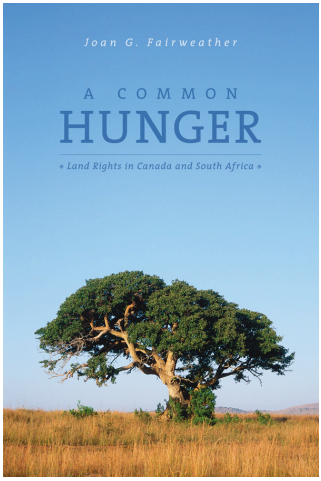
University of Calgary Press
www.uofcpress.com



A COMMON HUNGER:
LAND RIGHTS IN CANADA AND SOUTH AFRICA
by Joan G. Fairweather
ISBN 978-1-55238-573-9

THIS BOOK IS AN OPEN ACCESS E-BOOK. It is an electronic version of a book that can be purchased in physical form through any bookseller or on-line retailer, or from our distributors. Please support this open access publication by requesting that your university purchase a print copy of this book, or by purchasing a copy yourself. If you have any questions, please contact us at ucpress@ucalgary.ca

Cover Art: The artwork on the cover of this book is not open access and falls under traditional copyright provisions; it cannot be reproduced in any way without written permission of the artists and their agents. The cover can be displayed as a complete cover image for the purposes of publicizing this work, but the artwork cannot be extracted from the context of the cover of this specific work without breaching the artist's copyright.

COPYRIGHT NOTICE: This open-access work is published under a Creative Commons licence. This means that you are free to copy, distribute, display or perform the work as long as you clearly attribute the work to its authors and publisher, that you do not use this work for any commercial gain in any form, and that you in no way alter, transform, or build on the work outside of its use in normal academic scholarship without our express permission. If you want to reuse or distribute the work, you must inform its new audience of the licence terms of this work. For more information, see details of the Creative Commons licence at: http://creativecommons.org/licenses/by-nc-nd/3.0/

UNDER THE CREATIVE COMMONS LICENCE YOU **MAY**:

- read and store this document free of charge;
- distribute it for personal use free of charge;
- print sections of the work for personal use;
- read or perform parts of the work in a context where no financial transactions take place.

UNDER THE CREATIVE COMMONS LICENCE YOU **MAY NOT**:

- gain financially from the work in any way;
- sell the work or seek monies in relation to the distribution of the work;
- use the work in any commercial activity of any kind;
- profit a third party indirectly via use or distribution of the work;
- distribute in or through a commercial body (with the exception of academic usage within educational institutions such as schools and universities);
- reproduce, distribute, or store the cover image outside of its function as a cover of this work;
- alter or build on the work outside of normal academic scholarship.

Making a difference.
Making you think.

Acknowledgement: *We acknowledge the wording around open access used by Australian publisher,* **re.press**, *and thank them for giving us permission to adapt their wording to our policy* http://www.re-press.org/content/view/17/33/

Chapter Six

Self-Government

> The road to political self-determination, the road to self-government, is directly linked to the role of economic development. If we are to have strong self-government, if we are to have a strong political direction, we have to have a strong economic base.
>
> *Blaine Favel, Chief of the Saskatchewan Federation, 1996*[1]

RESTORING SOVEREIGNTY

The restoration of sovereignty to Canada's indigenous peoples lies at the heart of the land rights issue. As long as First Nations communities are denied the right to decide on their own form of government without coercion or interference, the recognition of their aboriginal land rights is a largely theoretical concept with little practical meaning. The reverse is also true: without a land base, self-determination is rendered almost meaningless. For this reason, Canada's first peoples have often linked the two rights together in land claims, whether these involved litigation or negotiations with the provincial and federal governments. In the view of First Nations, the right to self-government is an integral component of aboriginal entitlement deriving from the fact of first occupancy.

NEGOTIATING SELF-GOVERNMENT IN CANADA

In Canada today, many Status Indian, Métis and Inuit communities are seeking some form of self-government on their territories and reserves in order to regain control over their lives. This is a goal that underlies every land claim. However, there has been little consensus among First Nations on the shape self-government should take – or even if it should be sought at all. In most parts of Canada, Indian land claims involve conflict, both external and internal. The first conflict area is in defining self-government. Writing in 1971, during the furor over the Trudeau government's White Paper, William Wuttunee warned:

> Indians have a great love for their land which they regard as Mother Earth, but this love for the last remnant of their land has been their undoing. It has engendered a great devotion, to the point of heroic sacrifice, for a few acres of reserve land.[2]

In their socio-political critique of Indian self-government, Rick Ponting and Roger Gibbins warn of potential "thorns in the rose garden." Unrealistic expectations top the list. Other difficult issues are the rights of off-reserve Indians and the role of Indian representatives in the House of Commons. Would these representatives be integrated into existing parties, or would they form small factions with little influence?[3] Over the years, other concerns have gained prominence within native communities.

The growing awareness of the rights of Indian women added a new dimension to the controversies surrounding self-government within the aboriginal community. The issue of women's rights first surfaced in the 1950s when Mary Two-Axe Earley and others protested against the provision in the Indian Act linking a woman's status with that of her husband. In practice, what this meant was that by marrying a non-Status Indian, Indian women (and their children) lost their status while white women acquired Indian status by marrying a status Indian. Although the government eventually amended the Indian Act and repealed the discriminatory clause in 1985, the issue was not dealt with adequately in the legislation. Status Indian women who had "married out" before this date (and had thus lost their rights to land, housing and a range of other benefits on their home reserves) have found it very difficult to regain these rights and are often denied residence on reserves by the (often male) chiefs and elders. In 2005, problems still persist for many First Nations women across the country, despite several initiatives carried out by the Native Women's Association. For this reason, the protection of women's rights under the Charter of Rights and Freedoms remains an important issue for Indian women. Underlying the resolve of Indian women's groups to retain state-controlled protection is the increasing rate of domestic violence on reserves and the seeming inability of band leadership to address the situation.[4]

Most First Nation leaders insist that the self-government formula chosen must recognize the constitutionally entrenched rights of Canada's first peoples. The model of self-government presented by George Erasmus, former chief of the Assembly of First Nations, to a national conference on the subject in 1990 is one still shared by many aboriginal leaders today:

> The kind of powers that would probably be acceptable to us are those that provinces already have in their areas of sovereignty.… This model would lend itself very nicely to what First Nations have always told the people in this country. You already have federal powers, and provincial powers. Let's look at First Nations powers. And we will have three major forms of government. Three different types of sovereignty. Two coming from the Crown, one coming from the indigenous people, all together creating one state.[5]

However, Erasmus's formula, which was reiterated in the 1996 Report of the Royal Commission on Aboriginal Peoples (on which Erasmus served as co-chair), has found little acceptance in government circles. Aboriginal sovereignty is a sensitive issue for Canada's non-aboriginal political leaders. In their view, recognizing aboriginal sovereignty (claimed by many Indian bands and nations across Canada) would dilute and undermine that of the nation as a whole. Sharing rights to the land is controversial enough, but sharing sovereignty with other nations within its borders is something few political leaders in Canada are willing to seriously consider.

Moreover, the notion of self-governing communities based on the protection of group rights (particularly on grounds of ethnicity) raises the spectre of South Africa's homeland policy in the minds of many Canadians. The very existence of reserves is frequently referred to in the media and elsewhere as "Canada's particular version of apartheid."[6] To establish a third order of government for First Nations living on reserves runs counter to the basic tenet of liberal ideology, wherein persons are incorporated into the polity as individuals, not as groups. Even those who do not espouse liberalism tend to see aboriginal self-government as a violation of Canada's status as a sovereign nation.

Historically, the Canadian government has always looked for a uniform way to deal with Indian issues. The search for an acceptable solution to the question of aboriginal sovereignty and self-government is no different. Given the complexity of the issue, it is not surprising that no one has been able to come up with a definition and one-size-fits-all model of Indian self-government. First of all, there is a lack of homogeneity among aboriginal communities themselves. Self-government is simply not applicable to a large proportion of the aboriginal population. Most non-status Indians and many Métis people live off reserves and have no land base on which to exercise their sovereign rights. As Douglas Sanders, an advocate of aboriginal rights, observed, "self-government

can only be given content if special lands are set aside for these populations, the prospects of which are less than minimal."[7]

Nevertheless, various options and formulas for self-government have been put forward over the past few decades. In 1983, the Report of the Special Parliamentary Committee on Indian Self-Government (also known as the Penner Report) defined self-government as being very close to provincial status. In other words, virtually the entire range of law-making, policy development, program delivery, law enforcement and adjudication powers would be available to an Indian First Nation government within its territory.[8] Although many of the Penner Report's recommendations were reintroduced into the Royal Commission on Aboriginal Peoples Report thirteen years later, the issue of self-government remains unresolved.

Until 1999, when the Arctic Inuit negotiated for the creation of the territory of Nunavut, the federal government confined its definition of aboriginal self-government to limited control over local affairs. For example, the James Bay and Northern Quebec Agreement, signed in 1975 – Canada's first "Modern Treaty" – allowed limited autonomy for the Inuit and Cree inhabitants of the James Bay region. Stated in the simplest terms, this Agreement provided for local and regional administration in "Cree lands" and "Inuit lands" covering administration of justice, education, health, social services and economic and social development. In 1984, the federal government adopted a special local administrations scheme, wherein local band councils were granted increased authority over such areas as the management of band funds and the administration of bylaws. The Sechelt agreement in 1986 grew out of this new window of opportunity to negotiate for limited self-government.

THE SECHELT AGREEMENT

In 1976, the 650-member Sechelt band of British Columbia began to negotiate a new deal with the federal government. Their primary goal was to expand their land base and to gain maximum control of their lives through self-government. While the Sechelt band supported the efforts of the national aboriginal leadership to include the rights to self-government in the new constitution, they were determined to assert their claim to land as well. After a decade of negotiations, only some of these objectives had been achieved. Under the 1986 Sechelt Indian Band Self-Government Act, the Sechelt band was granted political and fee simple control over their reserve (of 26 square kilometres) north of Vancouver. The deal included $54 million in compensation but no general land claims settlement. The powers of the band council were to

be similar in scope to those exercised by most municipal governments across Canada. This was far from the Sechelt objective of aboriginal self-government within the fabric of the larger Canadian society.

Although the Sechelt model represented some significant innovations for Indian self-government, including the replacement of authority of the Indian Act with a band constitution, it fell short of the objectives of Indian leadership across the country, which were to entrench the right to self-government and aboriginal title in the 1982 Constitution. This was an important issue for First Nations communities. As J.R. Miller noted in 1989, "Native organizations are understandably suspicious that the acceptance of municipal-style self-governments might be only the prelude to their being abandoned constitutionally by Ottawa and consigned to the provinces."[9]

The view taken by historians John Taylor and Gary Paget was that the Sechelt agreement represented "a coincidence of interests." Each of the players – the Sechelt band, the provincial and the federal governments – had something to gain from its conclusion. As Chief Stanley Dixon had stated at the outset, the objective was "to work with our neighbour communities to improve the quality of life for all citizens."[10] However, the Sechelt gained very little in terms of quality of life for their people, and their struggle for a viable land base continued. For the federal government, the Sechelt agreement represented at least partial evidence of its willingness to follow through on the promise to assist any community that wanted to move towards self-government. However, as the Minister of Indian Affairs, David Crombie, was careful to point out, Sechelt was not a model for others to follow.[11]

As for the government of British Columbia, the Sechelt formula fitted perfectly with its overall policy towards native people. The province's objective was to demonstrate that self-government could be achieved without constitutional entrenchment. Moreover, the agreement would set a precedent for resolving native grievances through self-government rather than through the framework of comprehensive claims settlements. In contrast to the federal government, the province saw the Sechelt deal as a model for self-government for other bands across the province. Indeed, through this agreement, the province was providing a clear signal to other Indian groups that it was willing to discuss municipal-level self-government rather than land claims.[12]

THE INUIT PEOPLES OF THE NORTHWEST TERRITORIES

Like many other aboriginal communities, the people of the eastern Arctic took advantage of the federal government's offer to negotiate compre-

hensive land claims with native people who had never signed treaties. In 1976, the Inuit Tapirisat of Canada (renamed Inuit Tapirisat Kanatami in 2001) presented its first claim to the federal government. From the outset, the Inuit dreamed of dividing up the Northwest Territories to establish their own territory where they would have control over their lives and destinies.

For more than four thousand years, Inuit people had occupied the land, marine waters and islands of a vast area stretching from the Mackenzie River Delta in the west to the Labrador coast in the east, and from the southern reaches of Hudson Bay to the High Arctic islands in the north. The Inuit belong to a wider community of Arctic people (Greenland, Alaska and the western tip of Siberia are all part of the circumpolar Arctic region) and have an identity as a separate people or nation distinct from other indigenous peoples of North America. In living "off the land," they have developed and sustained a unique way of life. Although the people have adapted to the changes introduced by European peoples, Inuit culture has not been submerged by those changes.

In the early twentieth century, as the economic returns from whaling and the fur trade decreased, government intrusion in the Arctic region increased. In the 1940s, Canada built air bases in the Arctic for refueling European warplanes. The postwar period was a time of enormous change and hardship for the Arctic communities: forced relocations of Inuit people, high rates of disease, the removal of children to residential schools, and the movement of people from the land into more centralized settlements all had a profound effect on the traditional patterns of everyday life and land use in particular.

As the Inuit themselves acknowledge, not all the changes brought about by European intrusion were negative. The federal government provided new health, educational and social services. Later, a major housing scheme was introduced to provide modern, prefabricated dwellings for Inuit families. As settlements grew to include a growing non-Inuit population, new types of jobs were created, and new ideas about economic development were introduced into the region. For example, soapstone carving and printmaking, traditional crafts practiced by many Inuit artists, gained international markets.[13] Marketing cooperatives were established to help sell local products and earn foreign currency to obtain imported goods.[14]

The dream of creating an Inuit territory from the Northwest Territories began to take shape in the 1970s. Although the idea of combining the land claim settlement with a self-government agreement met strong resistance from the government, the persistence and determination of the Inuit paid

off. One of the toughest obstacles to a final agreement was the issue of boundaries between the new territory, its neighbours, and overlapping claims of Indian communities. Once again, a compromise was reached by establishing three regions: Qiqitaaluk (Baffin), Kivallik (Keewatin) and Kitikmoet (Central).[15] In 1990, the Federal government and the Inuit of Northwest Territories signed an initial Agreement in Principle, which included a clause pledging a new territory and a political accord to deal with the self-government issue. It took a further nine years for the settlement to be completed.

THE NUNAVUT LAND CLAIM

On 1 April 1999, the Canadian government officially proclaimed Nunavut (meaning "our land" in Inuktitut) Canada's third territory, after more than a decade of negotiations with the Inuit people of Northwest Territories. (Map 4, *xix*.) The atmosphere of euphoria that day, as the Nunavut flag was raised for the first time, was likened by Inuit journalist, Zebedee Nungaq to Inauguration Day in South Africa in 1994. On that day, television images of the new president Nelson Mandela and Archbishop Desmond Tutu dancing on the podium had renewed hope for millions of subjugated peoples worldwide. No wonder the sense of joy in this northern Canadian community brought South Africa to mind: "What a satisfying delight then to observe Nunavut's birth.… I can just see Desmond Tutu dancing the 'toya-toya' [*sic*] over this event," wrote Nungaq. "The dream is now reality and we have crossed the threshold of history on a forward roll.… What an honour to be part of Nunavut's Freedom Day!"[16]

Despite the superficial similarities, the people of Nunavut stood at a different kind of threshold to South Africans celebrating their newly won democracy in 1994. Freedom represented different things to the Inuit of Nunavut and South Africa's black majority. For the people of Nunavut, the objective of their negotiations was initially to have their own territory with the same powers and status as a province. Notions of self-government were beyond the government's land claims policy; thus, it was difficult to persuade the government negotiators to accept any formula that linked the conclusion of the land claims agreement to the establishment of a Nunavut territory and government. But in 1990, a compromise was reached. In the summer of 1993, two pieces of legislation were presented to Parliament for scrutiny and approval: the Nunavut Land Claims Agreement Act, which ratified the Nunavut Agreement, and the Nunavut Act, which created the Nunavut territory and government.

As the 1995 report by the Nunavut Implementation Commission explained, the Inuit representatives brought a range of political and proprietary demands to the land claims table. As a result, the final agreement included many new rights: fee simple ownership of surface and mineral rights; hunting, fishing and trapping rights; and joint Inuit/government management boards to plan and regulate the use of Nunavut waters, lands and resources.[17] While each of these rights had to be carefully negotiated with government representatives, the issue that required the most skill and patience was the creation of a new territory with its own territorial government. The Inuit negotiators emphasized that this would be a "public" government answerable to a legislative assembly elected by all citizens meeting residence and age qualifications. But it was still a hard sell. Even when agreement was reached on the issue of Nunavut being subject to Canada's Bill of Rights and Freedoms, government resistance continued.

Before the Nunavut agreement was signed, two other northern land claims reached settlement. In 1975, the federal government had signed a final agreement with the Inuit of Northern Quebec, which included surface rights to 3,147 square kilometres; exclusive hunting, fishing and trapping rights on the remaining 33,631 square kilometres; and compensation of $90 million. In 1984, a similar agreement was signed with the Inuvialuit of the Western Arctic. The Western Arctic Claim Agreement (also known as the Inuvialuit Final Agreement) extinguished Inuit title to the western Arctic in return for ownership of ninety-six thousand square kilometres along with benefit payments of $45 million plus $10 million for economic development. A third claim, by the Inuit of Northern Labrador is still being negotiated.

While the land covered under the Nunavut Land Claim agreement (352,191 square kilometres) is larger than either of the previous settlements, the conditions followed much the same pattern as the previous Arctic agreements. Like the Yukon Act and Northwest Territories Acts, the Nunavut Act includes provisions for such things as the office of the federally appointed commissioner, law-making powers of legislatures, and the role of the federal government. Like the other two territories (and unlike the ten provinces of Canada), Nunavut is not constituted as a "Crown in right of the territory": in other words, its Crown lands are controlled by the federal government, not the territorial governments.

Unlike the federal arrangements with the Northwest Territories and Yukon governments established in 1908, which were unilaterally imposed on the local populations, Nunavut resulted from the effort of the aboriginal people themselves. As a result, the Nunavummiut (the Inuit and

non-Inuit people of Nunavut, a total of 18,000 people) have considerable say in the control and management of their land. While previous Arctic agreements were exclusively about land and land use, the Nunavut settlement is also about joint sovereignty, albeit a qualified form of sovereignty. Although the concept of "sovereignty" in the Canadian context does not imply absolute autonomy or the creation of a separate, independent state, the Nunavut agreement shifted the goal posts in significant ways. The wording of the commitment to create the Nunavut Territory is open to interpretation, but it would appear that Nunavut has a constitutional dimension not shared with the other territories.

Another distinctive feature of the Nunavut agreement is its inclusiveness. Although Inuit people make up 85 per cent of the population of Nunavut, the government includes both Inuit and non-Inuit residents. Inuktitut and English are the official languages. Nunavut Tunngavik Inc (NTI), established in 1993 as the Inuit corporation responsible for implementing the Land Claim agreement, was responsible for setting up the new Territory of Nunavut. As a non-profit organization controlled by and accountable to the Inuit of Nunavut as defined in Section 39.1.6 of the Nunavut Land Claim agreement, NTI's mandate is to "constitute an open and accountable forum organized to represent Inuit of all regions and communities of Nunvut in a fair and democratic way, that will safeguard, administer and advance the rights and benefits that belong to the Inuit of Nunavut as an aboriginal people, so as to promote their economic, social and cultural well-being through succeeding generations."[18]

The very scale of the Nunavut undertaking means that it cannot be overlooked. The new territory comprises 20 per cent of the landmass of Canada, and its boundaries extend over a larger marine area than the boundaries of any other Canadian province or territory. Moreover, Nunavut's international significance is not confined to the circumpolar area. Clearly, the agreement is an extremely important feather in Canada's cap. As one internal report declared, at a time when the global community is increasingly conscious of the legal rights and moral claims of aboriginal peoples around the world, Canada's commitment to the Inuit people stands out as a "concrete expression of its willingness to share a genuine degree of legislative and administrative power with aboriginal citizens."[19] It also encourages other aboriginal communities to claim sovereign rights over their territories. Furthermore, with the Nunavut agreement in place, it will be more difficult for the Canadian government to argue that the recognition of aboriginal sovereignty negates the fundamental rights and freedoms of individual aboriginal and non-aboriginal citizens.

Like black South Africans, who belong to the wider community of African people across the continent, the Inuit identify with the indigenous peoples who inhabit the circumpolar world; but they also see themselves as citizens of Canada. Instead of seeking separation or secession from Canada, the Inuit's goal (as it is for many First Nations leaders) was to be included as equal partners in Confederation. In words reminiscent of South Africa's century-long struggle for political equality, the Inuit delegation to the Canadian Senate in 1983 stated: "We believe we have the right to participate fully and equally in Canadian political life and in the electoral process."[20]

Demographically, the situation in Nunavut is more like that of South Africa than that of the Sechelt reserve, whose residents comprise a tiny fraction of the total population of British Columbia. The Inuit, on the other hand, make up 85 per cent of the population of Nunavut, close to the black majority of 87 per cent in South Africa. Because of their numerical strength, the Inuit negotiators focused on political equality and basic human rights as the central point of their land claim. Rather than claiming special status based on inherent aboriginal rights, the driving force behind their fourteen-year battle for self-government was their belief in their inherent right to self-determination as members of the human family. The Inuit position was founded on the principle of the interdependence and equality of all individuals and peoples and on the irreversible connection between Inuit and their lands. This was different from the Sechelt agreement, where no land base was involved.

The Sechelt and Nunavut cases illustrate how different situations have produced different results with respect to the content and form of self-government attained. In the case of Nunavut, the government was prepared to grant both a land base and sovereignty (albeit limited) over the newly formed territory. The Sechelt, on the other hand, having negotiated a form of self-government with the provincial and federal governments, had to make a separate claim for their land base. In 1995, the Sechelt tabled a comprehensive treaty proposal with the British Columbia Treaty Commission for land and a share in resource revenues. But in 1997, they withdrew from the process, declaring they had reached a stalemate with the Commission over revenue sharing. In 2005, the Sechelt held an internal referendum on whether to pursue the land claim through the courts. The results were in favour of going to court, but the costs (an estimated $10 million) are more than the band leadership is prepared to pay.

However, it would also be naïve to conclude that Nunavut's future is without problems. Nunavut is different to other parts of Canada in that

it was never "homesteaded" (for obvious reasons); but it did not escape colonization. The burden of poverty inherited by the new government stems from destruction of the traditional economy due to the anti-fur lobby campaign, the debilitating levels of suicide and family violence, and heavy dependence on interim financial transfers from Ottawa. Its unemployment, poor educational levels, low income levels, and overcrowded housing conditions are the familiar legacies of a mismanaged past. For all its optimism and hopes for a brighter future, Nunavut has many challenges ahead in bringing social health and healing to its youthful society.

REVERSING "SELF-GOVERNMENT" IN THE FORMER BANTUSTANS

In South Africa, where the majority population reclaimed its sovereignty in 1994, the objective of creating viable and harmonious communities is especially challenging. The African National Congress government, which took over from the Government of National Unity after the second national elections in 1999, is faced with one of the most skewed land distribution structures in the world. One third of the entire population of South Africa (about 2.1 million households) continues to live on 13 per cent of the land in the former bantustans. The fact that the former bantustans were regarded by the apartheid government as "self-governing" autonomous states has added to the complicated process of land restitution. (Map 1, *xvi*.)

The issues are complex and easily misunderstood. The areas that comprised the ten former bantustans are by no means homogeneous. They display diverse settlement patterns, population distributions, land tenure rules and relationships, structures of government, land uses and ecological conditions. In some provinces (KwaZulu Natal, Limpopo and parts of the Eastern Cape, for example), communal tenure areas are wholly or partly subject to institutional arrangements of the chiefs or Traditional Authorities, as they chose to call themselves in the 1980s. Others are linked to old and new institutional arrangements within municipal authorities or government departments.[21]

The dual system of land rights introduced under colonial and apartheid governments continues in post-apartheid South Africa because of the difficulties of undoing history. Laws involving arbitrary racial distinctions have been repealed, but remnants of the old Bantu Areas Land Regulations of 1969 are still in place. The problem is compounded because of ambiguities in the 1996 Constitution. On the one hand, the Constitution promises in Section 25 (6) that

> A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to corporate redress.

However, on the other hand, the Constitution also recognizes the authority of Traditional Authorities, the former "puppet" chiefs of the apartheid regime, who controlled the allocation and use of land in the former bantustans. The issue of constitutional recognition of Traditional Leaders is complex but deserves some attention as an important political backdrop to land restitution.

The role of the traditional chiefs in African communities changed over the centuries, mainly due to European influences. The apartheid system and previous colonial systems had used government-appointed "chiefs" or traditional leaders in positions of almost complete control over the allocation of land and management of resources on so-called Native reserves, which later were renamed African homelands or bantustans. While these appointments were often made from members of a chiefly family, the rule of lineage was rarely followed. Moreover, the colonial powers maintained control over the traditional authorities by defining land as a customary communal holding. In other words, the land was to be used by the community rather than by individuals. As Professor Mamdani explains,

> The genius of British rule in Africa … was in seeking to civilize Africans as communities, not as individuals. More than anywhere else, there was in African colonial experience a one-sided opposition between the individual and the group, civil society and community, rights and tradition.[22]

The practice of co-opting traditional leaders (always male) to serve the European agenda reached its peak in the apartheid period. In 1951, the Bantu Authorities Act expanded and cemented the powers of chiefs to serve the interests of the apartheid state. Mamdani uses the analogy of a "clenched fist" to describe the chiefs' wide-ranging powers held in place by state coercion and intimidation:

> Not only did the chief have the right to pass rules (bylaws) governing persons under his domain, he also executed all laws and was the administrator in "his" area, in which he settled all disputes. The authority of the chief thus fused in a single

> person all elements of power, judicial, legislative, executive and administrative. This authority was like a clenched fist, necessary because the chief stood at the intersection of the market economy and the non-market one. The administrative justice and the administrative coercion that were the sum and substance of his authority lay behind a regime of extra-economic coercion, a regime that breathed life into a whole range of compulsions: forced labour, forced crops, forced sales, forced contributions and forced removals.[23]

However, the power held by chiefs in the apartheid era was far from absolute, since they owed total allegiance to the white government that appointed them and paid their salaries.

One of the primary powers the chiefs had at their disposal was control of land allocations. No application for land could be considered without the signature of the tribal authorities. This power was often abused by charging unauthorized fees to applicants. These fees could be paid in money or in goods – chiefly, alcohol or livestock. In 1999, in the Tshezi communal area on the Wild Coast of the Eastern Cape, tribal authorities used fee extraction to illegally allocate cottage sites to white entrepreneurs. These were dubbed "brandy sites" by the local people because of the alcohol payments that had been demanded. Abuse also occurred in the delivery of state pensions, the judgments of tribal courts, and applications for migrant labour permits.[24]

Given their controversial position, it is difficult to understand how the traditional authorities have won recognition in the post-apartheid dispensation. But the African National Congress (ANC) has always had a close relationship with tribal chiefs. When the ANC was formed in 1912, chiefs were among the founding members. Chiefs were also present at the Congress of the People in 1955. However, the position of chiefs became increasingly ambiguous during the apartheid era, when they were perceived to be stooges of the government. In the 1980s, when the ANC was attempting to broaden its support as widely as possible, many members of the newly formed Congress of Traditional Leaders in South Africa (Contralesa) became ANC supporters. The exceptions were Zulu tribal leaders belonging to the Inkatha Freedom Party (IFP), who were strongly opposed to the ANC. By this time, the bantustans had been completely discredited, and apartheid itself was in decline. The ANC was a government in waiting. Although some members of Contralesa played both sides of the field during the chaotic final months of apartheid rule, their participation in the negotiations between the National Party and the

ANC was essential for a peaceful transition to democracy to take place. From beginning to end, the negotiations were built on compromises. The recognition of Traditional Authorities in the draft Constitution was one such compromise.

When the tenure reform mandated by the 1996 Constitution was initially implemented, the land rights of farm dwellers were given precedence over those of former bantustan residents. Proposed policies that applied to the former bantustans lagged behind, largely because of the complexities involved. As Dr. Sipho Sibanda, Director of Tenure Reform Policy in the Department of Land Affairs observed, any proposed legislation in the area of land tenure "does not have the luxury of starting with a clean sheet." Some of the present occupants have "Permission to Occupy" (PTO) status, some occupy the land under customary law, and some are beneficiaries of a state-administered trust. Whatever rights the new government might confer on landholders within the former bantustans, they would inevitably conflict with the "old" apartheid institutions of management: "The task of the new government is therefore to ensure that mechanisms are in place to minimize the potential for abuse of power and ensure that the broad principles of democracy, equity and transparency are applied."[25] Moreover, because some bantustan residents were forced off land to accommodate "refugees" from other areas, there are problem of overlapping land claims. To add to the confusion, systems of administration and record keeping have broken down, if they ever existed. The loss of records, uncertainties about which laws apply, and the unauthorized issue of permits have created an urgent need for clarity and reform.

When Derek Hanekom took over the portfolio of Minister of Agriculture and Land Affairs after the 1994 elections, he proposed a Land Reform Bill to create statutory rights for existing land users on the former bantustans to decide for themselves what administrative role the traditional chiefs would play. The Bill was held back before the 1999 elections because it threatened to stir up the hornet's nest – as one commentator called it – of traditional leadership. Two years later, Hanekom's successor, Thoko Didiza, proposed a Bill that was equally controversial. The draft Communal Land Rights Bill was intended to open the way to transfer state land to communities still controlled by former bantustan leaders. However, critics of the proposed legislation accuse Didiza of introducing a policy with echoes of apartheid by effectively consolidating the power of chiefs over the land. At issue was the role of unelected traditional leadership in the allocation of land in the new democracy and the status of rural woman.[26]

Under pre-existing laws, the only tenure rights available to communities in the former bantustans (referred to in the Communal Land Rights Bill as "old order rights") were informal, with title vesting paternalistically in the state or (in KwaZulu-Natal) in the Ingonyama Trust. Under customary law and practices, the land was reserved for men who were issued Permission to Occupy (PTO) certificates. African women were treated as perpetual minors, accessing land and inheritance rights only through the male members of their family (husbands, fathers, sons). Widows were likely to be taken by their deceased husband's brother as an additional wife and thereby lose rights to their husband's land and property. By maintaining the system of PTOs in the proposed Bill, the discrimination against women would continue. In 1997, 63 per cent of households in the former bantustans were holders of PTO certificates, 26.6 per cent were not and 9.6 per cent were uncertain whether they had permission to occupy or not.[27] The issue of gender is therefore taken very seriously in debates over land tenure reform. Although women have full protection under the Constitution and are entitled to own and farm land on an equal footing with men, the old order institutions have cast a long shadow on their present rights.

One of the ways the government is trying to address the problem of land tenure in the former bantustans is to strengthen municipal institutions and thus build local capacity. Prior to 1994, municipal governments existed only in urban areas, and traditional authorities administered whatever municipal functions were available in the bantustans. But the new Constitution requires that municipal governments be established across the country. Although many traditional leaders oppose the appointment of elected councillors, regarding them as a threat to their own powers, local government is largely considered an essential building block in the democratic process.

CONCLUSION

The restoration of sovereignty to subjugated communities (even if it is only partial restoration, as in the case of Nunavut) does not begin with a clean slate. The majority of communities reclaiming their land in South Africa and Canada have all the social indicators of underdevelopment. To be effective in the long-term, land claims in these countries must be settled in such a way that they represent a major step in overcoming the existing social, political and economic inequality experienced by indigenous peoples. This means enough land to meet their needs, a fair share in the development of resources on these lands, and jobs and economic opportunities to end the poverty and unemployment that afflict so many

aboriginal communities. Upgrading of educational, housing, and health standards, maintenance of language and cultures, and meaningful control over local affairs are the essential ingredients for the development of healthy, viable communities.

The loss of land and land rights of the African population of South Africa and its association with the loss of citizenship under the laws of apartheid represent one of the most enduring legacies of the colonial and apartheid periods. The objective of the South African government is to extend the full set of rights and duties embraced by the notion of sovereignty (citizenship) as enshrined in the Constitution to all its citizens, including those who were deprived of any citizenship or human rights in the country of their birth. The dilemma it faces is how to acknowledge the cultural identity and traditions of African peoples, as represented by the institution of Traditional Leadership, on the one hand, while honouring the constitutional demands of democratic governance and individual and equal human rights on the other.