts. Mr. Justice Pidgeon, who cites these details, does not say why these sections were repealed by the Legislature.

In 1961 the Rock Lake colony in Manitoba split and divided its assets, in accordance with Hutterite practice, and gave an appropriate portion thereof to seven members (with their families) in order to enable those seven members to start a new,
daughter colony, namely the Interlake Colony. These seven members signed among themselves Articles of Association. These Articles provided (Ibid., pp. 976-8): that the purposes of the Colony were to carry on the Christian religion, to engage in farming, and to hold such real and personal property as was necessary to these purposes; that the members of the Colony were the persons who signed the Articles; that only members and communicants of the Hutterian Brethren Church could sign the Articles; that all the property of the Colony and its members would belong to the Colony "for the common use, interest, and benefit of each and all members of the Colony, for the purposes of said Colony"; that all property owned or acquired by a person who became a member, became the property of the colony; that property could be alienated only by the board of directors; and that no person who ceased to be a member of the Colony, or was expelled from it, was in any way entitled to any Colony property, whether or not property had been conveyed by that person to the Colony; and that the Colony could not be dissolved without the consent of all the members.

However, in 1964 and 1965, four of the seven original members of the Colony, were attracted to another religious denomination, one which practiced private property; and after being remonstrated with by several ministers of the Hutterian Church, these four persons were expelled from the Church and the Colony. The four dissidents then sought a declaration that they were still members of the Colony, and an order that the
Colony be wound up and its assets divided among the seven original members. The three remaining members counterclaimed for a declaration that the dissidents were no longer members of the Colony, and for an order requiring the dissidents to turn over any property they held to the Colony. The case wound its way up the hierarchy of courts, via the Manitoba Court of Appeal, and reached the Supreme Court of Canada in 1969.

Cartwright, C.J., and Spence, J., held that the legal rights of the dissidents were to be determined by the Articles of Association, which the dissidents had signed of their own free will. The Colony (said Chief Justice Cartwright) was not a legal entity. It was the collective name given to the seven members (there being no other members until after the action had been commenced in the courts). The dissidents had breached the Articles, and by the Articles had lost all right to their property. The Chief Justice held that the Colony was not a church, but a commercial undertaking, and should in law be so treated.

Justices Ritchie, Martland, and Judson held that by the Colony's own Articles, membership in the Hutterian Brethren Church was prerequisite to membership in the Colony. The Church's decision to expel the dissidents thereby made them ineligible for continued membership in the Colony. Although the lands of the Colony were legally held in trust by three members of the Rock Island Colony for the three non-dissident members of the Interlake Colony who were in turn described by the Articles
as holding the lands as joint tenants, nevertheless the lands of the Colony were "not held in trust for the individual members of the Interlake Colony but for the Colony as a whole and... the individual members have no beneficial interest whatsoever in the land upon which their Colony is situated." (p. 967) That was in conformity with the principles of the Hutterian religion and with the Articles of Association. The Colony was not a commercial enterprise, and was "merely an arm of the Church" (p. 969). The dissidents were validly expelled from the Colony according to the conditions in the Articles. Mr. Justice Ritchie also said that the Interlake Colony was not a partnership in the accepted legal meaning.

Hall, J., agreed with Ritchie's judgment, and expressly noted that the dissidents had signed the Articles of their own free will.

Mr. Justice Pidgeon dissented from the majority, and held that the Colony was not a church but a commercial enterprise, and that the severity of the loss of property to the dissidents was inconsistent with freedom of religion. He also considered that the repeal by the Manitoba Legislature of the communal property sections in the thirteen acts of incorporation mentioned above was evidence that these sections were contrary to public policy.

So the dissidents lost, the Colony preserved its property, and the remaining Hutterites continued to follow their own ideas of land-holding within the Colony. The Colony was not a cor-
poration, but something of the same result was attained by means of the Articles of Association. The Supreme Court in essence upheld these Articles, and found that the dissidents, having signed them of their own free will, were bound by the Articles; and that the other members involved had not broken the Articles. It helped, however, that the property doctrines were those of a church, and that membership in the church was necessary to membership in the Colony. Though the land was not in fact held in legal title by the Colony, but by three other individuals in trust for members of the Colony, this did not give the members any beneficial interest in the land.

From this story, we learn the importance of context (i.e. in this case, the religion), the importance of a constitution (the Articles), the importance of contract (again the Articles), the problem of dissidence, and something of the attitude of the courts. All of these are relevant to the concerns of the CLHC. As far as Dene and Inuit CLHCs might be concerned, we could wonder if ethnicity might play the role of religion in supporting the enterprise. Interestingly enough, furthermore, the Interlake Colony, although not a legal entity in the view of the court, gained results similar to those which (I think) it would probably have got had it been incorporated with provisions the same as those in the Articles.
Probable Consequences of Becoming a Community Land-Holding Corporation

Supposing, therefore, that a Dene or Inuit community formed itself into a community land-holding corporation as proposed above, and was thereby able to hold on to its land in a more or less traditional manner, what would be likely to happen to the community, and in particular what changes would be likely to occur in the traditional Dene and Inuit ideas of land and land-tenure?

Perhaps the first effect has already been indicated. In setting up the CLHC there must be a written instrument which sets out who the members are, what their duties and privileges are, who the representatives of the corporation are, how the corporation makes decisions, and what the powers of the corporation are. This requires that the community make its rules explicit and definite, and it also may, by "fixing" them, make the community somewhat less flexible in its responses. By making the rules explicit, furthermore, the community makes itself aware of its rules, and so also brings the possibility of alternatives into awareness. The thrust towards explicitness thus both draws boundaries, as it were, in people's minds, and brings into awareness the previously out-of-awareness, thus changing the quality of the people's consciousness.

Another effect is the nature of the CLHC as a resource
development corporation. Because it holds rights to land, it controls actual and potential resources. That is why it would be incorporated in the first place. There will be pressures, from both inside and outside sources, to "develop" those resources. The corporation will certainly have to assess the implications of such development, and to decide its relationship to development. It might choose to engage in resource-development itself, or to commission other persons to do so on its behalf. Such a turning of the corporation's attention would turn it away from, in some degree, the subsistence concerns which originated the traditional idea of land and land-tenure whose continuance the CLHC is designed to permit.

This change of concern would be, must be, increased if the CLHC has to pay taxes. Indeed, the demands of taxation are a major element in the political ecology of the corporation. Since the CLHC is not sovereign, but is a proprietor within a larger legal system, it is subject to all the laws and taxes imposed by the sovereign, unless the CLHC has been granted special immunities and exceptions.²⁹

To meet taxes, the CLHC must engage in money-generating activities vis-à-vis the larger society. Whatever these might be, these would change the ecological orientation of the community from production for subsistence for its members to production for sale on the wider market. The CLHC would then take on itself some of the characteristics of a producers' coöperative (and would have to take into account the dominant
society's laws about coöperatives).

Such an orientation is not completely unfamiliar already to either Dene or Inuit. They know about the fur-trade and wage-labour, and cooperatives have been a feature of Northern life since about 1959, when the Northwest Territorial Council passed legislation enabling coöperatives to be incorporated. Most of these coöperatives, as of 1976 at least, were Inuit. As of December 31, 1974, there were 42 active coöperatives in the N.W.T., employing in total 300 persons full-time and 600 part-time. A 1975 observer wrote that the coöperatives as a group were the largest employers of Inuit, and estimated that within a very few years they would also be the largest employers of the Indians in the N.W.T. These coöperatives are oriented towards sales in southern markets. They act as training schools in the ways of the dominant society. (Paterson 1976:51, 59, 61, 62-3, 65-67)

The Dene Nation has recently (1983) set up the Denendeh Development Corporation, which has joined with the Metis Development Corporation to form Dehcho Drilling Ltd., which in turn has joined with Esso Resources in a company called Shehtah Drilling Ltd. Shehtah Drilling is exploring and exploiting the Norman Wells oil deposits. (Project North, Second Level Newsletter, 6 December 1983, item 11 (pp. 11-14).)

The Denendeh Development Corporation is established as a non-profit corporation. Any money made by it will be used for charitable purposes, such as community programs, which would
be tax-free. Reinvesting of profits into another profit-making venture would require taxes to be paid.

These corporations (which are not cooperatives) are not, of course, CLHCs as proposed in the present enquiry. They do illustrate problems which a CLHC might have to face.

The existence of the CLHC as a legal property-holder, would make the CLHC a prize for political and economic struggle. Its existence would therefore intensify such struggle as may already exist within the community; and would also draw intervenors from outside, who would seek to profit by supporting one community faction against another. The intensified struggle would in turn push towards the break-up of the community and the dispersal of its property.

This push towards breaking up the community would need to be countered by the existence of a strong and solidary community. The corporation itself might, if properly constituted, indeed provide such strength and solidarity. Strength and solidarity (which are formed in competition with other communities and societies) have not, however, been characteristic of either Dene or Inuit traditions. There has been a pragmatic sense of interdependence and reciprocity between community members, expressed as an ideal of sharing and hospitality. It remains to be seen whether this is strong enough to deal with tendencies towards dispersal as a result of intensified power struggles, or whether new institutions will have to be invented.
Another possibility, towards which the Alaska Native Claims Settlement and the Nunavut Proposal point, is the federation of particular CLHCs into larger units. Such federations, with their combined resources, might exercise a good deal of political and economic power.

Baker (1982:48) has a quotation which nicely illustrates the possible results. The quotation is from an orientation speech given by management to pipe-line workers in Alaska:

'Now, then, you may come upon a small Indian village of twelve or fifteen families somewhere up along the Yukon. You are to treat these people with respect. When you see them you may wonder why you are to treat them with respect. Well, we can give you three very good reasons. First, because they are people. Second, because they were here first and they owned the land before we did. Third, because their Native Land Claims Corporations have got the money to hire the best legal talent in the United States.'

At this point, however, the CLHC has ceased to be a device for preserving traditional ideas of land and land-tenure, and is becoming manifest as a political entity. But then, in reality, so it has been from the beginning.
D

The CLHC and Aboriginal Rights

As envisaged so far in this enquiry, the CLHC is a device for permitting a group of people to live, among themselves, according to a land-law devised by themselves and different from the land-law outside the community. It is not, thus far, a device for ensuring aboriginal rights.

But the question may now be asked, In what way might the CLHC be used to preserve aboriginal rights? What changes would need to be made in it to allow the people to exercise aboriginal rights, including the claims of aboriginal title, which are, as we noted in chapter IV, section D, claims made by the subordinate society against the dominant society and recognized by the law of the dominant society?

The CLHC, as I have described it so far, is like every other (legal) person, subject to the "administrative" constraints of zoning and planning regulations, labour laws, and so on of both provincial and federal jurisdictions. These latter sometimes conflict with aboriginal rights, as, for example, fishing and hunting regulations sometimes conflict with aboriginal rights to hunt for subsistence (e.g. Cumming and Mickenberg 1972: 207-226). The CLHC has to be specially empowered (presumably by agreement among the people concerned and by appropriate federal legislation) to hold and exercise those rights against the rest of the world. But if it were so empowered, resulting
in a Community Land-Holding Corporation plus aboriginal rights (let's abbreviate this as "CLHCplus"), it should be able to preserve and exercise those rights quite effectively. Remember that the CLHC has the power to decide who its members are, and that the membership as a whole has the power to decide, according to its constitution, how its lands are to be disposed or even alienated. No one from outside can "buy-in" or otherwise get in and gain control without the consent of the whole membership, unless the membership adopts rules which permit outsiders to get in. (That differentiates the CLHC from a shareholding corporation, whose members do have (variable) powers to alienate their shares to outsiders without the necessary consent of their members, option clauses notwithstanding.)

If a CLHC can be empowered to hold aboriginal rights, then it can likewise be granted tax exemptions connected with these. Or perhaps these rights and exemptions belong to the community, which authorizes the CLHC to hold and exercise them on its behalf. The instrument granting or recognizing tax exemptions might be, perhaps, a federal charter which also recognizes the CLHCplus as a legal entity. At this point, however, we are again leaving ideas of land and land-tenure behind, and are moving into the realm of Canadian constitutional law.
Notes to Chapter VI

1 These dates and facts are taken from McCullum and McCullum (n.d.), which contains both the Dene Declaration and the proposed agreement. The Dene Declaration is (skeptically) considered in relation to Home Rule movements (in Iceland, Greenland, and the Faeroes) by Patterson (1976:146-152).

2 See Kupsch (1976) for the text of the Nunavut Proposal; a memorandum on same by Professor Norman Ward, Dept. of Economics and Political Science, Univ. of Saskatchewan; and debates of the N.W.T. Council of May 26 & 28, 1976, discussing the Nunavut Proposal. The Proposal is also discussed by Patterson (1976:152-153).

3 A history, up to 1897, of the corporation as a social and legal type of association in British and American experience is provided by Davis (1961). Chapter VII specifically describes the legal conception of corporations, and the emergence of that conception.

4 Much more similar to municipalities, than to the provinces as is suggested by the comparison of provincial powers and the powers of Indian bands under the Indian Act, given by Hawley in Asch 1984:121-124. The powers listed by Hawley as Band council powers are all powers equivalent to the powers of municipal councils, perhaps even sec. 38(1), surrenders. But, in support of Hawley's parallels, the powers of municipal corporations are pro-
vincial powers delegated by the provincial legislature to municipal corporations.

I apply here a distinction paralleling that made by F.S.C. Northrop (1959) between "concepts by intuition" and "concepts by postulation", but I am not using quite the same language as he.

Northrop's (1959) term.

According to Rene Fumoleau, in a talk given to the Vancouver, B.C., Project North Support Group on 1 March 1984.

To put it in the language of Basil Bernstein (1973:166–175, and passim), there will be a shift away from a "restricted code" towards an "elaborated code". The thrust of the law itself is necessarily to make one explicit and detailed, that is, "elaborated" in Bernstein's meaning, about social arrangements.

Here come the considerations whether the CLHC should be incorporated as a non-profit corporation (with relief from various tax burdens) or as a profit corporation. There is also the possibility that a Native group, especially an Indian band on a reserve, becoming a CLHC (either by charter or by special statute?) might be able to continue as a CLHC the tax exemptions it had enjoyed as a band.

VII

CONCLUDING ASSESSMENTS

A

The Problem and Its Solution

The problem of the present enquiry was to compare the ideas of land and land-tenure existing among the Dene and Inuit of the Northwest Territories, on the one hand, with the ideas of land and land-tenure in Canadian law, on the other, and to find a way, if a way exists, of using the latter to defend the former. In the power situation which exists between the two sides to the comparison, the Canadian law being the law of the dominant society, and the Dene and Inuit being subordinate, defending Dene and Inuit ideas and practices by means of Canadian ideas and practices, might be called "reconciling" the two systems.

That enquiry is now concluded. The comparison has been made, and a possible way of "reconciling" the two land-systems has been found. That way is to encapsulate the Dene or Inuit community as a community land-holding corporation within the dominant Canadian legal system. Given the very different characters of the two systems, such a CLHC is the only way, short of sovereignty or some form of autonomous jurisdiction, in which the traditional Dene or Inuit systems can be preserved within the Canadian legal system. The other alternative, which is indeed preferred by both Dene and Inuit, namely that of self-
rule, maintains a separate polity and legal system either beside or within the Canadian federal polity.

I have arrived at this conclusion by describing, analyzing, and comparing (in that order) the main characteristics of the two systems of land-tenure, and deriving from this juxtaposition the possibilities for "reconciliation" or mutual adaptation. This study was a study of social possibilities. Two traditions, reduced into comparable sets of ideas, were compared. (Indeed, not whole traditions were compared, but only those parts of traditions concerned with land and the control of land.) So posed, the enquiry has its own inherent logic, and it was that logic which carried the argument.

When I compare the two sets of ideas about land and land-tenure, I find them to be incommensurable. It is not possible, considering the ideas of land and land-tenure alone, to fit one system to the other. In other words, if any individual tries to act out one set of ideas among persons acting on the basis of the other set, he will simply get into trouble and his actions will be frustrated. If he tries to act out both sets simultaneously, his actions will contradict one another, and he will achieve nothing to any purpose, unless he can balance between the two, following the appropriate one in the appropriate circumstances (which is, so far, not to follow them simultaneously). (Such frustrations occur when anyone tries to follow any ideas — i.e., programs for action — which are logically contradictory to other ideas held either by oneself or by one's fellow actors.)
But if I expand my sights a little and consider the notion of person, and in particular the notion of corporation, then the irreconcilability of the two systems does not seem so absolute. True, it remains impossible for actors to follow both systems at once (though not impossible for them to oscillate between the systems). But it is possible, by using the device of the corporation, to encapsulate the Dene and Inuit system within the Canadian system such that Dene and Inuit people could practice their traditional system among themselves but follow the Canadian system between themselves collectively and Canadian outsiders. Thus the traditional system would be followed on some occasions and the Canadian system on other occasions; and because the occasions are separated, the contradictions between the two systems are evaded.

The logic involved is perhaps not purely deductive. The idea of the CLHC depends not merely on juxtaposing the two systems and including the notion of person in the descriptions, but also, and necessarily, on perceiving an analogy between the two systems at one point, namely that of the community among the Dene and Inuit and that of the corporation in Canadian law. Once the analogy is perceived, however, the rest (I think) follows.

Since the possibility of the CLHC is derived from the nature of the two systems as systems of ideas for guiding action, then any person who is reasonably well acquainted with both systems should, at least when his or her attention is pointed in the right direction, arrive at a similar conclusion.
Furthermore, since the two systems described are actual systems, and the ideas discerned presumably exist as actual dispositions or motives in the minds of actors incarnating these systems, there should develop, as the encounter between the Dene and Inuit traditional system and the Canadian system intensifies, some awareness of this possibility among the actors themselves, and therefore some suggestions should emerge moving towards community land-holding corporations.

Now, when we look at the proposals actually made by the Dene and the Inuit, especially the Nunavut proposals, we do indeed find such a movement. However, it is difficult to separate the logical effects of the content of the two systems in contact, from the pressures within the dominant system to organize and assimilate the natives. Thus in the 1950's and 1960's cooperatives were introduced into the North, especially among the Inuit, to provide an income for the natives and promote their assimilation. The 1971 Alaska Native Claims Settlement Act, of which both Dene and Inuit in Canada were well aware, provided for regional and village corporations. The Nunavut proposal of 1976 partly (but only partly) follows the Alaskan example: the differences give the Canadian Inuit greater power to protect their interest in the land and to preserve their traditional culture.

The corporation idea is not without its attractiveness to some Dene, at least. Or perhaps we should say, the idea of community control, perhaps in the form of a corporation.

In March 1977, George Erasmus of the Dene Nation appeared
before the National Energy Board to oppose pipelines in the Mackenzie Valley before land claims were settled. He wanted the Dene to develop a self-contained economy, with both economic and political control by the Dene. At one point he said that the Dene wanted to set up relatively self-contained communities like the Hutterite colonies in southern Canada (Peacock 1977:165).

Hutterite colonies are large farms, owning or leasing the land. In Alberta, they average about 7200 acres per colony. Colonies exist in Alberta, Saskatchewan, and Manitoba; and in Montana, North and South Dakota, and Minnesota. Each Hutterite colony practices communal tenure, and is incorporated. The colony is the land-holding unit, and its rights over its property are protected by the charter granted by the federal government to the Hutterites in 1951, by the articles of incorporation of each colony, and by the baptismal vow of the individual member. The three Hutterite divisions or Leut are each defined by the federal charter as a church, and each elects three members to a nine-member board of directors of the Hutterian Brethren Church. Each Leut has disciplinary powers over its members. (Hostetler and Huntington 1967:97; for background also see Peters 1970).

By means of the legal entity of the corporation, each Hutterite colony encapsulates a world-view and a conception of land and land-tenure different from the majority Canadian view. Still, the Hutterites are a variant of Western civilization, and land is viewed chiefly as a resource for production.
This production is primarily to support the colony; production for profit \textit{qua} profit is contrary to Hutterite values. (Hostetler and Huntington 1967:6, 12, 37, 40; Bennett 1976: 247.)

The community corporation, and the corporate community, are both old ideas in Western civilization. They have precedents at least as far back as the monastery and the manor, and are a theme running to the present day. In view of this theme is it possible that our perceptions of Dene and Inuit land-tenure as "tribal-communal" have been directed by this precedent, and that the idea of the CLHC as a means of adaptation for the Dene and Inuit has been likewise directed?

To the first part of this question, the answer is, No. The method outlined at the beginning of this enquiry, namely, the starting each description with a consideration of the cultural ecosystem of the group, moving thence through the idea of land to the pattern of land-tenure, prevents imposing an idea of communal tenure where that idea is not already present among the people whose ways are being described. The conclusion that the Dene and Inuit land-systems fall into the class labelled "tribal" (Type A) comes after the facts and not before them.

On the other hand, the answer to the second part of the question is, Certainly so on my part, and quite possibly so on the part of the Dene and Inuit themselves. I certainly came to this enquiry with a knowledge of the communitarian tradition of Western civilization and an awareness of the idea of the
corporation as a device for holding property in common. It is also quite likely, as George Erasmus' reference to the Hutterites suggests, that the Dene and Inuit leadership have heard something about the Western communitarian tradition, and may even have been guided towards it by various advisers. This, if it happened, would be added to the examples provided by the Alaska Native Claims Settlement, the cooperatives organized in the north, and indeed the Christian tradition itself. But for the Dene and Inuit the logic of cultural survival pushes them anyway to favour Home Rule and/or community corporations; and the possibility of the CLHC is really there in the Common Law. An awareness of the Western communitarian tradition certainly facilitates perceiving the possibility of the CLHC; but that possibility is there independent of that tradition and that awareness.

This enquiry has been a study of social possibilities. But to discern a possibility is not necessarily to discern an actuality. Is the CLHC a real possibility? A first answer would say, the idea of the CLHC is there when the two traditions are juxtaposed and compared as the present enquiry has done. A second answer would say, there are indications (just reviewed) that some Dene and Inuit themselves are finding their way to the idea of the CLHC. But suppose the idea of the CLHC were actually tried out: would it work, or would the attempted CLHC's founder? A first answer to this question would be, that before the question can be answered, the idea must be tried out. A second answer would be, to look at equivalent
attempts elsewhere in the world and discover what has happened. The results would be interesting, whether encouraging or cautioning. I did, indeed, note the Menomini story and the story of the Alaska Native Claims Settlement, as cautionary stories. But the results would have to be applied to the Dene or Inuit only after taking into account the differences between the people being described and their circumstances, on the one hand, and the Dene and the Inuit and their circumstances (including Canadian society), on the other. And whatever the results, they would not change the fact that given the traditional Dene and Inuit ideas of land and land-tenure and the ideas of land and land-tenure in Canadian law, including the ideas of person and of corporation, the community land-holding corporation exists as a possibility generated by the meeting of the two traditions. (And let me repeat: the CLHC is not envisaged to be a share-holding corporation unless the community so chooses.)

But what about this meeting of traditions? Granted that the Dene and Inuit traditional ideas of land and land-tenure are different from the ideas of land and land-tenure in Canadian law. What have been the actual consequences of these differences? Until the acceleration of resource exploration and exploitation in the late 1960's, the differences seem to have made little practical difference. The Dene and Inuit have been able to carry on their traditional system without significant change in their ideas of land and land-holding, except for the registration of trap-lines, and Canadians left them otherwise to enjoy their lands. But when resource exploration and ex-
ploitation were intensified, the Dene and Inuit were rather shunted aside, except insofar as they could call upon the ideas of aboriginal rights in Canadian law, and upon Canadians' own ideas of fair dealing. If anything, Dene and Inuit ideas of land and land-tenure probably let Canadians enter Dene and Inuit lands without objections from the inhabitants, at least until the newcomers started to damage the flora and fauna to the detriment of the Dene and Inuit. Has Canadian law given in at all to native ideas? No. Have traders, churchmen, and administrators in the north given in at all, that is, adopted in some degree within the northern sphere of action, the native ideas of land and land-tenure? No. A few churchmen, such as Rene Fumoleau, have tried to understand them.

When, where, and how, has there developed an awareness of the difference in ideas of land and ownership and what has this awareness meant? The answer to this question seems to be that apart from a few ethnographers and churchmen, "Whites" have been neither aware of the differences nor concerned to find them out, much less take them into account, until the advent of the Berger Commission. (We should note the judgment of Mr. Justice Morrow in Re Paulette et al. and Registrar of Titles (No. 2) (1973), 42 D.L.R. (3d) 8, which was given shortly prior to the Berger hearings and was part of the wider action which gave rise to the Commission.) The Berger Commission generated some awareness, and some sympathy for Dene and Inuit ideas, as well as (perhaps) some overidealization of them by ecologically minded Whites. In practical terms, that means
that Dene and Inuit can find sympathetic allies among Whites. The awareness of the difference by Dene and Inuit seems to arise (naturally enough) in connection with land claims. To make land claims "stick" in White terms, the natives must establish "use and occupancy". As those natives who are bicultural (at least in some degree) gather data to prove use and occupancy, they also become more aware of the difference between them and Whites, as well as of points of connection between themselves and Whites. The Berger Commission hearings accelerated this awareness. In practical terms, this awareness fuels the claims for Denendeh and Nunavut — claims in essence for some form of Home Rule or special province-like status, wherein traditional ideas of land, land-tenure, and social values can be maintained.

Do the records of the treaty negotiations and the Berger inquiry reveal such awareness, and among which participants? Fumoleau's ([1973]) history of the treaty negotiations reveals no such awareness of the differences, between ideas of land and land-tenure, on either side. The Berger hearings reveal awareness of these differences, in varying degrees, among Dene and Inuit witnesses, among many of their White supporters, and among members of the Commission itself. Nobody else really cared. Did such awareness have any bearing on the negotiations or deliberations? Since it didn't exist at the time of the treaty negotiations, awareness of the differences between ideas of land and land-tenure had no bearing on the negotiations.
With respect to the deliberations of the Commission, the awareness arose out of the hearings and of the preparations for the hearings and is expressed in Berger's report (1977). But Berger himself was already sensitized to these issues, having been counsel for the Nishga.

The possibility of the community land-holding corporation remains, therefore, as far as the Dene and Inuit of the N.W.T. are concerned, as of 1984, largely unrealized. It is a second-best alternative to Denendeh and Nunavut, and may (or may not) be realized if prospects for the realization of these two proposals fade.

Perhaps one more thing is worth noting. The CLHC not only allows the "tribal" (Type A) system of the Dene and Inuit to be fitted into the "proprietorial" (Type C) Canadian system of land-tenure, but also allows any system at all to be fitted into any proprietorial system which recognizes corporations as legal persons. In a sense, the internal structure of the Dene or Inuit system is irrelevant to the solution. Any community at all can be matched to a corporation as a legal entity, and the rules and practices of the community made into the internal rules of the corporation. The chief problem is whether the particular sovereign's rules permit the corporation (which is an entity subordinate to the sovereign) to have the particular rules which the particular community desires. (Since Canadian law allows such groups as the Hutterites to exist, there seems no reason to think that it would not allow Dene or Inuit communities to follow a similar option.) The idea of the commun-
ity land-holding corporation thus points beyond the problem of the present enquiry to a more general way of organizing differences.
B

Methodological Assessment

Given the particular problem, and the particular kind of possibilities therefore being explored, the method chosen seems both strong and adequate. But as a method for the study of social possibilities generally, it is nonetheless limited. It can discover the logical possibilities inherent in those aspects of the situation which are analyzed, and no more. It cannot tell us, by itself, how the situation might be transformed by something new from outside: that new thing must first be made known to us. It cannot tell us of the possibilities of unanalyzed aspects of the situation: we must first analyze them. And quite deliberately the method here used eschewed the suggestions which comparative material would have given, and instead focussed on the logic of the particular situation being examined. I made "mental models" of the leading ideas of land and land-tenure of the relevant societies, and worked from those. Since the problem was to find a way of "reconciling" those ideas, this method was appropriate. Ironically, the clue to reconciliation came not from the ideas of land or of land-tenure as such, but from the idea of legal personality. This latter idea upholds not only laws relating to land but all laws in the legal order.

This particular method's elegance and simplicity depends on its reduction of context. The problem was stripped to its essentials, and only these were (in principle) explored. Some
context still had to be admitted. The history of the encounter between Dene and Inuit and Canadian society and its effects on land-use and land-holding had to be sketched. They were also part of the ecological context which had been from the outset identified as methodologically necessary. The Denendeh and Nunavut proposals had to be included, as showing what the CLHC is not. So likewise the stories of the Menomini Termination and of the Alaska Native Claims Settlement underlined what the CLHC must not become. Without those stories, one's imagination might not take seriously the structure of the CLHC that was logically worked out from the requirement that the corporation be such that traditional Dene and Inuit ideas and practices can be preserved.

The logic of the study has four stages. In the first stage, corresponding to chapters I and II, certain decisions were made about method and about definitions of important framing concepts such as "land", "land-tenure", "property", "ownership", and "person". In the second stage, corresponding to chapters III and IV, particular materials were inspected and the principles and categories implicit in these materials were drawn out from the matrix of particulars; or in other words, the structural form was inductively abstracted. (The chapters present the results of this operation.) In the third stage, corresponding to chapter V, the two structural forms were compared and analogies of form were sought between them. One such (and only one) was discovered, namely that between community and corporation. Finally, in stage four, correspond-
ing to chapter VI, the implications of the analogy, guided by
the overall problem, were deductively or analytically worked
out. In this way, the solution found was set out and demon-
strated as at least plausible given the nature of the trad-
itons involved.

That is as far as the particular method can take us.
To go further, we must widen our horizons and embark on other
enquiries. These other enquiries pick up the comparative and
contextual perspectives carefully and deliberately limited at
the outset of the enquiry. Two such widenings jump immediate-
ly to mind.

The first such widening is to look not merely at the en-
counter of Dene and Inuit land-systems with Canadian law, but
at the entire encounter between the two cultures. This is
still an idiographic study, but the situation being described
would be, prima facie at least, more complex. The overall
structure might nevertheless prove still to be quite simple;
and the possibilities open to the people might turn out to be
quite wide, or they might turn out to be very narrow indeed.
In this locally wider view, the CLHC might prove to be a real
option or it might not.

The second possible widening is to look at relevant par-
allel phenomena, both similar and different, in other parts of
the world. Having dis-entangled the CLHC as an option for "re-
conciling" "tribal" (Type A) with "proprietary" (Type C) land-
tenures in one particular place, one could then use this idea
as a topic for investigation elsewhere, and would look at cor-
porations, community corporations, communitarian endeavours, agrarian communes, and community development, for example, both in situations of culture-contact, and in economies generally. From these various studies one might then generate hypotheses about CLHC's and parallel phenomena.\(^2\)

This second widening would be both idiographic and nomothetic. It would still be necessary to establish the particular facts and particular structures for each particular instance before instances could be compared either to test or to generate comparative hypotheses about general tendencies or laws of social action. Once two or three specific instances had been analyzed, however, the interplay between particular facts and general hypotheses could begin.

This second widening could focus on actual happenings or it could attempt to assess social possibilities as well. If it did the latter, the kind of method and logic illustrated by the present enquiry would be used within the widened investigation.

In section C of chapter one, I stated a methodological principle of considerable importance, namely, that before societies could properly be compared in order thereby to derive general propositions about human actions, societies, or cultures, the particular facts of each society must be ascertained. This is to say that particular structures must be at least identified and outlined before the general ones can be considered sufficiently established and proved. (In practice, the general and the particular are discovered together.) It does
not mean that single instances cannot be used to generate hypotheses; but it does mean that the truth of a general hypothesis depends upon the independently established truths of relevant particular facts. The present enquiry has unearthed nothing to contradict this methodological principle.

For instance, the tripartite classification of land-tenures given in chapter II, arises from the descriptions of particular kinds of agrarian tenures given by Liversage (1945). These particular facts suggest a general model of the possible kinds of land-tenure and of the directions of transformations of one system into another. We can set up "pure types", and then mentally try to change one type into another: what kind of changes must be made, for instance, to get from Type A ("tribal") to Type C ("proprietary")? Then we can ask, what kind of changes must not be made if, for instance, Type A is not to change into Type C, and (supposing the types to have been precisely enough defined, which they were not) we could have made predictions about the reconcilability of Type A with Type C, and then have tested these predictions against the Dene-Inuit-Canadian encounter. But the truth of the tripartite classification as a general theory would still depend on its fitting particular facts about specific societies.

I did not use the tripartite classification to make predictions, however, because I did not then discern how to do so, nor does the classification yet allow me to do so. It needs more work. For the particular problem of this enquiry, however, it was not necessary to do so. Hence I have applied the tri-
partite classification of land-tenures merely to suggest that the particular encounter here discussed is an instance of a general class; but this application is after the fact (or along with the fact) and not before the fact by way of prediction. Before the prediction (if I had made one) could be tested, I would in any event have had to establish the particular facts of the encounter. The problem required only that I establish the particular facts, and not that I develop a general hypothesis.

However, now that the particular facts have been discovered and analyzed, we can see that they are consistent with the tripartite classification of land-tenures, and they give particular empirical content to the types distinguished. We can also propose that Types A and C are fundamentally irreconcilable except by the 'dodge' of a community land-holding corporation which encapsulates A within C. So much universality the present analysis of a particular encounter allows us to anticipate.
Implications for Anthropology

Finally, let us ask what contributions the present enquiry has made to anthropology. In summary, they are as follows:

(1) A method has been proposed and demonstrated whereby land-tenure systems very different in kind can be compared and their guiding principles also compared without the categories of one system being imposed on the other. (chapters I, III, IV, V)

(2) The approach of cultural ecology, understood both in a broad sense and in the sense particularly associated with the work of Julian Steward, has been shown to be useful in comparing systems of land-tenure. (chapters III, IV, V)

(3) A tripartite classification of land-holding systems has been discovered and proposed. (chapter III)

(4) Crocombe's classification of land-rights has been found useful in comparing both a simple and a complex property system. (chapters II, III, IV)

(5) A method for the study of a particular kind of social possibility has been demonstrated and something of its logic analyzed. (whole enquiry, and especially chapters I and VII)

(6) A case-study of a particular encounter between different ideas of land and land-tenure has been presented. (chapters I, III, IV, VI)

(7) The notion of the Community Land-Holding Corporation, as a means for "reconciling" Type A and Type C systems of land-
holding, has been clearly set out.

(8) That the idea of "person" (both moral and legal) in land-tenure is important, has been shown.

(9) That anthropological perspectives can be useful in assessing social possibilities, has been demonstrated.
Notes to Chapter VII

1 This question, and those which follow it, were suggested to me by Professor M. Kew of the Dept. of Anthropology and Sociology, University of British Columbia.

2 One might also note such things as Radcliffe-Brown's (1952:34-35) extension of the ideas of "corporation" and "estate" to describe the Australian Kariera local group as a corporation having an estate combining incidents of both ownership and dominion (sovereignty) over its territory. A footnote to the present enquiry, such a conception might well prove — and probably would — important in a comparative study of several systems. I can also see the approach of the present enquiry, and its idea of the CLHC, having applicability to the encounter of Aboriginal communities with the Common Law in Australia.
LIST OF SOURCES

Books, Articles, and Pamphlets

ALLOTT, A. N.

ALLOTT, A. N., EPSTEIN, A. L., and GLUCKMAN, M.

ASCH, Michael
1984 Home and Native Land: Aboriginal Rights and the Canadian Constitution, Toronto: Methuen.

ATWOOD, Margaret

BAILEY, F. G.

BAKER, David

BALIKCI, Asen

BARCLAY, Harold B.
BARLOWE, Raleigh

BASTIDE, Roger

BEAGLEHOLE, Ernest

BELLAN, Ruben C.

BENNETT, John W.

BERGER, Thomas R.
1982 Fragile Freedoms: Human Rights and Dissent in Canada, Toronto and Vancouver: Clarke, Irwin and Co. Ltd.

BERNSTEIN, Basil

BERTON, Pierre

BIEBUYCK, Daniel P.

BLISHEN, Bernard R., JONES, Frank E., NAEGELE, Kaspar D., and PORTER, John, eds.

BOHANNAN, Paul
BRINKMANN, Carl, et al.

BRITISH COLUMBIA LEGISLATIVE ASSEMBLY, SELECT STANDING COMMITTEE ON AGRICULTURE

BRODY, Hugh

CAMU, Pierre, WEEKS, E.P., and SAMETZ, Z.W.
1965 Economic Geography of Canada, Toronto; Macmillan.

CAPPANNARI, Stephen C.

CARTOGRAPHIC DEPARTMENT OF THE CLARENDON PRESS

CHESHIRE, G. C.

CJL FOUNDATION
1982 "Denendeh, the Dene Struggle for a Pluralist Province," CJL Foundation Political Service Bulletin, Toronto: CJL Foundation. (Pamphlet)

CLAWSON, Marion

COHEN, Yehudi A., ed.

COTTRELL, Fred

CREIGHTON, Donald
1956 The Empire of the St. Lawrence, Toronto: Macmillan. (Orig. publ. 1937.)
1972 Towards the Discovery of Canada: Selected Essays, Toronto: Macmillan.
CROCOMBE, Ron

CUMMING, Peter A., and MICKENBERG, Neil H., eds.

DAVIS, John P.
1961 Corporations, New York: Capricorn Books. (Orig. publ. 1904.)

de SMITH, S. A.

DOBYS, Henry F., DOUGHTY, Paul L., and LASSWELL, Harold D., eds.

DOHRENWEND, Bruce P., and SMITH, Robert J.


DRIVER, Harold E.

DURKHEIM, Emile

EASTERBROOK, W. T., and WATKINS, M. H., eds.
1967 Approaches to Canadian Economic History, Toronto: McClelland and Stewart.

ECCLES, W. J.
1969 The Canadian Frontier, 1534-1760, Hinsdale (Ill.): The Dryden Press.

EHRLICH, J. W., ed.
ELLIOTT, John

FIRTH, Raymond

FLOULD, Jean

FORTES, M., and EVANS-PRITCHARD, E. E., Eds.
1940 African Political Systems, London: Oxford University

FOWKE, Vernon C.
1957 The National Policy and the Wheat Economy, Toronto: University of Toronto Press. (Repr. 1973.)

FUMOLEAU, Rene
[1973] As Long as This Land Shall Last, Toronto: McClelland and Stewart Ltd., n.d.

GALL, Gerald L.

GEERTZ, Clifford

GINSBERG, M.
1934 Sociology, London: Home University Library.

GLUCKMAN, Max

GUÉDON, Marie-Francoise
GUTSTEIN, Donald
1975 Vancouver Ltd., Toronto: James Lorimer.

HALL, Edward T.

HALLOWELL, A. Irving

HALSBURY

HAMILTON, Walton H., and TILL, Irene

HARDIN, Herschel

HARWOOD, Michael

HAWTHORN, Harry B., ed.
1966- A Survey of the Contemporary Indians of Canada:

HELM, June

HELM, June, ed.

HENRY, Jules
HOEBEL, E. Adamson

HOHfeld, Wesley Newcomb

HOOKER, M. B.

HORWOOD, J. V.
1966 British Columbia: An Introduction to Geographic Studies, Toronto: McClelland and Stewart Limited

HOSTETLER, John A., and HUNTINGTON, Gertrude Enders

HYAMS, Edward

INDIAN CLAIMS BIBLIOGRAPHIES

INUIT LAND USE AND OCCUPANCY PROJECT

JENNESS, Diamond

KNIGHT, Rolf

KROEBER, A. L.

KUPSCH, W. O., ed.
LAUX, Frederick A.  
1973 The Administrative Process: Cases, Notes, and Other Materials, 2nd ed., Edmonton: Faculty of Law, University of Alberta.

LIVERSAGE, V.  

LOWIE, Robert H.  

LUCAS, A. R., ed.  
1970 Cases and Materials on Natural Resources, Vancouver B.C.: Faculty of Law, University of B.C.

LUNDSGAARDE, Henry P., ed.  
1974 Land Tenure in Oceania, Honolulu: The University Press of Hawaii. (ASAO Monograph No. 2.)

LURIE, Nancy Oestreich  

LYSYK, Kenneth  

McCLEAN, A. J., ed.  

McCULLUM, Hugh, and McCULLUM, Karmel  
1975 This Land Is Not For Sale, Toronto: Anglican Book Centre.  

MALINOWSKI, Bronislaw  

MARSH, Leonard  
1970 Communities in Canada: Selected Sources, Toronto: McClelland and Stewart Ltd.
MAUDSLEY, R. H., ed.  

MEEK, C. K.  

MEGARRY, R. E., and BAKER, P. V., eds.  

MEGARRY, R. E., and WADE, H. W. R.  

MILLER, Harold  

MORRIS, Alexander  

MORRIS, H. S.  

NADEL, S.F.  

NATIONAL MUSEUM OF MAN  

NELSON, Richard K.  

NETTING, Robert McC.  

NGATA, Apirana T.  
NICHOLAS, Ralph

NORTHROP, F. S. C.
1959 The Logic of the Sciences and the Humanities, New York: Meridian Books, Inc.

O'MALLEY, Martin

PATERSON, Lesley
1976 "The Co-Operative Movement in the Canadian Arctic," in Nils Ørvik and Kirk R. Patterson, eds., The North in Transition, Centre for International Relations, Queens University, pp. 48-64.

PATON, G. W.

PATTERSON, E. Palmer, II
1972 The Canadian Indian: A History Since 1500, Don Mills (Ont.): Collier-Macmillan Canada, Ltd.

PATTERSON, Kirk R.

PEACOCK, Donald
1977 People, Peregrines and Arctic Pipelines, Vancouver: J. J. Douglas Ltd.

PETERS, Victor

PORTER, John

POTTER, Harold
PUTNAM, Donald F., and PUTNAM, Robert G.
1979 Canada: A Regional Analysis, Toronto: J. M. Dent and Sons (Canada) Limited, 2nd ed.

RADCLIFFE-BROWN, A. R.

RAMU, G. N., and JOHNSON, Stuart D., eds.

RAUNET, Daniel

REDFIELD, Robert

ROYAL ANTHROPOLOGICAL INSTITUTE, A COMMITTEE OF THE

SALMOND, John

SERVICE, Elman R.

SLATTERY, Brian
1983 Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title, Studies in Aboriginal Rights No. 2, University of Saskatchewan Native Law Centre.

SLOBODIN, Richard

SMITH, J. C.
1976 Legal Obligation, Toronto and Buffalo: University of Toronto Press.
SMITH, J. G. E.

SMITH, Norman

SPINDLER, George, and SPINDLER, Louise

STAGER, J. K.

STEWARD, Julian

SWARTZ, Marc J., TURNER, Victor W., and TUDEN, Arthur, eds.
1966 Political Anthropology, Chicago: Aldine.

TAX, Sol

TAYLOR, Griffith

TOBIAS, John L.

TODD, Eric C. E. ed.
1971 Cases and Materials on Municipal Law, Vancouver: Faculty of Law, University of B.C.

TODD, Eric C. E., and McCLEAN, A. J., eds.
1968 Cases and Text on Property, Vancouver: Faculty of Law, University of British Columbia.
TREATIES AND HISTORICAL RESEARCH CENTRE

1978 The Historical Development of the Indian Act, P.R.E. Group, Indian and Northern Affairs.

VAINES, J. Crossley

VANSTONE, James W.

VAYDA, Andrew P., ed.,

VOGET, Fred W.

WARD, Alan
1974 A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand, Toronto: University of Toronto Press.

WATERS, Frank

WATKINS, Mel, ed.

WEYER, Edward Moffat, Jr.
1932 The Eskimos: Their Environment and Folkways, New Haven: Yale University Press.

WHITFIELD, G. M. B.
1948 South African Native Law, 2nd ed., Cape Town and Johannesburg: Juta and Co Ltd.

WIGMORE, John H.
Cases and Statutes


Campbell v. Hall (1774), 1 Cowp. 204, 98 E.R. 1045.


Four B Manufacturing Ltd. v. United Garment Workers of America and Ontario Labour Relations Board, [1980] 1 S.C.R. 1031 (S.C.C.)


Oyekan v. Adele, [1957] 2 All E.R. 785

Pickering v. Rudd (1815), 4 Camp. 219, 171 E.R. 70.


Re Paulette et al. and Registrar of Titles (No. 2) (1973), 42 D.L.R. (3d) 6 (N.W.T. S.C.)

St. Catherine's Milling v. The Queen (1887), 13 S.C.R. 577 (S.C.C.)

St. Catherine's Milling v. The Queen (1889), 14 App. Cas. 46 (P.C.)


Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board, [1949] 2 K.B. 500 (C.A.)

Constitution Act, 1867, formerly titled British North America Act, 1867, 30-31 Vict., c. 3.


Indian Act, R.S.C., c. I-6 (am. c. 10 (2nd Supp.), 1974-75-76, c. 48

Air Space Titles Act, S.B.C. 1971, c. 2.

Company Act, R.S.B.C. 1979, c. 59.

Condominium Act, R.S.B.C. 1979, c. 61

Cooperative Association Act, R.S.B.C. 1979, c. 66.

Land Registry Act, R.S.B.C. 1960, c. 208

Society Act, R.S.B.C. 1979, c. 390

Strata Titles Act, S.B.C. 1966, C. 46 (am. 1968, c.54; 1970, c.58, s. 17).

Other Sources

Transcripts of Mackenzie Valley Pipeline Inquiry Hearings

Project North, Second Level Newsletter, 6 December 1983

Rene Fumoleau, talk given to the Vancouver, B.C., Project North Support Group, 1 March 1984.