



# Some Reflections on Hydroelectric Development and the Land Rights of the Innu Who Live in Quebec and Those Who Live in Labrador

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**Abstract:** For more than thirty years, the Innu of the Matimekush Lac John reserve in Northern Quebec have been negotiating to recover rights to ancestral lands extinguished under the terms of the James Bay & Northern Quebec Agreement. Where the Cree and Inuit who shared these lands were prepared – having tried every means to stop the James Bay project – to sign away all their land rights except those specifically provided for in the Agreement, the Innu of Quebec and Labrador felt bound by their deep conviction that land is not a commodity to be bought and sold but the foundation of their belief system, held in trust for past generations and generations to come. Thus they walked away from the negotiation table and their rights were ignored by all parties to the Agreement. Since 1975, unlike the Cree and Inuit who signed the agreement, the Innu of Quebec have remained wards of the Crown. The governance of their communities is overseen by the Department of Aboriginal Affairs, with no control over their budgets, inferior education for their children, and no access to lucrative government contracts. These go to their neighbours who have signed so-called land claims agreements with the governments and their commercial partners. Now the Innu are facing the extinguishment of their land rights in the east as their relatives in Labrador prepare to sign the final Tshash Petapen or ‘New Dawn’ Agreement, which must precede the building of a second hydroelectric project on the Churchill River. This will leave them with no rights to land other than those attached to their villages. For a hunting people who lived a nomadic life up until the 1950s this is a catastrophe which will destroy their language and culture. This paper makes some suggestions as to how the land might be recovered in the light of an unreported case which upholds indigenous rights over needs for hydroelectricity.

**Keywords:** Canada, land claims, hydroelectric development, extinguishment, certainty, United Nations Declaration on the Rights of Indigenous Peoples

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## 1. Introduction

Originally, before the settlers required the land for resource extraction, the Innu shared the whole of the Ungava Peninsula with the Cree and the Inuit and other indigenous peoples who spoke different dialects of the same language. They intermarried and respected each others’ rights to hunt, trap and fish on the shared land.

When iron ore was found on the Quebec–Labrador border in the early 1950s, some of the Innu who passed the summer months on the coast near Sept-Îles, were persuaded to settle further north at the new town of Schefferville.

They were promised easier access to the lands where they hunted, modern housing and a good education for their children as well as employment in the new mine. They were moved into reserve villages where they found there was no housing, that they had been driven off their land, and that the education for their children was inferior to that offered in provincial schools. A few years later, a group of Mushuau Innu were removed from the land around Fort Chimo for reasons unknown to the Innu to this day, and settled in the small reserve village of Lac John alongside the Innu from the south, who had received no notice or consultation before their arrival. This group of Mushuau Innu were named Naskapi (following precedents from anthropologists such as Frank Speck) by the Canadian authorities.<sup>1</sup>

Even while working in the mines, the Innu of Matimekush and Lac John, the reserves in the municipality of Schefferville, continued as far as possible to maintain their hunting life. Up until 1975, Nitassinan, the Innu territory, included the land bordering on James Bay, the south-east arm of Hudson's Bay and the rivers which flowed into it.

However, in 1970, Robert Bourassa, then prime minister of Quebec, embarked on an ambitious plan to dam James Bay and the four major rivers which fed into it for a massive hydroelectric project. This was as much an assertion of Quebecois nationality as a project to provide electricity for Canada and the United States. The Cree and Inuit sought an interlocutory injunction to stop the works while their claim to property rights over their ancestral lands could be heard in a full court hearing.<sup>2</sup> Although successful at first instance, the decision was immediately overturned by the Quebec Court of Appeal and the Cree, the Inuit, the Innu and the Naskapi were driven to the negotiation table where they were presented with a set agenda.<sup>3</sup>

A fundamental stipulation on the part of the federal and provincial governments and their commercial partners was (and still is) that all indigenous rights in the affected land, other than those specifically provided in the final agreement, were to be extinguished. As soon as this became clear, the Innu and the Naskapi walked away from the negotiation table. Their main concern, and the concern of those who eventually signed the James Bay Agreement, was for environmental protection of the land and freedom to pursue their traditional hunter-gatherer life.

Returning to their lands around Lake Caniapiscou a few years later, the Innu found them flooded and irrecoverable. Their traditional territory had been signed away at the James Bay negotiating table in an agreement in which the Cree and Inuit were complicit and careless of the rights of the Innu with whom they had travelled and intermarried for centuries.

In 1979, following secret negotiations with the governments and the James Bay Corporation, the Naskapi also signed the agreement in exchange for a small parcel of land traditionally used by the Innu, and C\$7,000,000. Signing the North Eastern Quebec Agreement bought the Naskapi freedom from the control of the Department of Indian and Northern Affairs; sufficient funds to form a Development Corporation to promote business initiatives within the new Nation (a status achieved by less than 1,000 people with a 'government' the size of an English parish council); provincial schooling for their children; and access to valuable government contracts.

Through all the James Bay negotiations, the Innu who live in eleven villages in Quebec worked with those who live in two Labrador villages. The Innu who live in Quebec supported their relatives in Labrador, first during the planning of Voisey's Bay nickel plant and then in a campaign to stop overflying by jets based at Goose Bay. All Innu negotiated for nearly thirty years to recover their lost James Bay lands. Subsequently, the Ashuanipi Corporation of the villages of Uashat, Maliotenam and Matimekush Lac John negotiated alone until the negotiations were closed in 2009 and the Strategic Alliance, formed to replace the Corporation, decided to pursue a court case for the recovery of their land.

In 1977, the two Labrador villages of Sheshatshiu and Utshimasit<sup>4</sup> entered into separate land claims negotiations with the Federal and Newfoundland Labrador governments which eventually bore fruit in 2011 with the ratification of an Agreement in Principle (AIP)<sup>5</sup>. Under the terms of the Tshash Petapen (New Dawn) Agreement, the governments recognised the rights of the Innu who live in Labrador to all Innu territory in Labrador. This included land which, although on the Labrador side of the provincial border, was the homeland of all Innu and Cree; land which was recognised as primarily hunting land of the Innu who live in Quebec; and other parts of the territory which belonged to all Innu including Lake Ashuanipi and the surrounding land. Although the Quebec–Labrador border was drawn in 1927, the Innu did not know of its existence until the negotiations over the James Bay lands in the 1970s. Under the terms of the New Dawn Agreement, those from the villages of Sheshatshiu and Natuashish (the new village to which

1 For an account of these events, see An Antan Kapesh, *Je suis une mauvaise sauvagesse*, (Montreal: Lemeac Press, 1976).

2 This judgment, *Chief Robert Kanatewat v Societe de Développement de Baie James* is known as the Malouf Judgment. It was published in book form: André Gagnon, *La Baie James Indienne: Texte integrale du jugement du juge Albert Malouf*, (Montreal: Editions du Jour, 1973).

3 The full hearing on the claim to indigenous land rights concluded that no such rights existed, with no depth of argument that, if the Cree and Inuit had any rights, these were merely personal rights to compensation. *Chief Robert Kanatewat et al v La Societe de Développement de la Baie James et al*, [1975] CA 15.

4 The Innu population of Utshimasit were moved to a new government-built village, Natuashish, in 2002 following severe social problems in Utshimasit.

5 For a full account of this process, see Colin Samson and Elizabeth Cassell, 'The long reach of frontier justice: Canadian land claims 'negotiation' strategies as human rights violations', 17, no. 1 (2013) *International Journal of Human Rights*, pp. 35–55.

the people of Utshimasiit were moved in 2002–3) are agreeing to sign over to the governments and their commercial partners the vast majority of Nitassinan land in Labrador. Further, as part of this process, the Innu who live in Labrador also gave permission for the opening of new mines on the outskirts of Matimekush but just over the border into Labrador, three miles from the community.

When I carried out a series of interviews in Matimekush Lac John in 2009, many Innu told me that they felt ‘between a rock and a hard place’, ‘trapped’ and ‘voiceless’ simply because they had held to the principles shared by all Innu.

The outstanding land claims to be pursued by the Strategic Alliance, in the James Bay region and in Labrador, whether by court action or by negotiation, have much in common. In both processes, the corporations started work on hydroelectric projects before a final agreement had been signed. In both communities there was considerable opposition to the scheme and most importantly, in both regions the land had never been ceded or sold to the federal government. Each of these factors was addressed in the Malouf Judgment in which Judge Albert Malouf granted an application from the Cree and Inuit of the James Bay region for an interlocutory injunction to stop the hydroelectric development which eventually destroyed the ecology of the territory and the livelihood of its indigenous peoples.

## 2. The Malouf Judgment - *Chief Robert Kanatewat et al v La Societe de Developpement de la Baie James et al et La Commission Hydroelectrique de Quebec* [1974] RP 38<sup>6</sup>

Initially, the Cree and Inuit applied to the Superior Court of Quebec for an interlocutory injunction to stop the project. The application was heard by Judge Albert Malouf. In his meticulous 200-page judgment he considered 10,000 pages of transcribed evidence from 167 witnesses, with 312 exhibits produced before the court. In addition, we have two detailed lay accounts from Boyce Richardson<sup>7</sup> and Roy MacGregor<sup>8</sup> who were both in court for the proceedings.

At the outset, Judge Malouf stated clearly the scope of his powers to grant the injunction, explaining that the applicants were seeking an interlocutory injunction, an order to the respondent corporations to cease the preliminary works on the James Bay Project until the rights of the Cree and Inuit could be considered in a full court hearing. Such an injunction is granted when a judge decides that it is necessary to preserve the status quo in a case where continuation on the part of the respondents would prejudice the position of the applicants. The judge explained that an interlocutory injunction was granted on different criteria from those applicable to an application for a final injunction. All Judge Malouf had to consider was whether the construction project would have a sufficiently serious effect on the rights of the Cree and Inuit to the extent that they must be stayed in order to preserve the rights claimed until the court could make a final decision on their validity. The granting of an interlocutory injunction did not establish rights but proceeded on the basis that the plaintiff presented a good arguable case that such rights existed – the injunction simply preserved those potential rights intact. On this basis, the court could only consider the effects of the construction works currently being undertaken, not the effects of the James Bay Project in its entirety.

Judge Malouf described the land affected, lying between the Ontario border in the west, the 49<sup>th</sup> Parallel in the south, the Gulf of St Lawrence in the east and the 55<sup>th</sup> Parallel in the north, comprising 133,000 square miles, a fifth of the entire area of Quebec – an area twice the size of England and 60% of the size of France.

The judge accepted evidence that the major part of Quebec lies in the sub-Arctic, characterised by a hard climate, subject to large fluctuations in temperature during winter and summer. In that region there are fewer species of animals. The number and types of vegetation are limited and their regeneration is usually slow. The Rupert, Great Whale, La Grande and Eastmain Rivers all had rapids which were very important for fish stocks. Other rivers in the territory would also be affected including the Caniapiscau which flowed 200–250 miles through narrow gorges. Around the La Grande River, there were a great number of lakes, including Lake Caniapiscau (where families from Matimekush Lac John had hunted for generations).

Judge Malouf said that, at full capacity, the James Bay Project would produce three times the power of the Churchill Falls in Labrador, then the largest hydro project on the American continent. This was another part of Nitassinan taken for hydro development.<sup>9</sup> In total, the basis of the complex envisaged the construction of four plants, four dams, eighteen diversions and control structures and eighty miles of walls. By the end of 1975, the project would become irreversible.

The judge assessed the total population of Cree and Inuit affected by the project at 9,302. He accepted the evidence of anthropologists Ignatius Larusic and Harvey Feit that the Cree had occupied their territory at least since

6 The case was reported, only in French, in a minor series of law reports with limited circulation.

7 Boyce Richardson, *Strangers Devour the Land*, (Vermont: Chelsea Green Publishing Company, 1991).

8 Roy MacGregor *Chief: The Fearless Vision of Billy Diamond* (Ontario: Viking, 1989).

9 In Arthur Lamotte's series of films, *Memoir Battante*, about the Innu made in the 1970s, Mathieu Andre from Matimekush Lac John is seen looking over the new Churchill dam, lamenting the disappearance of Innu land under the waters.

the seventeenth century (the time of initial contact with Europeans) and that they had lived on that land continuously since that date.

Judge Malouf dismissed the idea that the Cree were a warlike people (an assertion frequently made in order to justify the action of settlers to take the land for themselves). To the contrary, the relations between white people and Indians had always been very good and very friendly.

The judge admitted the fourteen treaties adduced by the applicants as aids to the court in its determination of the nature and extent of the land rights of the Cree and Inuit, especially in relation to their dealings with the Crown. The Court also considered *la Loi de l'extension des frontières de Québec* passed on 1<sup>st</sup> April 1912 which extended the limits of the province of Quebec to incorporate Rupert's Land and contained the following clause which reflected his conclusion that the fourteen treaties presupposed that the indigenous peoples of Canada had rights to be negotiated away:

2c. The Province of Quebec shall recognise the rights of the native peoples in the territory ... in the same way, and shall ensure the delivery of these rights in the same manner that the government of Canada has heretofore recognised them and delivered them up.

Judge Malouf interpreted the words 'Government of Canada' to include the James Bay Development Corporation and its associates.

The second issue raised by s. 2c was the nature and extent of the territorial rights of the Cree and Inuit who asserted a real (freehold) property right, a right which included the rights of usufruct and possession.<sup>10</sup> The section recognised that they could only cede the land to the Crown but they claimed that the Province of Quebec could not develop the land without having obtained the cession of the native rights which affected it.

Noting Lord Haldane's dicta in *re Southern Rhodesia*,<sup>11</sup>

...there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood, they are no less enforceable than rights arising under English law,

Judge Malouf went on to consider the Law of 1912 and the obligations it conferred on the Province of Quebec. He reviewed the position of the Canadian government vis a vis the lands to be ceded and observed that a 1910 order in council revealed the federal government's intention that the Quebec government would enter into a treaty with the native peoples for the cession of their lands. The Quebec government had argued that a treaty was not necessary but in a further order in council the Canadian government reiterated that terms should be offered to the native peoples "for a relinquishment of their rights and title to the territory". From this, the judge concluded, that the legislation showed clearly and precisely that the Province of Quebec had consented to recognise the rights of the native inhabitants of the land. Judge Malouf now had to determine what these rights were and in what manner the Canadian Government had obtained their release.

The judge noted that when Charles II made the grant of exploitation of the land to the Governor and Company of Adventurers of England which became the Hudson's Bay Company, the native peoples were already occupying most, if not all of the territory. Both English and French authorities were concerned to recognise native rights at this time. They recognised their right to hunt and fish in all the unoccupied territories. They had no desire to disturb this right except in places where the land was needed for white settlers and, in these cases, they entered into treaties under which the Indians ceded all or part of their rights.

Judge Malouf referred to the case of *Calder*<sup>12</sup> in which, earlier that year Judge Hall had reviewed the nature and extent of native title in detail and he summarised the points which were relevant to the case now before him. He noted that, as early as the 17<sup>th</sup> century, the Crown had ordered its governors not to upset or disturb the Indians in the possession of their lands. In particular, he referred to the instructions given to Governor Murray of Quebec:

And you are upon no account to molest or disturb them in the possession of such parts of the said province as they at present occupy or possess...<sup>13</sup>

Immediately after confederation, the Imperial government had taken steps to terminate the jurisdiction of the Hudson's Bay Company over the territory ceded to it by Charles II. Rupert's Land was acknowledged as part of the Confederation

10 The rights to take the fruits of the land, e.g. to hunt and/or to gather berries.

11 In *re Southern Rhodesia* [1919] A.C. 211.

12 *Calder v AGBC* [1973] SCR 313.

13 Gagnon, *La Baie James Indienne*, p.41

by the British North America Act, 1867. In an order in council, the terms and conditions of this transfer included a provision to the effect that the Crown and the Canadian government would assume responsibility for any indemnity which might be paid to the Indians for the use of their land. Attached to the same order in council was a schedule containing *The Address to the Queen of the Senate and Chamber of Commons of Canada*, which contained the following request:

And further that before the transfer of the lands in question [including Prince Rupert's Land] to the Government of Canada, the claims of the Indian tribes for lands required for the purpose of colonisation, shall be considered and regulated in conformity with the principles of equity which have uniformly guided the English Crown in its relations with the aboriginal peoples.

Judge Malouf then began a review of the past Indian treaties. In all the fourteen treaties adduced in evidence before him, the Indians had agreed to cede, release and surrender to the Crown all the land included in the territory described in the treaty. In most of the treaties the Crown recognised the right of the Indians to continue to hunt, trap and fish over the ceded territory.

The judge held that, although it was not necessary to define exactly the nature of the Cree and Inuit title to the land for a decision on whether to grant the injunction, the judgments he had examined nevertheless demonstrated that they had enjoyed possession and occupation of the land together with personal and usufructuary rights. Further, taking into consideration the obligations assumed by the province of Quebec under the terms of the Law of 1912 together with the fact that all other lands ceded to the Crown had been secured by a treaty, the only way in which Quebec could develop or otherwise open up the lands to colonisation was with the prior consent of the Cree and Inuit. It was irrelevant that, because the land had formerly been ceded to the Hudson's Bay Company, it was not within the scope of the Royal Proclamation; first because the Government of Canada had treated all Indians as having an interest in their lands, and second because of the obligations imposed by the Law of 1912. The judge also decided that the land rights of the Cree and Inuit had never been extinguished, as evidenced by the order in council of 1907 which expressly reported this.

The Cree gave evidence that:

- They, their fathers and grandfathers trapped, hunted and fished in the greater part of Northern Quebec;
- The diet of Indian and Inuit populations consisted above all of food which they hunted, fished and trapped, known as 'country food' and the proportion of country food consumed as opposed to shop-bought food was 90%;
- The Cree and Inuit ate all the animals and fish that they caught, including caribou, moose, bear, martin, beaver, rabbit, fox, squirrel, snow partridge, lynx, diver and otter. From the sea they took whale and seal in small quantities and a great variety of fish including trout, salmon, whitefish, arctic char, vairon, pike and sturgeon. They also hunted a large variety of birds, most importantly geese;
- Several heads of family were full-time hunters and trappers, some were part-time and most, if not all, of the rest hunted and trapped near the reserve on a part-time basis. They had used 75% of their territory within the last five years;
- They fished in many of the lakes and rivers. A particular mention was made of the fishing near the first rapids on the La Grande River and between the first and second rapids, places where great quantities of fish were caught.
- The rivers were used as water routes which permitted them to go to their traplines and elsewhere with ease during the summer and winter;
- Several among them had salaried employment;
- Several of their deceased relatives had been buried along the rivers near to lakes and to their traplines;
- Their religion was centred on the hunting of animals and the killing of each animal has a religious significance for them;

- They were happy with their way of life and violently opposed to the hydroelectric project.

The Corporations challenged this evidence, pointing out the indigenous reliance on salaried employment and social security benefits and food from the store. One witness went so far as to claim that in 1972–1973 each family in Fort George received C\$10,167.00 but this included the cost of all services and infrastructure together with the provision of roads and of old age pensions. This method of calculation was rejected by the judge – to include the costs of provision of such services in the income of the individual defied logic. It was wrong to apply such a calculation to the Cree and Inuit when it was never applied in the calculation of the income of any other individual. Several Cree and Inuit had attested that they had never received an income of C\$10,000 in all their lives. The judge then pointed out that, just because the Cree and Inuit bought provisions from the store, this did not mean that they were not dependent on hunting. This led the judge to conclude that:

- The Cree and Inuit who occupied the territory and the adjacent lands had hunted, trapped and fished there since time immemorial;
- They had exercised these rights on a large part of the territory and on the adjacent lands, including their traplines, the lakes, rivers and streams;
- These occupations were still of great importance for them and constituted a way of life for a great number of them;
- Their diet was dependent, at least in part, on the animals which the hunt and trap and on the fish which they catch;
- The sale of the animals for fur represented a source of revenue for them; and the animals which they trap and hunt and the fish which they catch represent, if measured in dollars, a form of additional revenue;
- The skins of certain animals were used for clothing;
- They had a unique concept of the earth, they make use of all its fruits and products including all the animal life there and any interference would compromise their existence as a people;
- They wished to continue in their way of life.

After reviewing in detail the evidence of biologists, ecologists, geographers and engineers from both sides, the judge concluded that the Cree and Inuit were justified in fearing that their rights were in danger of being prejudiced. Danger to flora and fauna was already occurring. Much greater damage would be caused by the works currently being undertaken.

The judge concluded that the evidence showed that these works would have an adverse effect on the birds, fish, animals, and on aquatic life in general. The number of animals would be significantly reduced. The native people would not be able to make use of the fruits of the earth. They would no longer be able to hunt, trap or fish in the affected territories. The ecological balance which existed in the territory would be seriously compromised. The entire system which had taken 8,000 years to develop would be destroyed. It would take at least 30 to 50 years for a new wetland habitat to re-establish itself.

One argument put forward by the Development Corporations was that they enjoyed Crown immunity as agents of the Crown, but the judge held that immunity does not work in favour of an agent of the Crown which exceeds its authority and, reviewing the terms of Bill 50 which created the James Bay Development Corporation and defined its powers, he concluded that The James Bay Energy Corporation, as a subsidiary company, was not protected. He found that the Corporations were only authorised to operate in the territory defined in Bill 50. Since some of the works were being carried out in basins outside the defined territory, the Corporations were acting outside the scope of their powers and thus did not enjoy Crown immunity. Similarly, Hydro-Quebec had exceeded its powers and could not take advantage of a privative clause<sup>14</sup> in the Hydro-Quebec Act, which exempted it from proceedings by way of injunction.

Judge Malouf also found that the Cree and Inuit had brought proceedings within a reasonable time and that there was no delay which would preclude the granting of the injunction.

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<sup>14</sup> A clause which exempts the party from liability.

Having previously discussed the damage which would occur to the flora and fauna, the judge found that, if the works were to continue, a tort and an irreparable prejudice would be caused to the Cree and Inuit. It would not be possible to give back life to the fish and animals which would die, and it would no longer be possible to restore the vegetation which would be destroyed. The evidence had shown that it would take many, many years before the flora and fauna were re-established. Further, if the Court were to allow the respondents to continue the works, a state of fact would soon be created which would render any final or permanent injunction ineffective. It would thus be physically impossible to return the parties to their current positions. Because of the nature and extent of the works which were being undertaken and which were projected for the months to come, the project would become irreversible at the end of that year. On the other hand, there was doubt that the prejudices suffered by the respondent Corporations if the injunction were granted, were not of the nature of irremediable losses.

The general rule was to allow the parties to remain in their respective positions until their respective rights were determined by the final judgment. The judge held that, in carrying out these works, the respondents had succeeded in changing the status quo which existed between the parties at the time of the institution of the proceedings. Further, they had the intention of continuing the works according to their production schedule. The continuation of the works would cause a state of fact which could not be remedied adequately by a final judgment. The judge had no doubt that it would be preferable for the parties to remain in their respective positions until their rights are determined by the full hearing.

Since the Cree and the Inuit had established a clear right to occupation of the land, it was not strictly necessary for Judge Malouf to consider the balance of inconvenience between the parties, but since this was an issue of importance to the respondent Corporations, the judge took time to consider the case which they put forward. Nevertheless, he pointed out that if he agreed to consider the balance of inconvenience in this case, this would allow a person to change the status quo before or during the hearing and subsequently plead the balance of inconvenience.

The respondents had of their own accord commenced work on the project without taking account of the opposition expressed by the applicants. Even after the institution of the present proceedings, the respondents continued the project and spent large sums of money. This was a very unfortunate decision. The respondents knew that the Cree and Inuit were in possession of the territory and the adjacent lands. They also knew that the Indians and the Inuit occupied and made use of the land. No one had forced them to do this. They took the risk to proceed with the works. It would have been much more prudent to await the decision of the Court.

The Corporations' case rested on the amount of money they would lose if the works were suspended. However, on an examination of the figures, supplemented by the production in evidence by the Cree and Inuit of the Corporations' construction contracts with third parties, the Court found that these sums were greatly inflated because these contracts showed that, in the event of a suspension of works the Corporations were not obliged to compensate the contractors. The figure for purchase contracts claimed by the Corporations was reduced on examination of the evidence from C\$9,000,000 to C\$1,000,000. Claims for preliminary research on the project were dismissed as were claims for interest incurred on loans for the project. Only items of expenditure in the immediate future were taken into consideration. Amounts expended on the construction of roads which would be lost as a result of the suspension were considered to be very small. The judge considered claims by Hydro-Quebec for interest on investment in the Development Corporation to be too remote. None of these sums could be taken into account when assessing the balance of inconvenience, nor could the needs of Quebec in 1980 for electricity.

In addition to the financial arguments, the Corporations claimed that the project would only affect a small proportion of indigenous land and that the Cree and Inuit could exercise their rights elsewhere but the judge held that it was not the magnitude of the region which was important but more the use which the applicants make of these particular places where the works are undertaken. Their argument on this subject could not be sustained because the evidence revealed that the lands, the lakes, the rivers and the streams affected by the project were of extreme importance to the applicants. Further, if the works were to continue, a state of affairs would arise which would render any final injunction inefficacious because it would be impossible to restore the status quo. The pursuit of the works would lead to a *fait accompli*.

Turning to the losses which would be suffered by the Cree and Inuit were the injunction not granted, Judge Malouf concluded that in many cases such losses would be not only devastating but also irreparable. Although he found it difficult to compare the monetary losses of the corporations with the losses which the Cree and Inuit would suffer, he held that the right of the applicants to pursue their way of life in the lands subjects to the litigation far surpassed any consideration given to monetary loss.

For these reasons, even if he had had to consider the balance of inconvenience, the judge said that he would come to the conclusion that the balance of inconvenience militated in favour of the Cree and Inuit.

In conclusion, Judge Malouf granted the interlocutory injunction and ordered the James Bay Development Corporation, James Bay Energy Corporation and Hydro-Quebec to cease all operations on the hydroelectric project.

Judge Malouf's order was overturned by the Quebec Court of Appeal just one week later on a public interest argument and the judgment never appeared in the law reports. The Court of Appeal decision was itself overturned by the Supreme Court of Canada in *Manitoba (AG) v Metropolitan Stores (MTS) Ltd and others*, [1987] 1 SCR 110, and the decision to reverse Judge Malouf's carefully considered decision was taken only on the grounds of a public interest argument, something dealt with in the original application citing case law to demonstrate that public interest should not be taken into account when balancing the needs of the parties. The Malouf judgment is revealing in its assessment of the magnitude of the project and the catastrophic effect that it would have on the ecology of the region, described by one witness as equivalent to a major natural catastrophe.

Judge Malouf makes the case for an Indian title which rests on primary and secondary legislation of the British and Canadian governments and the implications of the treaties by which the federal government extinguished Indian title by Treaties which gave minimal compensation in return.<sup>15</sup> If the federal government held title to the land, there would be no need for the treaties which ceded it.

The case also reveals the approach to indigenous rights taken by the federal and provincial governments and the James Bay Corporations. It is clear that the respondents did not consider these rights and had no real answer to the case put together by the lawyers for the Cree and Inuit. Indeed, witnesses for the respondents admitted that their prime consideration was the production of electricity, not the preservation of the ecology, let alone the livelihood of the indigenous peoples and their respect for the land and its creatures. Their calculation of potential pecuniary damage which would result from an order to cease work was grossly exaggerated and it only took an examination of the construction contracts with third parties by the lawyers for the Cree and Inuit to demonstrate that the damage suffered would be minimal in comparison with the sum claimed.

### 3. Negotiation

Although Judge Malouf had argued clearly and cogently for the duty of the governments to accommodate indigenous rights, the reversal by the Court of Appeal forced the Cree and Inuit to the negotiation table, where they discovered that only minimal recognition was given to their desire to continue their traditional way of life. Richardson notes that:

...the young Crees who had mobilized their people for the fight now had to confront the complex task of giving flesh to the intricate and bewildering Agreement they had negotiated. To say that they found the federal and provincial governments slippery as they tried to pin them down to the letter and spirit of what had been agreed would be an understatement.<sup>16</sup>

Freed from Judge Malouf's findings by the Court of Appeal, the government and the James Bay Development Corporation presented the Cree, Inuit and Innu negotiators with a set agenda. Initially, the governments offered compensation of C\$100 million and 2,000 square miles of land (one square mile per family of five).

The young Cree negotiators, bound by the indigenous tradition that the elders made major decisions on behalf of the group, delayed their response to the governments' terms until their elders could be consulted on their return from the land where they still practised migratory hunting. They were ill-prepared to present their own long-term claims because they had spent the previous years building up sufficient political cohesion to argue their case before the court. Richardson points out that the Cree had no interest in the monetary compensation – all that they were concerned with was what was to happen to their land. Tired of waiting for the elders to return, the governments paid for them to be flown out of the land.

Work on the project was proceeding and the Cree felt they had no alternative but to accept the government's final offer of C\$225 million<sup>17</sup>, a degree of self-determination and exclusive rights to 14,000 sq km of land. They retained limited rights to hunt and fish over a further 150,000 sq km but ceded all rights in 908,000 sq km of ancestral land, amounting to an extinguishment of all inherent rights in the land. As Chief Billy Diamond explained at the time:

The Cree people all understand that the province must be allowed to build the hydroelectric project in the James Bay area... We realize that many of the friends we have made during our opposition to the project will

15 For an account of the negotiations for Treaty 8, see René Fomoleau, *As Long as This Land Shall Last*, (Calgary: University of Calgary Press, 2004).

16 Gagnon, *La Baie James Indienne*, p.329

17 Aboriginal & Northern Affairs Canada, James Bay and North Eastern Quebec Agreement, Annual Report 1999-2000, [www.aadnc.gc.ca](http://www.aadnc.gc.ca), (accessed February 8, 2013).



label us as sellouts... I hope you can all understand our feelings, that it has been a tough fight, and our people are still very much opposed to the project, but they realize that they must share the resources.<sup>18</sup>

By the time of the signing, the Innu were long gone from the negotiating table.

When in the ten years following the signing of the James Bay Agreement,<sup>19</sup> Hydro Quebec and the governments ignored or broke terms of the Treaty, Diamond came to regret bitterly the signing of the treaty, many of the terms of which were ambiguous. As the Cree and Inuit began to realise that the promises of environmental protection were being ignored by the Corporations, there were numerous court cases and renegotiations in an unsatisfactory conflict resolution on single issues until in 2002 a new accord was signed known as the Paix des Braves,<sup>20</sup> following the recommendations of the Royal Commission on Aboriginal Peoples. Under this new treaty the Cree received a further C\$125 million and guarantees of apprenticeships, employment and support for Cree business enterprises.<sup>21</sup>

On 2nd June 2012, at the 10th Anniversary Celebration of the Paix des Braves, among the self-congratulatory speeches from both sides, Dr Matthew Coon Come, former Grand Chief of the Cree Nation and former National Chief of the Assembly of First Nations, couched his support of the Paix des Braves in less hubristic terms, pointing out that:

The Paix des Braves is also an ending. It marks the end of a certain paradigm, a certain framework which defined the relationship in the past. Sometimes we called that relationship 'colonial'; sometimes we called it 'paternalism'; and sometimes we called it 'cultural genocide'. In an era when we were excluded from development of the resources on our traditional territory and when development took place without our consent; when we were excluded from certain basic and fundamental rights – even the right to vote – and excluded from the management of our own affairs; and sent to residential schools forbidding us to speak our language, these were not inaccurate characterisations.<sup>22</sup>

In the thirty-seven years between the signing of the James Bay Agreement and the 10th Anniversary of the Paix des Braves, the Innu of the Strategic Alliance continued to suffer the indignities and exclusion described by Dr Coon Come. There have been repeated, unsuccessful attempts to gain recognition of their aboriginal title to some of the lands signed away by the Cree and Inuit, the governments eventually telling the Innu that they must negotiate direct with the Cree and Inuit for the return of their lands. When negotiating with the governments, they were presented with set agendas, always including an extinguishment clause to which the Innu would not agree. As one former chief put it, 'All that was left to us was to negotiate the terms of our surrender'.<sup>23</sup>

In 2009, when the Innu arranged a negotiation table with elders from the Cree and Inuit who had received their land, they had some success in getting recognition that the Inuit had no real prior interest in the disputed lands. At this point, the governments closed down the negotiations, citing accounting irregularities. The Innu left the negotiations saying that they would pursue their claims in the courts. The Chief Negotiator for Matimekush Lac John at the time described the closure as follows:

Our office [the Ashuanipi Corporation] was closed in May 2009 because the government of Quebec doesn't want to discuss Aboriginal rights. That's why they cut the money and our office was closed. When I was a negotiator we once had a meeting in Kawawachikamach [Naskapi village] and we needed C\$600,000 and the government gave us only half a million dollars. With that we could only have two meetings to get Inuit, Naskapi, Cree and Innu to discuss the Quebec agreement and the impact on us. What we wanted was the recommendations of the elders on what the issues are for them and how to fix the agreement. And no money no meetings after that.<sup>24</sup>

18 Richardson, *Strangers Devour the Land*, p.321

19 See 'Proceedings of the Forum on the James Bay and Northern Quebec Agreement: Ten Years After', in Sylvie Vincent and Gary Bowers (eds) *James Bay and Northern Quebec: Ten Years After*, (Société de Recherches amérindiennes: Quebec, Montreal, 1988), which includes a timeline showing the many court cases and renegotiations for the purpose of making the governments and corporations honour the terms of the JBA dealing with social and environmental matters.

20 2002 Agreement Respecting a New Relationship Between the Cree Nation and the Government of Quebec.

21 <http://www.pdac.ca/docs/default-source/aboriginal-affairs-docs/la-paix-des-braves.pdf?sfvrsn=2> (accessed December 23 April, 2013).

22 Grand Council of the Crees, '10th Anniversary Celebrations of the 'Paix des Braves: Speaking Noted for Grand Chief Dr Matthew Coon Come', <http://www.gcc.ca/newsarticle.php?id=263> (accessed February 8, 2013).

23 Interview MAS5, September 2009.

24 Interview MD2, September 2009.

At the time of closure of these negotiations, there were more pressing concerns for the Innu of Matimekush Lac John. Negotiations were proceeding for the opening of new iron ore mines on the outskirts of the community, but just over the border into Labrador. These negotiations were conducted primarily with the Innu who live in Labrador, who have no claim to aboriginal rights in this area and with the Naskapi. There were fears that the opening of the new mines and the money which would follow would have adverse social consequences for Matimekush Lac John<sup>25</sup> as well as the pollution and disruption that the excavations would bring to the community.

#### 4. The New Dawn Agreement

The two Innu villages in Labrador were signatories to the mining agreements because they were in the later stages of negotiation for their own land claims agreement, *Tshash Patapen*, or the New Dawn Agreement. Under this, lands belonging to the Innu of the Strategic Alliance would be ceded to the governments and their commercial development corporations for the primary purpose of hydroelectric development, as were other lands for which there was no immediate commercial purpose. The Innu in Matimekush Lac John would be left with no land other than their reserve land which is administered by the Department of Aboriginal Affairs:

The New Dawn Agreement? It's the second James Bay Agreement. It's the same thing. We are going to have a new map again because Indians from Sept-Îles and here have their own territories. It's the same as the Quebec agreement. The [Innu in Labrador] have a mining agreement for the Voisey's Bay project and with Hydro Labrador for the Churchill River and now with the government. I know for governments to negotiate with two communities it's easy. It's easy to persuade them. When you have nine communities, it is harder. People in Sheshatshiu [Goose Bay, Labrador], these are our own sisters and brothers. Are they going to be like the Naskapi are now – not wanting to be a nation with us? It's the same with the nation of Labrador, they don't want to know. Sheshatshiu has no territory near here. There are no cemeteries round here belonging to Sheshatshiu – only from here and from Sept-Îles.<sup>26</sup>

The New Dawn Agreement in Principle was ratified by vote in November 2011.<sup>27</sup> The full 400-page text of the agreement was not available to those who voted, nor was the 80-page summary which had limited circulation before, with the proviso that it was not to be shown to anyone outside the two Innu communities because of its 'commercial sensitivity'. Three thousand Innu in the two villages in Labrador voted to sign away all Innu land in Labrador with the exception of small parcels which are the traditional lands of the influential families whose members were signatories to the Agreement in Principle.

Separate commercial agreements will be entered into with Nalcor, the Newfoundland Labrador's commercial arm which will oversee the hydroelectric development. The terms of these agreements reflect those in the Paix des Braves, but these are discretionary terms so that the Innu enterprises who take up the commercial contracts must be competitive with mainstream Canadian businesses, employees must meet standards of competence based on provincial standards of education rather than the inferior federal education and qualifications that Innu receive. Further, these provisions should be read in the light of the qualification that these terms only apply 'where reasonable' and of the fact that after the initial construction, few permanent jobs will be available.

The official versions of both the summary and the full AIP are in English and French, not in Innu-Aimun which is the only language that many Innu speak. The burden of explaining the full implications of the Agreement rests with the Innu themselves and there are no equivalent translations of the very technical language in Innu-Aimun. Explanations were given in poorly-attended public meetings in the two Labrador villages based on a short and inaccurate PowerPoint presentation.<sup>28</sup> Yet there was a very high turnout and a near-unanimous vote in favour of ratification. Anecdotal evidence suggests that each vote in favour was bought with a 'bonus' of C\$4,000.

The summary on which this vote was based omitted to mention that the governments and corporations could expropriate a further 12% of the Labrador Innu Land and could carry out further development on it.

In the final ancillary clauses in the summary was the following paragraph:

25 Interviews MD8, MD3 September 2009.

26 Interview MFD7, September 2009.

27 Full text available at [www.releases.gov.nl.ca/releases/2011/exec/0926n07.htm](http://www.releases.gov.nl.ca/releases/2011/exec/0926n07.htm) (accessed 6 March 2013)

28 Copies of this presentation and the summary referred to above were sent to Professor Colin Samson and passed on to the author in confidence.

The Final Agreement will detail the scope and extent of the release that the Innu will give to Newfoundland and Labrador and Canada in return for the constitutionally protected rights and the benefits set out for the Innu.

In the AIP this provision becomes:

2.12.1 “This Agreement will:

- a) constitute the full and final settlement of the aboriginal rights of Innu in Canada, except in Quebec; and
- b) ...exhaustively sets out the rights of Innu in Canada, except in Quebec, that are recognized and affirmed by s35 of the Constitution Act 1982.

What is described as a release in the summary becomes an extinguishment of all Innu rights in Labrador other than those specifically provided for in the Final Agreement. It should be noted that, under this provision, the Innu in Sheshatshiu and Natuashish are still free to pursue their claims to land signed away under the James Bay Agreement.

The Innu Government to be set up under the Final Agreement must give an indemnity and release for ‘all past claims known or unknown relating to any act or omission prior to the agreement ....’ This is accompanied by an indemnity from all costs and damages arising from any Innu challenge to the agreement. In the summary ‘Innu’ is defined as only those Innu who live in Labrador. The definition is still under negotiation for the AIP, since clearly such a narrow definition is absurd. Nevertheless, there will be claims from the Innu who live in Quebec which could exceed the sums paid to the Labrador Innu under the agreement.

The interpretative presumption in favour of the weaker party is specifically excluded in the AIP. Squatters’ rights in the land are also excluded.<sup>29</sup> Throughout both summary and AIP, hunting is described as ‘Innu Domestic Harvesting’. There is also provision for access to the Innu lands by military personnel which is in contravention of the Article 30 of the 2008 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which was endorsed by Canada in 2010.

In the notes which accompany the Agreement in Principle there is evidence that, although indigenous land can only be ceded to the Crown in Right of Canada, Nalcor, the Newfoundland and Labrador Development Corporation, had a hand in the drafting.

With regard to the validity of the agreement, perhaps the most important clause is the definition of consultation:

“Consult” means to provide:

To the Person being consulted, notice of a matter to be decided in sufficient form and detail to allow that Person to prepare its views of the matter;

A reasonable period of time in which the Person being consulted may prepare its views on the matter, and an opportunity to present its view to the Person obliged to consult;

Full and fair consideration by the Person obliged to consult of any views presented;

There is a further provision that written reasons must be given for any views that are not substantially incorporated by the developers.

This definition falls short of the obligations to consult imposed by the Supreme Court of Canada in *Delgamuukw*.<sup>30</sup> It does not come close to Article 19 of UNDRIP:

States shall consult and co-operate in good faith with the indigenous people concerned through their own representative institutions in order to obtain the *free prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them.<sup>31</sup>

This Article would allow Innu who live in Labrador to challenge the validity of the ratification of the Agreement. They were never given the opportunity to scrutinise the full document, in their own language, or to seek independent advice.

29 The rights of anyone who has occupied the land for twelve years or more without objection from the landowner to claim title to the land.

30 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

31 Art 19, United Nations Declaration on the Rights of Indigenous Peoples (adopted by the UNGA 13 September 2007), A/RES/66/142 [emphasis added].

Further, the majority vote appears to have been obtained by bribery. As for the AIP itself, it also provides that the Innu cannot challenge this definition – the agreement is stated to exhaustively set out the rights of consultation.

It would appear that both the indemnity clauses and this definition oust the jurisdiction of the court. Since ‘equity looks to the substance rather than the form’ a court might well accept a case from the Innu on the Agreement. However, the AIP is said to have no legal status and thus at this stage a legal challenge to works carried out before a Final Agreement has been ratified would be possible.

In the meantime, work is proceeding at Muskrat Falls, the site of the first Lower Churchill Falls hydroelectric project. The land and water which has been used by the Innu for generations, is now fenced off and work on channels and access routes has begun. Recognition of the rights of the Innu to monitor the work has not been forthcoming<sup>32</sup> and, since the AIP is stated not to be legally binding, the work exceeds the scope of the authority given to any contractors working on the site. These circumstances reflect the situation of the Cree and Inuit when they sought an injunction in the Quebec High Court and members of the Innu communities in Labrador are beginning to see that the project will make their land irrecoverable. The signing of the Final Agreement may yet be some years away, if it happens at all in the present international financial climate and with fluctuations in the cost of electricity.

The balance of inconvenience findings in the judgment are obiter dicta but Malouf recognised that inconvenience could be judged in terms other than financial loss and allowed ecological and social arguments to outweigh the spurious claims of the Corporations who had incurred costs through their own trespass on indigenous land.

The evidence given by the respondent Corporations before Judge Malouf demonstrated their lack of knowledge or care for the environment and social system they set out to destroy and this is reflected in the governments’ ‘take it or leave it’ approach to negotiation with the Innu of Labrador, an approach which is reflected in the advice of the consultants and lawyers who have benefited financially from the contracts available for this preliminary work and for whom, on the first payment of C\$112,000,000 under the Agreement in Principle, C\$60,000,000 was deducted.

The Cree and Inuit case for an interlocutory injunction was prepared by James O’Reilly, a young lawyer who left commercial practice to work on indigenous issues. Where the lawyers for the Corporations were so confident of their success that they did not properly check their figures, produced spurious estimates of Cree income, and had one witness who admitted that their prime consideration was the production of electricity rather than the consequences for the environment and its flora, fauna and human proprietors; those preparing the case for the application produced engineers, ecologists and anthropologists to demonstrate that the way of life the indigenous peoples would be lost forever and that the environment would be irreversibly damaged.

The question remains whether there are similarly committed Innu, who, with their lawyers and consultants, could take similar action now.

## 5. The Position of the Innu Who Live in Quebec

While the Innu who live in Quebec say that the Innu in Labrador have abandoned their core beliefs in agreeing to sell the Labrador lands to the governments, the Innu who live in Labrador claim somewhat defensively that their cousins in Quebec were asked to join the negotiating table and share in any benefits from the New Dawn Agreement but refused. Nevertheless under the New Dawn Agreement they will sign away lands which are shared and lands in which the people of Sheshatshiu and Natuashish had little interest.

In 2009, attempts were made to drive the Matimekush Lac John Innu from their hunting land over the Quebec Labrador border and threats were made to burn down their cabins. The threats were subsequently withdrawn but the hunters, led by their chiefs, from Matimekush Lac John, Uashat and Maliotenam – the villages of the Strategic Alliance – mounted a protest by killing 250 wood caribou in Labrador.<sup>33</sup> This represented an average of two per hunter, enough to feed a family for a month or more. There was substantial press coverage, some of it criticising the mass slaughter of an endangered herd while continuing to ignore the greater threat from Canadian sports hunters.

A year later, barricades were set up on the roads to the mines opening around Matimekush Lac John, again staking the claim to rights over land in Labrador and the right to stop the new mines from opening.<sup>34</sup>

In 2011 informal discussions were held between the Newfoundland Labrador government and the Strategic Alliance regarding the rights claimed by the Strategic Alliance to lands in Labrador.<sup>35</sup> In November 2011 a meeting

32 Conversation with Anthony Jenkinson, resident of Sheshatshiu, November 2012.

33 Reports of the protest appeared ‘Quebec Innu Say “Enough is Enough”’, (The Labradorian, March 1, 2010); and ‘Quebec Innu Hunters May Face Charges’ (The St John’s Telegram, March 11, 2010).

34 Intercontinental Cry, 14th June 2010, [www.intercontinentalcry.org/innu-block-access-to-mining-projects-on-their-territory/](http://www.intercontinentalcry.org/innu-block-access-to-mining-projects-on-their-territory/) (accessed February 8, 2013).

35 Conversation with Armand MacKenzie, negotiator for Uashat Maliotenam, November 2011.

was held at the Band Council Offices in Matimekush of representatives of all interested communities in Quebec to decide on a joint approach to the Newfoundland Labrador governments.<sup>36</sup> There is a provision in the New Dawn AIP that the agreement will be amended to accommodate any successful court challenge from other native people, which includes a challenge from the Strategic Alliance.

Negotiations with Labrador Iron Mines and Tata Mines have provided an opportunity for the Innu of Matimekush Lac John to pursue their claims in Labrador. The first payments from Labrador Iron Mines and Tata Mines were taken to pay off the Matimekush Lac John Band Council deficit and the remainder to build a sports facility to replace that bulldozed when the Canadian employees of the Iron Ore Company left town in 1982. Further payments could finance court cases to recover both James Bay and Labrador lands.

The Innu village of Ekuanitshit, to the east of Sept-Îles and not part of the Strategic Alliance began a court challenge to the works at Muskrat Falls on the 26<sup>th</sup> of April 2012.<sup>37</sup> They asked the court to set aside a decision of the federal government to grant permits to Nalcor for the Muskrat Falls project because the government had rejected the joint review panel's recommendations with regard to the rights of the Innu who live Quebec. The panel had recommended a financial review and assessments of alternative sources of energy. The lawyer for the plaintiffs said that they were particularly concerned about the effect on the George River herd of caribou, which was reported by Survival International to have been reduced in size from 800–900,000 to fewer than 74,000.<sup>38</sup> Peter Penashue, now a minister in the Harper Government retorted that all outstanding legal issues had been addressed.<sup>39</sup> So far as is known, no involvement was offered or sought by the Strategic Alliance, such is the successful division of Innu in Quebec into eastern, central and western negotiating tables.

The claims of indigenous peoples in Canada to their territory have been strengthened through case law since the first tentative finding in *Calder* that indigenous title prevailed in lands which had never been ceded or sold to the federal government. *Guerin*<sup>40</sup> established the fiduciary duty of the Crown to indigenous people in dealings with their land, applicable in Labrador where the land was never held by the Hudson's Bay Company. The Supreme Court in *Delgamuukw* recognised that indigenous title, though different from common law title to land, was a valid and effective title to land. Moreover, in that case the court set out much stronger rights to consultation than those provided in the New Dawn AIP, and *Haida No 4* reintroduced the concept of the honour of the Crown – meaning that the federal government must act with the utmost good faith in its dealings with Canada's indigenous peoples. Further, indigenous land in Labrador is the subject of the Royal Proclamation of 1763, recognised by Judge Malouf as conclusive of indigenous title which must be respected by the Crown. Another possible line of argument to strengthen claims to land in Labrador could be based on an analogy with Article 36 of UNDRIP which gives rights to indigenous people divided by a national border the right to be treated equally. Could the same apply by analogy to a provincial boundary?

Yet, as the Innu of central Quebec have found in the past, it is virtually impossible to establish a claim to land once a decision has been made not to negotiate. As in the 'negotiations' for the numbered treaties,<sup>41</sup> in the new round of treaties from the James Bay Agreement onwards, the governments have a propensity to negotiate with whoever is prepared to sign away the land, regardless of their authority to do so or the validity of their claim. Moreover the Matimekush Innu interviewed in 2009 were anxious not to provoke ill-feeling in those with whom they were in dispute over the James Bay and Labrador lands with whom they have close ties of kinship and marriage. They are a people who out on the land would walk away from confrontation. Similarly, their answer to calls from the governments for the extinguishment of their rights has led them to leave the negotiations.

When the Voisey's Bay Nickel Mines were proposed, all Innu stood together to stop the project which would ruin the land. Innu from Matimekush Lac John united with the Innu of Sheshatshiu to circle the runway of the Goose Bay airfield and went together to Rotterdam to protest at NATO headquarters.<sup>42</sup> Yet in 2008 when Chief Real McKenzie of Matimekush Lac John asked Peter Penashue, then Chief in Sheshatshiu for help to fight the opening of the new mines,

36 Preparations for this meeting were in progress when I was working there in October 2011.

37 CBC News, 26th April 2012, [www.cbc.ca/news/canada/newfoundland-labrador/story/2012/04/26/nl\\_innu-hydro-426.html](http://www.cbc.ca/news/canada/newfoundland-labrador/story/2012/04/26/nl_innu-hydro-426.html) (accessed February 8, 2013).

38 Survival International, 'Christmas reindeer mystery as world's largest herd plummets' (21 December, 2012), [www.survivalinternational.org/news/7967](http://www.survivalinternational.org/news/7967) (accessed February 8, 2013).

39 'MP Dismisses Quebec Innu Complaint', (VOCM Local News, 29th April 2012), [www.vocm.com/newsarticle.sp?mn=&cid=22748&latest=1](http://www.vocm.com/newsarticle.sp?mn=&cid=22748&latest=1) (accessed February 8, 2013).

40 *Guerin v R* (1984) 12 DLR (4th) 321.

41 This was recognised in the case of *Paulette v Registrar of Titles (No 2)*, (1973) 42 DLR 3d 8.

42 Interview MFA7, March 2009. For accounts of the Goose Bay protests, see Colin Samson, *A Way of Life That Does Not Exist: Canada and the Extinguishment of the Innu*, (New York: Verso, 2003); Marie Wadden, *Nitassinan*, (Vancouver: Douglas & McIntyre, 1991); and Hugh Brody's film *Hunters & Bombers*, 1990.

no help was forthcoming.<sup>43</sup> With the ratification of the New Dawn Agreement in prospect, one elder in Matimekush described relations between the Innu in Quebec and those in Labrador as follows:

It seems to me that the governments have divided the Innu people into their separate communities. How can the Innu reunite? It's a very tough question. Off the top of my mind I can't give you a straightforward answer. It's really complex and difficult. I am pretty much concerned about the New Dawn agreement about to be ratified by the Innu of Labrador because what it will do is cause an upset to our hunting rights and our hunting activities. Priority will be given to the Innu resident in Labrador and those in Quebec – there will be no concern for our position. I cannot see how people cannot see that we are the same people – Innu from Quebec and Labrador are one nation.<sup>44</sup>

## 6. What Can Be Done?

Having ratified the Agreement in Principle by vote, the Innu who live in the two Labrador villages are beginning to question the terms of the New Dawn Agreement agreed over their heads, on the spurious advice that this was the best deal they could get.<sup>45</sup> In particular, they note, that valuable contracts are taken up by the signatories to the agreement and their advisors instead of being processed by a co-operative for the benefit of all.

They are concerned that work has already begun at Muskrat Falls in advance of a final agreement and are seeking an independent review of the full terms of an agreement which they ratified without full information as to its contents and implications.

To an outsider, it may be plain that all Innu should act together to renegotiate the terms of the New Dawn Agreement but this is to ignore the reason why the Innu who live in Quebec refused to sign in the first place. On my first encounter with Chief Real McKenzie, a member of the Grand Council of the Crees berated him because his predecessors walked away from the James Bay negotiations, explaining that, if they had stayed, they could have negotiated a better financial deal. An elder explained to me that no amount of money would have persuaded the Innu to sign away their land.

Negotiations are conducted under the auspices of the band council, a Canadian government construct equivalent to a small municipal or town council with the chief as its Chair, set up to replace the infamous Indian Agents who controlled the life and finances of reserves until their powers were greatly reduced following WWII.<sup>46</sup>

While in the 1970s the young negotiators of the James Bay Agreement insisted on awaiting the return of their elders from the land before committing their communities to any course of action regarding the project, working within the band council system appears to isolate the members from those they represent through a process of assimilation through Canadian-run meetings through which they themselves become part of the assimilation process.<sup>47</sup> Although consultation with elders may still occur, decisions are taken by vote in the Canadian way, rather than by advice from those most experienced and capable of making the decision. This process can be seen in Sheshatshiu where leaders and their Canadian consultants are growing wealthy on the preliminary construction and preparation contracts for the Muskrat Falls project. Where once Peter Penashue stood alongside the protesters at the Goose Bay airfield, now he is a minister in the Conservative Harper Government. He signed the Agreement in Principle on behalf of the Crown in Right of Canada. Similarly, Real McKenzie in Matimekush is heavily involved in the Labrador and Tata mining project, albeit that the financial rewards for Matimekush are on a very much smaller scale and there is no question of signing to extinguish land rights and there is no evidence that he is benefitting personally. Nevertheless he is now accomplished at working within the Canadian system.

The question thus arises as to how those in the Quebec and the Labrador villages who refuse to agree to extinguishment of their rights could come together to challenge the agreement and the works already in progress. This would carry a risk that the band council which controls allocations of housing and employment might penalise the families involved in such an initiative.

Despite this perception, in November 2011, an individual band member challenged the validity of the recently-held band council elections in Sheshatshiu and new elections had to be held, producing a younger chief and band

<sup>43</sup> Conversation with Chief Real McKenzie, August 2008.

<sup>44</sup> Interview MA11 March 2009.

<sup>45</sup> Confidential enquiries from a number of Innu in Labrador.

<sup>46</sup> For an account of the Indian Agent system, see Robin Brownlie, *A Fatherly Eye: Indian Agents, Government Power and Aboriginal Resistance in Ontario*, (Oxford: Oxford University Press, 2003).

<sup>47</sup> Discussed in an anonymous article, 'Resist the Assimilation of First Nations' at <http://warriorpublications.wordpress.com/2011/02/11/resist-the-assimilation-of-first-nations/> (accessed February 8, 2013).

council members. Such an initiative marks another turning point away from the consensual governance of the elders of the Innu people but demonstrates a lack of faith in the Canadian band council system.

A former chief in Matimekush spoke of the success in obtaining acknowledgement of Innu rights to the James Bay lands when chiefs from the Cree and Inuit communities discussed the issues with the Innu in their own (common) language away from the consultancy machine which moves into town wherever such negotiations are held. As the former chief put it:

We opened discussions with the Cree, Inuit and Naskapi. We spoke our own language and got the elders involved. The Inuit agreed that they never used our land. Then the lawyers came in and screwed it up.<sup>48</sup>

Perhaps what is needed to bring about a rapprochement is a new team of young lawyers with some experience of the Canadian land claims process (but not enough to give them negative expectations as to the outcome) – first to mediate a resolution between the Innu and then to work with them to prepare a case which is not dictated by the set terms of the Canadian's approach to land settlement, but one which is based on recent cases and on the United Nations Declaration on the Rights of Indigenous peoples. The New Dawn Agreement in Principle is stated not to be legally binding and is therefore open to renegotiation. Good negotiations are always conducted within the shadow of the law with the understanding that, should negotiations break down; the parties can pursue their claims through court action.

## **7. Conclusion**

On questions of land claims the Federal Government's approach to negotiation has changed little since the nineteenth-century negotiations for the numbered treaties. There is no attempt to identify the extent of indigenous use and ownership of land which is required for resource extraction or hydroelectricity. The environmental provisions in settlement agreements which are of prime importance to the indigenous negotiators have little or no priority in the decision-making of the Corporations. Where the Grand Council of the Crees hailed the progress made on the signing of the modern Paix des Braves, its major provision concerning business opportunities, employment and training are tools of assimilation leading indigenous peoples away from their tradition connection to the land.

Resistance to these instruments of 'progress', which is written into the personal histories of the Innu who live in Central Quebec, leaves those who adhere faithfully to a life centred on the land, its language and culture in an untenable position. Once the New Dawn Final Agreement is ratified, they will be left with no land; their rights extinguished, not only by the governments but by the few indigenous peoples who have acted over the heads of their own people to conclude these settlements. The Innu of Central Quebec will remain wards of the Crown with no control over their budgets, falling behind in education and skills as their children are 'educated' in federal schools.

The governments' policies of divide and rule operate on two levels, first to divide the communities from each other and then to divide those assimilated by Canada's indigenous governance processes which lead to the development of a distance between the band councils, their officers and the people on whose behalf they make decisions. A challenge to this system has been mounted in Labrador, leading to a change in the outlook of the new band council.

The elements which led Judge Albert Malouf to the conclusion that the destruction of an environment and the way of life this environment generated for the indigenous peoples who depended on it outweighed any financial considerations are present in the situation developing at Muskrat Falls on the Lower Churchill River. Provisions of the New Dawn Agreement in Principle are in contravention of both the more recent Canadian case law and the United Nations Declaration on the Rights of Indigenous Peoples. Both the Strategic Alliance of the Innu of Central Quebec and the Innu of Shesatshiu and Natuashish have standing to challenge the legitimacy of the New Dawn Agreement but their case could be stronger if, as in the old days, they stood together to mount the challenge.

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48 Interview MAS5, September 2009.