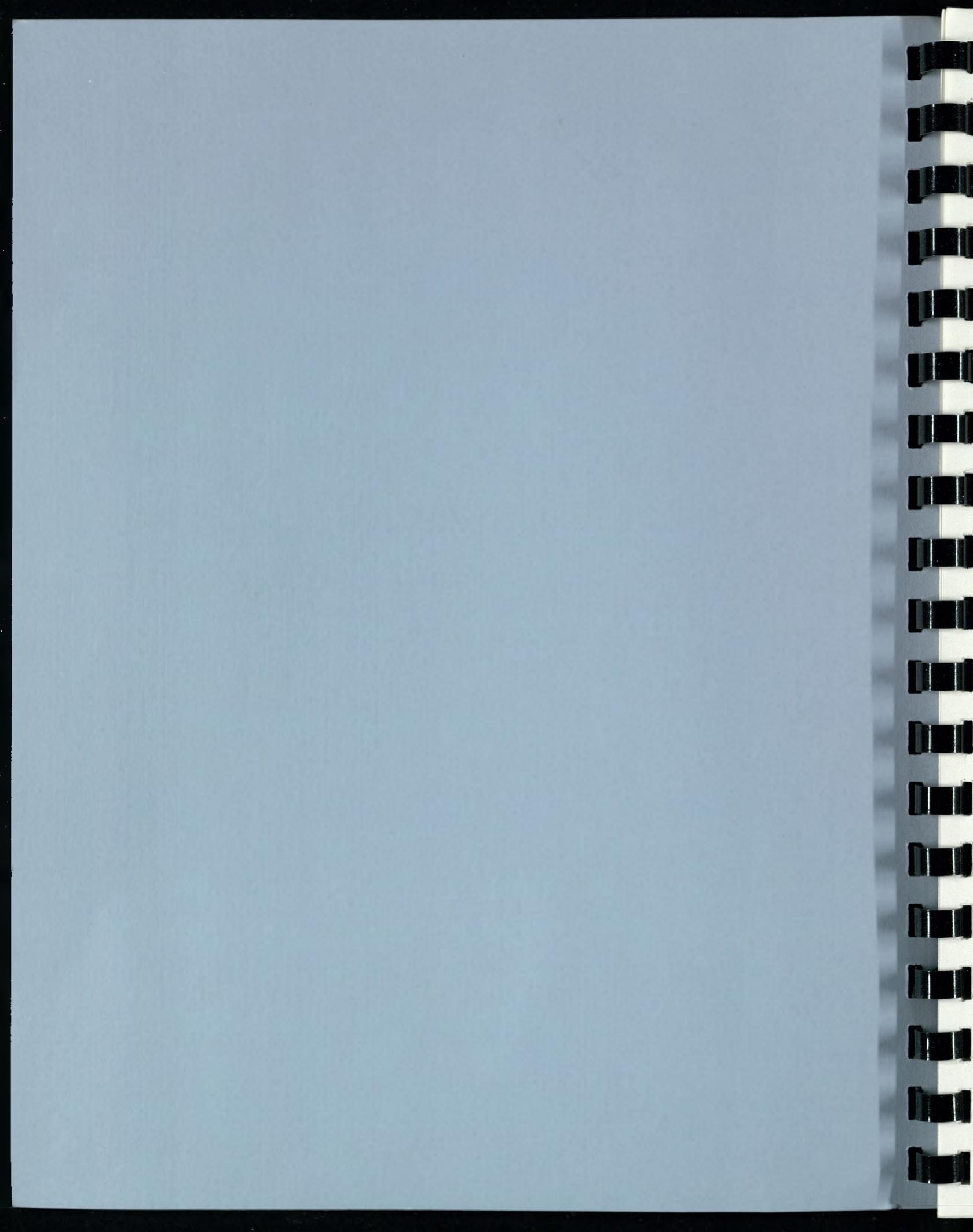


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International Overview  
March 13, 1984  
Anchorage, Alaska

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VOLUME X  
PAGES 934 - 993  
TRANSCRIPT OF PROCEEDINGS  
ALASKA NATIVE REVIEW COMMISSION  
INTERNATIONAL OVERVIEW  
MARCH 13, 1984  
ANCHORAGE, ALASKA

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.Anchorage, March 13, 14, 15, 16, 1984  
International Overview: Week 3, Session 4

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formerly Professor of Linguistics, Institute of Eskimology,  
17 University of Copenhagen, Denmark.

18 Norway

19 Alf Isak Keskitalo  
Sami Institute, Kautokeino, Norway.

20 United States

21 To provide a continuing Alaskan and United States National presence  
22 through this international Overview, the Commission has also  
invited the following:

23 Don Mitchell  
24 Former Vice President and General Counsel, Alaska Federation  
of Natives (AFN) (Or substitute suggested by the AFN).

25



- 1 Dalee Sambo  
Assistant to the President, Inuit Circumpolar Conference,  
Alaska.
- 2
- 3 Al Goozmer  
President, Native Village of Tyonek and Treasurer, United  
Tribes of Alaska (UTA). (Sheldon Katchatag, UTA Vice  
4 Chairman,  
will also participate).
- 5
- 6 David Case  
Law Professor, Native Studies Program University of Alaska,  
Fairbanks (also Special Counsel to the ANRC).
- 7
- 8 Alfred Starr  
An Athabaskan elder who was involved as an early proponent  
(decades before ANCSA) of land settlement to preserve  
9 Native rights.
- 10 Charlie Edwardson, Jr.  
Early land claims activist in Alaska and a key figure in  
11 the movement for congressional action on Native claims.
- 12 Rosita Whorl  
Anthropologist and consultant to the Commission.
- 13
- 14 Chuck Smythe  
Anthropologist and consultant to the Commission.
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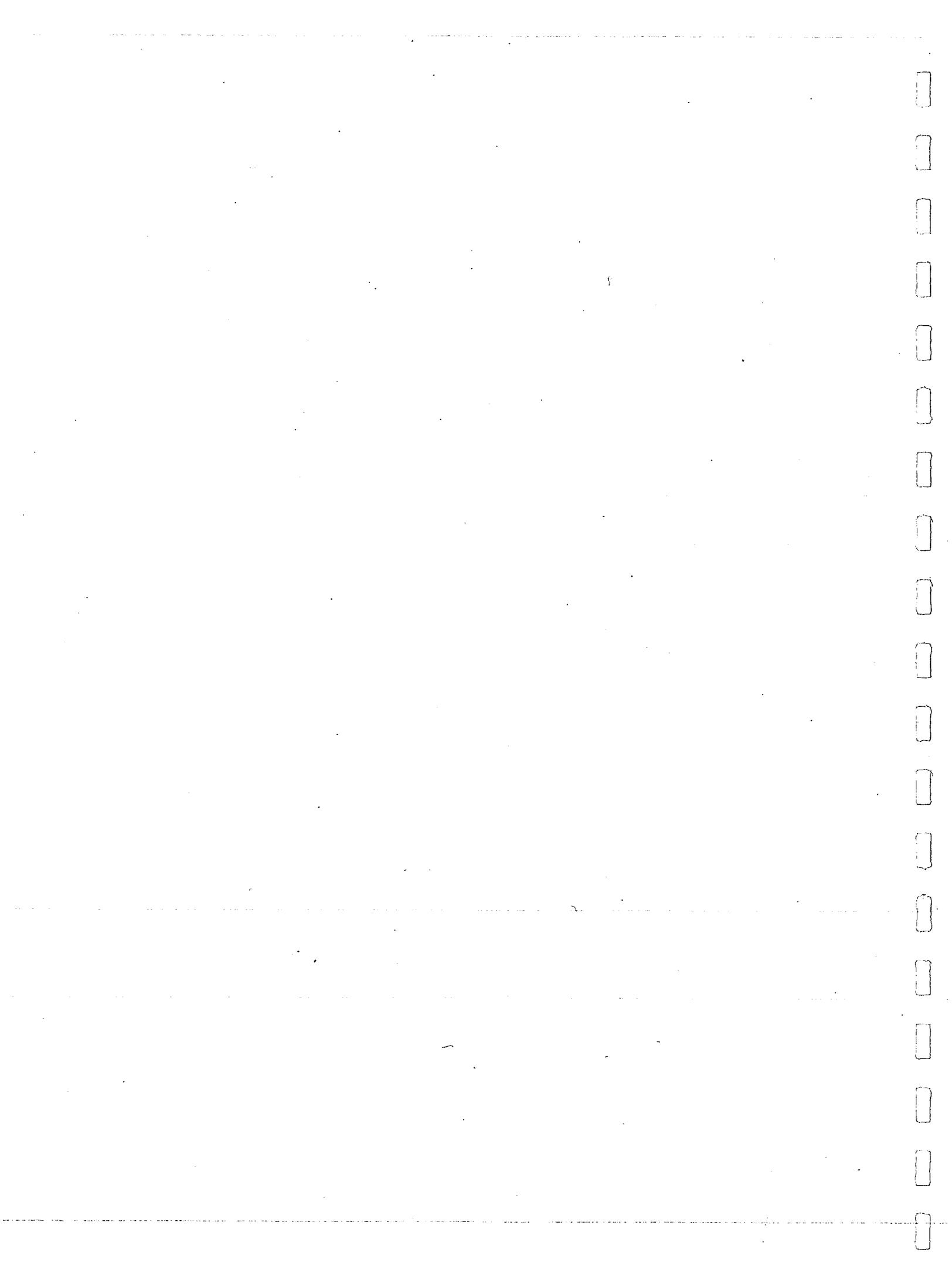


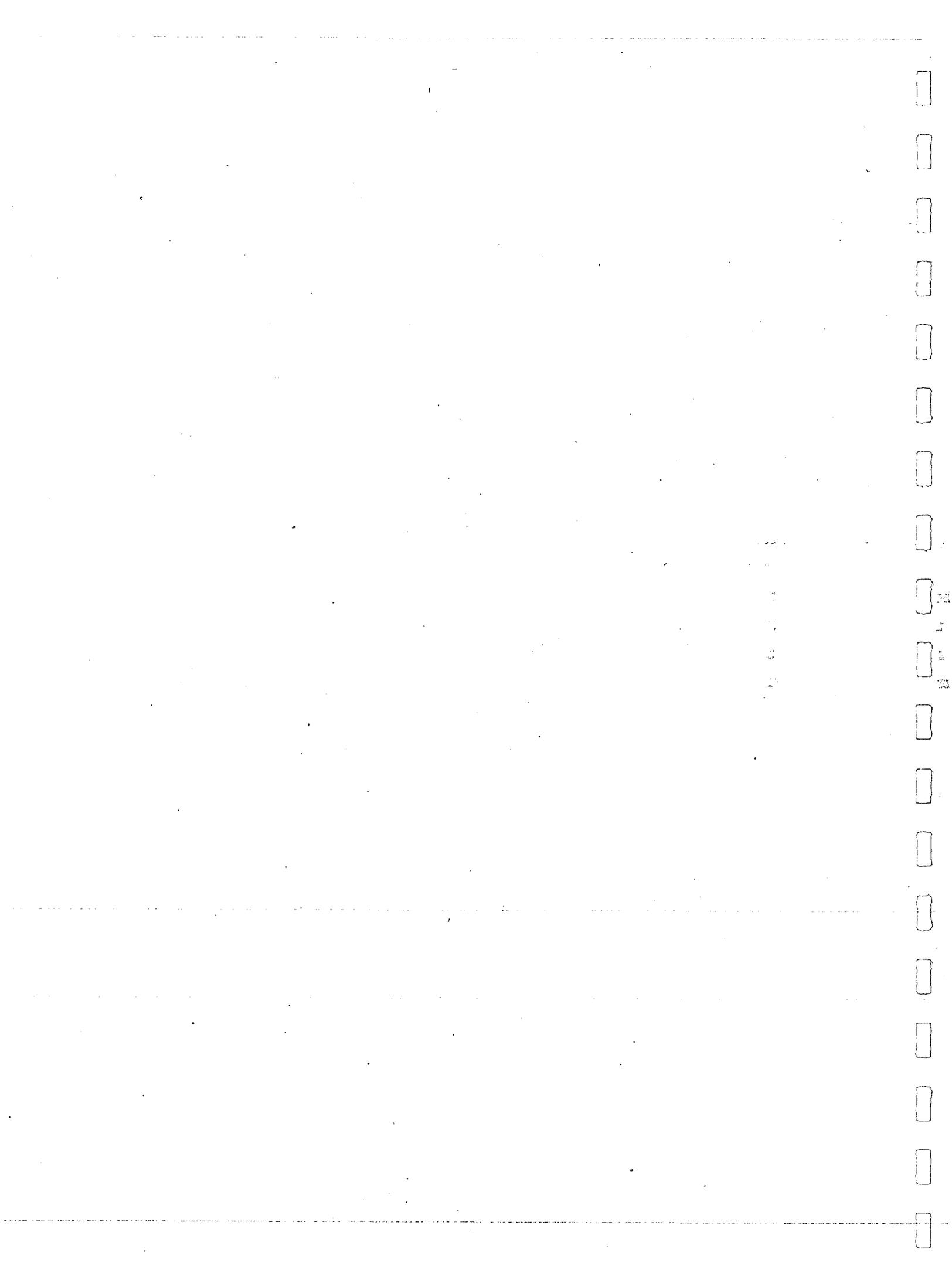
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(TAPE 36, SIDE A)

(MARCH 13, 1984)

1  
2 MR. BERGER: I'll call our  
3 gathering to order now. My name is Tom Berger, and I'm the  
4 chairman of the review commission and this is the third week of  
5 our overview hearings here in Anchorage. We expect others to  
6 arrive this afternoon and this evening for the overview and we  
7 may, tomorrow morning, once we have a full house, have to re-  
8 arrange the roundtable but we'll leave that until tomorrow to  
9 worry about.

10 This commission was established by the Inuit Circumpolar  
11 Conference to examine the Alaska Native Claims Settlement Act of  
12 1971. That was the... the landmark settlement of Native claims  
13 in the modern era. It is well known, I think, to all of you and  
14 the job given to this commission is to examine how the Alaska  
15 settlement has worked out and to do that in the broadest context  
16 and to consider what lessons have been learned in Alaska that  
17 will be useful to aboriginal peoples in other countries and to  
18 governments in other countries, for that matter, and we have asked  
19 all of you here so that Alaska Natives and Alaskans generally  
20 can benefit from your experience in these matters... your own  
21 history with regard to land claims and issues relating to Native  
22 self government in your own countries.

23 This commission will, once these overview hearings are  
24 completed this week, be spending the rest of its time for the  
25 next 12 months in the villages of Alaska. There are approximately  
200 villages in Alaska and the largest proportion of Alaska  
Natives live in those villages. And this commission will be going  
there to hear what those people have to say about the settlement  
of 1971, its impact on their villages and on their lives, and  
the directions that they may wish to take now and in the years  
that lie ahead.

Well, I think that I owe it to you to tell you what  
we've been talking about here for the last two weeks. During

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1 the first week of the overview hearings, we had Native people  
2 and leaders from Alaska who told us what they were trying to  
3 achieve when they worked for a settlement of Native land claims  
4 back in the late '60s and early '70s. What was it they wanted  
5 that settlement back in 1971 to do for Alaska Natives? We've  
6 had representatives of the congressional staff, some of those  
7 who were responsible for drafting portions of the claims act  
8 and representatives of the Alaska state government at the time  
9 and they've been here to talk about what it was Congress, the  
10 Congress of the United States, was trying to achieve in the claims  
11 act.

12 They all agree on what the settlement did. They don't  
13 altogether agree on the way it's worked out. But under the  
14 settlement here in Alaska in 1971, 44 million acres of land were  
15 to be conveyed to the Alaska Native people and they were to  
16 receive 962 and a half million dollars. Now, the people, them-  
17 selves, weren't to receive the land and the money. It was to  
18 be conveyed... The land was to be conveyed to 12 regional corpora-  
19 tions and 200 village corporations and the land was conveyed in  
20 fee simple, what I think we would all call freehold. The sub-  
21 surface rights, however, were to be held by the regional corpora-  
22 tions, the 12 regional corporations. That is, they were to hold  
23 and they do hold subsurface rights to all the land, whether it  
24 is land conveyed to the regional corporations or to the village  
25 corporations.

26 And each Alaska Native who participates in the settle-  
27 ment received 100 shares in his regional corporation and 100  
28 shares in his village corporation. So the Alaska Natives who  
29 participated in the settlement back in 1971 became shareholders  
30 in these corporations and it is the corporations that received the  
31 money and that hold Native ancestral lands.

32 Now, looking back, I think it is fair to describe the  
33 settlement as a landmark achievement. The corporations have been



1 the means of holding and consolidating Native ancestral lands and  
2 the money available to them, together with the land, has given  
3 them economic power in the state and thereby a certain measure...  
4 and a substantial measure, I believe, of political influence.

5 Now, it is apparent from the hearings that we have held  
6 already, that land was, in 1971, the most important concern of  
7 Alaska Natives and land is still the most important concern they  
8 have today. The land, however, is not their land. That is an  
9 expression used by Byron Mallott, president of Sealaska Corpora-  
10 tion, one of the regional for-profit corporations. Mr. Mallott  
11 came to these hearings during the first week and expressed the  
12 ... the dilemma that the corporations face in that they are, on  
13 the one hand, for-profit corporations. Their purpose in life is  
14 to make a profit. The land, then, that they hold is for their  
15 purposes an economic asset and yet, in very large measure from  
16 the point of view of village Alaska, Native people living in the  
17 villages, the land is regarded by them as a heritage to be passed  
18 on to their children and it is regarded by them as devoted... to  
19 be devoted primarily to subsistence hunting and fishing activities,  
20 activities which do not usually generate a profit and are not on  
21 the balance sheet of the corporations something that falls within  
22 the category normally of an economic asset.

23 Now, Mr. Mallott made the point that the corporations  
24 have not divested themselves of the land. That is, the uses to  
25 which they have devoted the land may not always be consistent with  
26 subsistence uses but they have not divested themselves of the land  
27 although there is nothing to prevent them selling it or they  
28 may, indeed, lose it if they are unable to pay their debts and  
29 go into bankruptcy. But the point should be made that the cor-  
30 porations have not, in the 12 years that have passed since the  
31 settlement was made, have not divested themselves of any substan-  
32 tial parcels of land.

Now, the land may, in 1991 or thereafter, be lost

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1 because the land that the corporations hold is not subject to  
2 property tax but it does become subject to property tax 20 years  
3 after conveyance. So in 1991 and the years that follow, the land  
4 may become subject to tax and could be lost. These are theoretical  
5 propositions but they've been discussed at length here... could  
6 be lost through tax sales.

6 Now, these corporations are shareholder corporations,  
7 not membership corporations. Only Native persons were entitled  
8 to be enrolled as shareholders in 1971. They cannot sell their  
9 shares until 1991. That is, for 20 years they are restricted in  
10 the sale of their shares. They cannot sell them to anyone, al-  
11 though their children may take by inheritance, and others may  
12 take by inheritance, though they cannot vote their shares. But  
13 there is concern here in Alaska that in 1991 when the shares  
14 become transferable, when Alaska Natives who hold shares can sell  
15 them, that some may, for one reason or another, sell them and  
16 that the corporations and the lands they hold could become the  
17 subject of takeover bids, and thus the corporations and the  
18 lands could be lost.

15 Furthermore, the only persons to whom shares were sold...  
16 to whom shares were issued in 1971 were those Native persons  
17 living in 1971, so all Alaska Natives born since 1971 are not  
18 entitled to be enrolled although they may take, as I say, by  
19 inheritance. Now, these... This means that the children of  
20 Alaska Natives who are less than 12 years of age are not entitled  
21 to be enrolled as shareholders in the corporations.

21 All of these are grave concerns to Alaska Natives.  
22 Under the claims act, under the settlement, their children do  
23 not share in the settlement as of right and after 1991, they  
24 may lose the land through loss of corporate control or through  
25 tax sales.

25 Now... (PAUSE) In describing the settlement that was  
made in 1971, I've emphasized the corporations. These are economic

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1 institutions but they have had to serve in a sense as political  
2 institutions as well because no political institutions were  
3 established by the claims act. It's called ANCSA... A-N-C-S-A,  
4 Alaska Native Claims Settlement Act, and many around the table  
5 will refer to it as ANCSA, the claims act, the settlement act.  
6 It's all the same thing.

7 At any rate, the issue of political institutions of  
8 political autonomy was not addressed by the act. But now this  
9 question of political autonomy has become an issue in Alaska and  
10 many Alaska Natives are urging that traditional tribal govern-  
11 ments, or tribal governments established under federal legislation,  
12 they are known as IRAs, should become the central institutions of  
13 Native government here in Alaska and some have gone so far as to  
14 urge that the corporations transfer the Native lands they hold to  
15 the tribal government to insure that the land remains in Native  
16 hands even if the corporations do not.

17 So last week and the week before, there was much  
18 discussion about the advantages and disadvantages of tribal  
19 governments and about the reservation system in the Lower 48  
20 because last week we invited Native leaders, lawyers and scholars  
21 from the Lower 48 to come to discuss these questions. Now we  
22 here in Alaska have observed that there is a worldwide movement  
23 by indigenous people, by aboriginal peoples for self-sufficiency  
24 and self-determination and we hope that you will tell us what is  
25 taking place in your own countries in furtherance of that move-  
ment by aboriginal peoples towards self-sufficiency and self-  
determination. Now that movement exists here in Alaska and  
during the first week of these movements, Charles Johnson, who  
is president of the Alaska Federation of Natives, expressed the  
desire of Alaska Natives not to be just citizens of the United  
States of America, but to be Native people as well, a distinct  
people in America with their own institutions. Mr. Johnson felt  
that the Native corporations here in Alaska were a sufficient

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1 expression of that desire for Native institutions. Mr. Sheldon  
2 Katchatag, on the other hand, who was here today, vice-president  
3 of the United Tribes of Alaska, speaking for his organization,  
4 takes the view that Native institutions must be political institu-  
5 tions. That is, they must have law-making authority, authority  
6 derived from the limited sovereignty that tribal governments  
7 possess as domestic dependent nations under United States law.

8 Many non-Natives in the state of Alaska... and Native  
9 people in the state of Alaska constitute approximately 15 or 16  
10 percent of the population... and non-Native people in the state  
11 of Alaska, many of them oppose distinct political institutions  
12 for Alaska Natives. They believe that they should, that the  
13 Native people should, as citizens of Alaska participate in state-  
14 chartered city and borough governments as other citizens do, and  
15 that these state institutions are sufficient.

16 Now, we understand that in Greenland the Eskimos are a  
17 majority in that country and that the premier and the cabinet are  
18 Eskimos and that the Eskimo people predominate in the government  
19 of that country but that the government is, nevertheless, one in  
20 which non-Native people, people of European descent, are entitled  
21 to play an equal part with the Eskimo majority. We will, I hope,  
22 hear not only about the movement towards home rule in Greenland  
23 and its outcome, I hope we will also hear from the Eskimos in  
24 Canada, and I use the word Eskimos to embrace the people who may  
25 be Yupik or Inupiat or Inuvialuit or Inuit or extend right across  
the Arctic. We want to hear from the representatives of the  
Eskimos in the Central and Eastern Arctic region of Canada about  
their plans to establish new territory with the predominantly  
Eskimo population and the means they intend to take to accommodate  
the non-Native population of European descent, the means they in-  
tend to offer them to participate in that government.

In any event, arguments about self-rule and sovereignty  
have arisen here in Alaska and they seem to be intertwined

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1 with the issues about what is to happen in 1991. At any rate,  
2 they seem to be given a special kind of urgency by reason of  
3 the felt necessity to make provision to avoid the consequences  
4 that people believe lie in wait in 1991.

5 Now, we want to hear from all of you how land claims  
6 have fared in your countries and how the movement for self rule  
7 and self government has fared and whether it has taken the form  
8 of a movement to establish distinctly Native institutions in  
9 which non-Native people do not participate or whether as in  
10 Greenland, as in the Central and Eastern Arctic region of Canada,  
11 movement is rather one... for governmental institutions in which,  
12 although Native people are the majority, non-Native people have  
13 the right to participate.

14 Well, last week... the second week of our overview,  
15 Native leaders from the Lower 48, legal scholars and others  
16 concerned with the humanities, discussed the policies of the  
17 United States of America towards native Americans in the Lower 48.  
18 Professor Joe Jorgensen, of the University of California, discussed  
19 these policies from the founding of the United States of America  
20 to the present. He said that U.S. policy had followed a roller  
21 coaster at one era, inclined to recognize the distinct nature  
22 of Native claims and Native institutions, and then in another  
23 era unwilling to recognize the distinct character of Native  
24 institutions and Native claims. That roller coaster has continued  
25 into this century and into our own time, and Ada Deer, of the  
Menominee tribe in Wisconsin, spoke of the history of that tribe  
in the '50s and the '60s and the '70s, of their termination by  
the United States government, and then of their struggle for  
restoration of their tribal government and tribal institutions  
achieved in the 1970s.

Professor Ralph Johnson told us last week that there  
has been, during the past ten years, acknowledgement of the  
right of native Americans to govern themselves through their own

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1 tribal governments. This, at least, has been so in the Lower 48  
2 and he said that this has been affirmed by legislation enacted  
3 by every administration during the 1970s and 1980s and by a series  
4 of decisions of the supreme court of the United States during the  
5 same period.

6 Now, most of those who came from the Lower 48 were  
7 dubious about the Alaska Native Claims Settlement Act of 1971.  
8 For instance, Kim Gottschalk, a lawyer with the Native American  
9 Rights Fund, said that it should be regarded as likely to end in  
10 the loss of Alaska Native land and he felt it was out of keeping  
11 with the movement in the Lower 48 by native Americans for a  
12 greater measure of Native autonomy.

13 Professor Ralph Johnson and Tim Coulter of the Native  
14 American Resource Council in Washington, D.C., spoke of the  
15 movement to extend the powers of tribal governments during the  
16 past decade. Some of these powers exercisable by tribal govern-  
17 ments include the power to determine who is a member of the tribe,  
18 the power to tax, certain civil and criminal jurisdiction, in-  
19 cluding child welfare, jurisdiction over the use of water on  
20 reservation lands, jurisdiction to enact building codes, zoning  
21 measures, and to establish preferences for Native hire by tribal  
22 governments.

23 I think I should add that in Canada and the... In  
24 Canada, the constitution adopted by Canada in 1982 provided for  
25 explicit recognition and affirmation of the rights of the  
aboriginal peoples. In a report subscribed to by all parties  
of the Canadian parliament in November of last year, it was  
agreed that Canadian... that Native governments in Canada should  
be recognized as a third order of government along with the federal  
government and the governments of the provinces, and there was  
a constitutional conference in Canada last week relating to  
Native rights and we will ask... Since none of us were there, we  
will ask the Canadian representatives at this conference to tell us

1 more about that as the week goes on.

2 We were also told that there has been a movement for  
3 the restoration of sacred places in the Lower 48 and throughout  
4 the world. Russell Jim, of the Yakima tribe, spoke of the restora-  
5 tion of a sacred mountain in Washington state to the Yakima people.  
6 Tito Naranjo, of the Pueblos of New Mexico, spoke of the restora-  
7 tion of Blue Lake, the Pueblos' Lake of Emergence, and we have  
8 heard of the restoration in Australia of Ayers Rock to the  
9 aboriginal people of that country.

10 Now, last week we were reminded, however, that in the  
11 United States there is a large body of opinion that looks with  
12 disfavor on the idea that Native peoples should have their own  
13 governments, that does not look with favor on the idea that they  
14 should have their own land, free from taxation, or, for that  
15 matter, their own Native corporations. Many people in the United  
16 States and in other countries are opposed to what they regard as  
17 a nation within a nation, a state within a state. They say that  
18 all should have equal rights and that these rights can only be  
19 claimed by individuals. And Professor Lerner, from the University  
20 of Chicago, told us last week that this was the genius of the  
21 U.S. constitution and Bill of Rights, that everyone has equality  
22 of rights under the law but that these rights can only be claimed  
23 by individuals and that Indian tribes and Indian people can no  
24 more claim rights belonging to them as a class or as a tribe  
25 than the Irish in America, or the Italians or the Ukranians  
or the Chinese in America could claim the right to their own  
government and their own land, free from taxation, or their  
own corporate structures.

And this reflects a widely held view that uniformity  
and language, customs, religion and culture, is a good thing and  
that diversity is bad. At least, that diversity should not be  
given institutional... or, constitutional recognition.

Well, we want to know to what extent you, who come from

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1 Canada and Greenland and Norway and Australia have encountered  
2 this argument and what arguments have been advanced on your side  
3 to meet that argument. Or, if it be so, whether you have accepted  
4 the validity of that argument and have ceased to try to persuade  
5 those who accept it.

6 In Norway, we have been told that Professor Karsten  
7 Smith is completing a report on the land rights of the Sami  
8 people of Norway, of whom there are 40,000, and we hope to hear  
9 about their movement for land rights and, indeed as well, their  
10 movement to achieve a measure of self government.

11 We want to know what arrangements you have made in your  
12 own countries for preservation of ancestral lands. Is your land  
13 held in trust by your national government for Native people? Is  
14 it held by Native corporations? If you have Native corporations,  
15 are they shareholders corporation in which everybody holds shares,  
16 or are they membership corporations in which every tribal member  
17 is entitled to participate? Are the political institutions that  
18 you have established public governments in which Natives and  
19 non-Natives have the right to full participation, or are they  
20 Native governments restricted to Native persons? To what extent  
21 in all of this have you followed or rejected the Alaska Native  
22 claims settlement model of 1971?

23 And we hope that in the course of these four days, we  
24 will hear about the settlement in James Bay and Northern Quebec  
25 in 1975, the settlement in the Mackenzie Delta that is apparently  
even now being considered by the government of Canada and the  
Inuit people in the Mackenzie Valley and Mackenzie Delta. We  
hope to hear about the settlement that has been reached in the  
Yukon by the Council of Yukon Indians and the government of  
Canada. We hope to hear about the land claims that are being  
advanced by the Dene Nation, in the Mackenzie Valley, and by  
the Inuit Tapirisat of Canada in the Central and Eastern Arctic.  
We hope, from Greenland, to hear the story of home rule and how

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1 far land claims have been settled in Greenland and what proposals  
2 the Eskimos of Greenland are advancing for settlement.

3 From Norway, we hope to hear about the movement of the  
4 Sami for land rights in Norway and in other Scandanavian countries.  
5 And in Australia, we hope to hear of the national struggle for  
6 land rights by the aboriginal people of Australia, and in par-  
7 ticular to hear of developments in the Northern Territory and in  
8 Western Australia.

9 All that is said here today and for the remainder of the  
10 week is transcribed on the audio equipment and a transcript will  
11 be made, and the record will be a permanent record, available to  
12 all of us in the future. And I hope that we will learn much  
13 from one another. Perhaps I should say that these television  
14 cameras are here not only to record what is said, but for the  
15 purposes of developing a television program.

16 When these overview hearings are completed later this  
17 week, we will... This commission, which is focusing on Alaska  
18 land claims, will resume its meetings in the villages throughout  
19 Alaska. That work will take us into 1985 and I will write a  
20 report in 1985 that we hope will be of use to Alaska Natives and  
21 to aboriginal peoples in the countries that all of you represent  
22 here.

23 I think that I might, for the record, just list the  
24 people that we have here already today. Maureen Kelly is here from  
25 Pilbara Land Council, Marble Bar, Western Australia. Shorty  
O'Neil from the National Land Council in Australia. The delegates  
from Canada are not here in force but they have sent Sam Silver-  
stone, legal council to Makivik Corporation, the Inuit Corporation  
in Quebec, and from Alberta, Alex Red Crow and Ron Laneman are  
here and they have been working with the... the United Nations  
working group on indigenous peoples in Geneva. From Norway we  
welcome Alf Isak Kekitalo of the Sami Institute, and from the  
United States, especially Alaska, Don Mitchell, who served for

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1 some considerable time as vice-president of the Alaska Federation  
2 of Natives and is a well known figure in the Alaska land claims  
3 movement and a legal advisor to Native people, is here. And  
4 Sheldon Katchetag, vice-president of the United Tribes of Alaska,  
5 and Dalee Sambo of the Inuit Circumpolar Conference, as well,  
6 Alfred Starr, an Athabascan elder who was an early proponent of  
7 land rights for Native people here in Alaska, Charlie Edwardsen,  
8 Junior, who was one of the key figures in the struggle for  
9 ANCSA back in the late '60s and early '70s, as well as David  
10 Case who is professor at the University of Alaska and is legal  
11 advisor to this commission, and Chuck Smythe, an anthropologist  
12 here in Alaska who is working with the commission.

13 Tomorrow morning when we have the aircraft schedules  
14 and the weather permitting a full house, I may take the liberty  
15 of introducing all of you again.

16 Now, we have asked Professor Doug Sanders of the Univer-  
17 sity of British Columbia, who is legal counsel to the World  
18 Council of Indigenous People, to open the discussion today,  
19 and his paper about the reemergence of Native rights in inter-  
20 national law was circulated to all of you and we will ask Doug  
21 to begin by discussing his paper. And after that, we will have  
22 a coffee break and we'll then ask some of you to... to contribute  
23 to the discussion after that.

24 Doug, with that perhaps less than adequate introduction,  
25 would you open the discussion?

MR. SANDERS: Thank you. I  
might note, Mr. Commissioner, that this is our 20th anniversary.  
It was 20 years ago that I began to work with you in a small law  
firm in Vancouver and...

MR. BERGER: Now we're both  
unemployed.

MR. SANDERS: (LAUGHTER) Much  
has changed since then, but you're still the one presiding.

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1 MR. BERGER: (LAUGHTER) Let it  
2 remain so.

3 MR. SANDERS: Two documents  
4 have been circulated, a paper that I've written called "The  
5 Reemergence of Indigenous Questions in International Law" and  
6 a briefer document at the end of that entitled "Comparative and  
7 International Chronology of Indigenous Rights." I will be  
8 roughly following the chronology, rather than the paper which is  
9 more a background document.

10 One of the central theses in the longer paper is that  
11 the question of indigenous rights was regarded as an international  
12 law question in the early days of European colonial expansion.  
13 In the 16th century the writing of the fathers, as they are  
14 called, of international law, clearly treated the question of  
15 indigenous rights as a question of international law. Now,  
16 international law was not truly international. It was the pro-  
17 duct of the Western European colonial states. It was designed  
18 to resolve conflicts between them and not designed to create any  
19 kind of balance between rights of colonized populations and  
20 rights acquired by colonial powers. It wasn't truly international  
21 then. In periods since the Second World War we've had very  
22 significant arguments by Third World nations that it still is  
23 not truly international in our time.

24 What happened with international law was that, having  
25 treated the questions of indigenous rights as true international  
26 law questions, that element of international law was then rather  
27 unceremoniously dumped. Colonialism became so extensive and so  
28 successful in terms of the Western European powers that they  
29 ceased to regard the questions of indigenous rights as interna-  
30 tional law questions and the mark of this success or this  
31 achievement of power was the redefinition in international law  
32 of indigenous questions as being domestic. They were internalized.  
33 They were not subject to any kind of international principles,

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1 any kind of international scrutiny, any kind of international  
2 standards. International law traditionally has been basically  
3 the law governing the relationship between nation states, with  
4 the nation states being restricted to those national entities  
5 which recognized each other. Tribal populations and indigenous  
6 populations were excluded from this essentially Euro-centric  
7 analysis of the relationship between peoples and between popula-  
8 tions. So it became a standard... There were some anomalies  
9 because there were documents such as the document in Figi  
10 acceding to British sovereignty in Figi and there were the treaties  
11 in North America. But these anomalies were not treated as being  
12 real anomalies. The documents involved were treated as less than  
13 international law documents, the transactions as less than  
14 international law transactions.

15 By international law, all of these matters were domestic  
16 matters. Therefore, they were not subject to international  
17 scrutiny. There was a development in international law in the  
18 late 19th century, the evolution of an extensive set of inter-  
19 national institutions, and the gradual extension of international  
20 law into fields that it had not been involved in before, some  
21 simply responding to technological change, the development of  
22 more trade and more communications. It's only significantly  
23 since the Second World War that international law has extended  
24 into areas that were previously described as being domestic,  
25 internal social questions. Human rights entered the international  
law most notably after the Second World War but following the  
dominant pattern of human rights concerns in the traditions of  
the United States. That is, of focusing on individual human  
rights and not on collective rights or on the rights of minorities.

We have gotten to the point today where it is increas-  
ingly accepted that it is not adequate to look at indigenous  
questions solely in domestic law terms. The old framework is  
no longer adequate. In 1973, Professor Louis Sohn, S-O-H-N, the

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1 distinguished United States expert on the international law of  
2 human rights, stated that the subject of human rights of indigenous  
3 peoples was, quote "clearly on the agenda of the world community,"  
4 end of quote. And the very fact that this set of hearings is  
5 being held this week, the character of the hearings this week,  
6 testifies that at least some of the people connected with this  
7 inquiry and connected with indigenous questions in Alaska have  
8 rejected the view that these questions are solely domestic.

9 There are two ways of seeing it, and they're not  
10 solely comparative, because if they were seen as solely compara-  
11 tive, then one would look at other countries out of interest  
12 because perhaps other countries have some lessons to teach you.  
13 But it's only a comparative examination. There's no compulsion  
14 to follow what's going on in any other country of the world.

15 One of the major characteristics of international law  
16 as it is developed in at least the Western traditions, has been  
17 that it's a kind of summing up of minimum standards of behavior  
18 on the part of nation states. So in our time there is a question  
19 as to whether certain minimum standards of treatment of indigenous  
20 populations have now come to be accepted by nation states and  
21 scholars as appropriate in relation to indigenous populations.  
22 For, if that can be said, then in purely orthodox international  
23 law terms there is then a base on which the formulation of  
24 international standards is possible. On the basis not of new  
25 conventions, but on the basis of customary international law.  
That is the recording of a minimum concensus which has developed.

There are two forms of international law, customary  
international law in which I suggest certain standards could now  
be derived. As well, there is conventional international law  
which is international law which is based on agreements, treaties,  
conventions and agreements. There is, among certain figures  
active at the international level, a kind of generalized agenda  
that certain standards for the treatment of indigenous populations

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1 are being and are to continue to be developed in the anticipation  
2 of leading to some resolution of the general assembly or some  
3 convention which would deal with standards for the treatment of  
indigenous populations.

4 We're very clearly in the middle of this transition.  
5 The beginning is clearly over and we're still quite a ways from  
6 the end. If we look back over the last number of years, if we  
7 look at major studies that have been done about indigenous questions  
8 that are older than 15 years, you do not find comparative or  
9 international material. So if you go back to the Meriam Report  
10 in the United States in 1928, or the Hawthorn Report, in Canada  
11 in 1966 and 1967, the Hun Report, in New Zealand in the mid '60s  
12 and three or four reports which have been done in Finland, Sweden  
13 and Norway, you do not find comparative material and, even more  
14 so... the absence is even more striking of any suggestions that  
15 there are any international law principles involved. More  
16 recent studies contain at least some comparative material.  
17 The report of the Mackenzie Valley Pipeline Inquiry, well known  
18 to the chairman, is interesting in this. There were two inter-  
19 national law opinions which were tabled to the inquiry from  
20 Professor Brownlee in the United Kindom and Professor Faulk in  
21 the United States, both of which argued that the international  
22 law principle of the self-determination of peoples applied to the  
23 Dene in the Northwest Territories. The end report used the term  
24 self-determination to describe the nature of the positions being  
25 put forward by the Dene and the Inuits in Northern Canada. The  
report of the Woodward Inquiry in Australia contains some compara-  
tive material and Judge Woodward came to Canada. The report  
of the Special Committee on Indian Self Government in Canada,  
published in November of last year, again the committee traveled  
to the United States, there was comparative material commissioned  
as in the background studies, and we see in the report of the  
Senate Committee in Australia, published also last fall, on the

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(TAPE 36, SIDE B)

1 idea of a compact or makarrata, that there you also get compara-  
2 tive material. It's a bit striking there that the international  
3 law arguments are explicitly rejected by the committee, and it  
4 is clear that the forthcoming report by Dr. Karsten Smith in  
5 Norway, will have an extensive section on international law.  
6 Karsten Smith, of course, himself, was an international law  
7 scholar so... but it did not, in fact, occur to the government of  
8 Norway when he was appointed a few years ago that international  
9 law might become identified as a major subject matter in the  
10 inquiry that he was appointed to head.

9 We have had a study which was commissioned in 1971 by  
10 the subcommission on the prevention of discrimination and the  
11 protection of minorities in the United Nations system, a study  
12 on discrimination against indigenous populations, that study is  
13 not yet completed reflecting the slow pace of things at the  
14 international level and that, of course, is a major comparative  
15 study which will give us the most comprehensive comparative  
16 study of state policy that has ever been produced. Because the  
17 comparative studies in the past that are notable, are only about  
18 three or four in total number.

16 We've had over the last few years a series of conferences  
17 in which the international and comparative aspects of indigenous  
18 policy have been stressed. There was a conference organized by  
19 the Indian students at Harvard University, I think in 1981.  
20 There was an international law conference at Carleton University  
21 at Ottawa in January of 1982, and an international law conference  
22 in Australia in November of 1983. As well, of course, there have  
23 been the two Geneva human rights conferences organized by the  
24 Organization of Non-Governmental Organizations, accredited to  
25 the economic and social council of the United Nations, both on  
26 questions of human rights of indigenous peoples in the Americas.  
27 And those were held in Geneva in 1977 and 1981.

25 It's interesting, even the fact, Mr. Chariman, that you

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1 are not a citizen of the United States is an interesting fact in  
2 terms of the internationalization of these issues. I was trying  
3 to think whether there were any precedents for... for establish-  
4 ing an inquiry of this type. Certainly, there have been some  
5 international inquiries such as the one organized by the Inter-  
6 church Committee on Human Rights in Latin America, a Canadian  
7 interchurch group which sent a team to investigate the question  
8 of indigenous rights in Chile about three years ago. The inde-  
9 pendence constitution of Guyana had provisions for land rights  
10 for Amer-Indian peoples to fulfill that provision. A commission  
11 was established and the government of Guyana requested the  
12 government of Canada to name a person to sit on the commission  
13 to give it an international character. Canada nominated Mr.  
14 Alfred Scow, who was the first Indian in Western Canada to obtain  
15 a law degree and who is now a judge of the provincial court in  
16 British Columbia. And he served as, I believe, one of three  
17 commissioners who did that report.

18 Also in Canada during the prime ministership of Lester  
19 Pearson was a proposal for an Indian claims commission modeled on  
20 that of the United States but with the significant variation that  
21 it would have an international character and Mr. Pearson suggested  
22 that perhaps a Maori from New Zealand should be appointed to  
23 be one of the commissioners. We're happy, of course, that the  
24 commission was never established because the model was a bad  
25 one, but the idea, the acknowledgement, that it is appropriate  
to internationalize the tribunal is significant.

One of the things that may be unique about this inquiry  
is having indigenous people outside the nation state come to  
testify. While there has been comparative work done in other  
inquiries, the Alaska Highway Pipeline Inquiry, the Mackenzie  
Valley Pipeline Inquiry and the Special Committee on Indian  
Self Government, and all of those bodies either held hearings  
outside of Canada or visited outside of Canada... I don't think



1 it was true that any indigenous witnesses from outside Canada  
2 came to Canada to testify. If I'm right on that, then the  
3 pattern here is a step ahead in terms of how inquiries of this  
kind would be organized.

4 It's also striking that in the listing of possible  
5 witnesses this week, the number of indigenous people outnumbers  
6 significantly the number of nonindigenous people.

7 The testimony I want to give today is still very much  
8 work in progress. Indigenous questions have been so devalued in  
9 the scholarly work in the Western countries that there has been  
10 virtually no comparative work and we are now at this point putting  
11 together some analogies and some analysis of parallel patterns in  
12 different parts of the world. So I will file with you later  
13 this week an updated version of my chronology. The chronology  
14 first appeared in January at the small conference that was held  
15 here in Anchorage. You have before you today the second version.  
16 By the end of the week you will have a third version.

17 If I can turn to that, then, it is broken into about  
18 five or six sections. The first section attempts to outline the  
19 patterns of early recollection of indigenous political and civil  
20 rights, beginning with the references to the work of Las Casas  
21 and Vittoria, within Spanish colonialism, and Vieira within Portu-  
22 gese colonialism. In these patterns of early recognition of  
23 indigenous rights, as I suggested earlier, there was a clear  
24 international law framework. These figures were significant  
25 figures in the founding of modern international law. We come  
today back to certain of the questions that they raised. For the  
question of by what right the Western European colonial powers  
took over occupied lands in the Americas is not settled. It's  
striking that in Canadian law, we have no legal theory as to the  
acquisition of sovereignty over Canada. It is striking in U.S.  
law that there is disarray on the question of the exact legal  
theory for the acquisition of sovereignty over what is now the

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1 United States.

2 In my article on page 27, I have summarized very quickly  
3 what I take to be the major theories on the acquisition of  
4 sovereignty by the Western European colonial powers, and I'll  
5 just read that.

6 "A, prior discovery. Discovery alone does not give rights  
7 in international law." That is now accepted. "B..." This is a  
8 listing of the various theories that have been put forward. "B,  
9 religious or civilizing mission." These were extremely important  
10 concepts in the earlier history of Western European colonial  
11 expansion. "They are not acceptable bases in modern international  
12 law. Even the papal grant of 1493 was rejected as a basis for  
13 the acquisition of territories by Franciscus de Vitoria in the  
14 early 16th century. Concepts of trusteeship and protection have  
15 often been used as justifications for colonialism, but they  
16 fail as legal grounds."

17 "C, conquest." Conquest is used very loosely in many  
18 statements, but "Conquest is only legally valid in the case of  
19 a just war," and that was recognized even in the early Spanish  
20 period. "As well, under the modern law of war, conquest is not a  
21 basis for continuing possession of a territory."

22 "D, cession," which is the granting of the rights by the  
23 indigenous population. It's often said by indigenous spokes-  
24 people that sovereignty is not something that is transferable,  
25 that it is contrary to indigenous law. It is not contrary, how-  
ever, to Western European international law, and so within that  
context it is a conceivable basis. So I state the Western  
European position, "The acquisition of populated territories is  
not colonialism when it is the exercise of the right of self-  
determination by the population. The decision to become part of  
another state can take the form of a formal treaty of cession or  
informal acquiescence." I then comment, "It is very difficult  
to argue the various indigenous enclave populations gave any free



1 consent to the colonial powers."

2 And, "E, occupation and settlement," and this, I might  
3 add, is the basic thesis in both Australia and in Canada, although  
4 more clearly articulated in the law of Australia than in the law  
5 of Canada. "By this view indigenous peoples lacked any system of  
6 law and, for that reason," there was "no barrier to European  
7 colonialism. The lands could be treated as unoccupied." This,  
8 of course, is an ethno-centric analysis. It was very common in  
9 practice but is no longer acceptable and specifically, it is  
10 in conflict with the advisory opinion on the Western Sahara, the  
11 decision of the International Court of Justice in 1975.

12 That completes that brief summary of the major doctrines  
13 which have been used. It's interesting that the Senate Committee  
14 Report, published in Australia last fall, puts forward two  
15 grounds in international law for validating Australian sovereignty  
16 over aboriginal lands. The first one is by citing what is often  
17 referred to as the doctrine of intertemporal law. Intertemporal...  
18 you can bridge time, and therefore a right which was valid under  
19 the concept of the time in which it was established, is acceptable  
20 now. The rights survive even if the basis is no longer considered  
21 acceptable in international law.

22 I find this very striking because it's in conflict  
23 with the major analyses that I have seen of the doctrine of  
24 intertemporal law, specifically the article by Elias, one of the  
25 judges from the International Court of Justice who would find  
the Australian comments to be totally incorrect in terms of the  
international law doctrine.

The second thing that the Australian Senate Committee  
talks about is a prescriptive title to sovereignty, arguing that  
the time that has gone by has meant that the rights, however  
dubious in their origin, have become less dubious as they have  
matured like fine wine. This doctrine is, I think, extremely  
suspect. The committee, itself, notes the analysis of the long

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1 history of resistance in Australia by aboriginal people to the  
2 presumptions of the settler population. And on the point, I  
3 will table with the commission a paper which I have recently  
4 done called "The Search for Recognition in International Law"  
5 which attempts to document attempts largely by Canadian Indians  
6 to raise these questions, both within the structure of the  
7 British empire and internationally. This kind of information  
8 has not been valued and has not been brought together, and so  
9 the assumption has not been possible that indigenous peoples  
10 acquiesce in the presumptions of sovereignty put forward by the  
11 Western European colonial powers. However, as more research is  
12 done on these questions, it becomes clear that there was not  
13 acquiescence, that whenever there were opportunities to protest  
14 the assumptions that were made, those opportunities were taken.  
15 That makes the doctrine of prescriptive title to sovereignty  
16 argued in Australia, I think, untenable.

17 The second aspect of my first heading in the chronology,  
18 patterns of early recognition, goes from the international law  
19 recognition to patterns of significant domestic law commitments  
20 developed by various European powers. Documents such as the  
21 Royal Proclamation of 1763, the Northwest Ordinance, the New  
22 Laws of the Indies, the Papal Bull "Sublimis Deus," and the  
23 patterns of treaties and certain of the early court judgments.  
24 Now, the second heading begins lower on the page, is headed,  
25 "The Undercutting of Indigenous Rights and the Consolidation  
of Unilateral National Jurisdiction over Indigenous Populations."

It becomes important to try to understand how this reversal occurred. This involves two elements. First, the domestication of indigenous questions, so the junking of the idea that there is... these are properly questions of international law, and secondly, not only their domestication but also a reversal of patterns in domestic law. So, the patterns, the commitments that had been made in the Royal Proclamation, in

1 the Northwest Ordinance, and in the treaties are reversed.  
2 Because those documents did not involve the assumption of inter-  
3 nal jurisdiction over internal matters on the tribes and did not  
4 explicitly assume unilateral decision-making. The Royal Proclama-  
5 tion talked about a principle of consent, treaties. The Northwest  
6 Ordinance talked about consent, lands were not to be taken  
7 without consent. The treaty pattern was consent. Therefore,  
8 you had a model of how domestic relations were to be handled,  
9 by agreement, by consent, by treaties.

8 By the end of the 19th century, that model had been  
9 abandoned. So even the domestic law principles which had been  
10 established had been reversed. Colonial governments, settler  
11 governments, had assumed unilateral jurisdiction to alter the  
12 terms of treaties, to establish relationships with additional  
13 tribal groups without going through a consensual relationship.

12 Now, how did this happen? There are two... two aspects  
13 which I've identified. The first is... intellectual or philo-  
14 sophical. By the end of the 19th century, you had various  
15 intellectual systems which were hostile to the collectivist  
16 traditions of indigenous tribal groups. In the late 19th century  
17 you had... particularly in Central and South America... what are  
18 referred to as liberal reforms. These involved values which were  
19 nationalistic. They were rationalistic or scientific, and they  
20 were individualistic in their orientation. The use of the term  
21 liberalism is a bit dangerous because in the liberal tradition  
22 there's also a concept of tolerance and so this is one of the  
23 streams of the liberal tradition which was hostile to difference  
24 and sympathetic to the individualism which was characteristic  
25 of the capitalism of the period.

23 This was not, however, a capitalist plot. The plot was  
24 more extensive because you find in Marxist thought an analysis of  
25 the evolution of societies, from more primitive to more modern  
structures. And this... Those systems of thought were also hostile

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1 to respect for traditionalist systems. Those systems were  
2 archaic. They must change, they must pass away, they would be  
3 replaced inevitably by more modern forms. So you did not have  
4 any Marxist thought and there developed a tradition of Marxist  
5 anthropology. You did not have in that any respect, conceptually,  
6 for tribal society.

7 You also had social Darwinism which has come to be  
8 perhaps the most strongest... the system of thought most strongly  
9 identified with the hostility to tribal systems in the late 19th  
10 and early 20th century. Some good work has been done in  
11 Scandanavia analyzing the impact of social Darwinist thinking  
12 on Scandanavian governments in terms of Sami policy in the late  
13 19th century.

14 You also have the philosophy of Krumph, called posi-  
15 tivism, which, while it is not remembered as having much impact  
16 in North America, was extremely pervasive in Central and South  
17 America. And so the intellectual milieu in Western thought in  
18 the late 19th century was individualistic, rationalistic, nation-  
19 alist. In the romantic schools of northern landscape painting  
20 that occurred both in Canada and Scandanavia in the latter part  
21 of the 19th century, the wonderful romanticism about the land  
22 and no depiction of northern peoples. The romanticism did not  
23 extend to the northern tribal populations. So that's one  
24 aspect. A second aspect, and perhaps a more common analysis of  
25 what happened, was simply that there was a shifting power balance.  
When the relations between the European colonial powers and the  
tribe were more evenly balanced, when the European colonialists  
needed indigenous allies, it was in that kind of period that  
there was a recognition in domestic law of rights of indigenous  
populations. When the power balance, in the eyes of the colonial  
powers, was irrevocably shifted in their favor, then the need  
to recognize was lessened. Also, frequently the latter stages  
of contact with tribes were contacts with hunting groups in which



1 the political units were relatively small and the population  
2 density relatively small, situations in which the intrusion of  
3 the alien populations was much easier, situations in which resis-  
4 tance was much more difficult.

5 In any case, for a combination of these reasons presumably,  
6 unilateral jurisdiction was established, at least in the minds of  
7 the settler governments that had become established, and when the  
8 League of Nations was formed after the First World War, the ques-  
9 tion of putting some minority rights provisions into the cove-  
10 nants of the league was discussed. The governments of Australia  
11 and New Zealand, acting through the United Kingdom, succeeded in  
12 having no provisions on minority rights inserted in the covenant  
13 of the league because they wanted no international investigation  
14 of their treatment of Maori and aboriginal peoples.

15 The pattern of undercutting indigenous rights which  
16 occurred in North America in the late 19th century occurred as  
17 well in Central and South America, it occurred in Scandanavia  
18 in which prior patterns of recognition of Sami territorial rights  
19 was transformed or translated or revised into simply a right to  
20 herd reindeer, divorced from any property rights in the territory  
21 that was necessary for reindeer herding. Even in Japan, in the  
22 late 19th century, a prior pattern of recognition of Ainu  
23 territorial rights, was replaced with a system of allotments  
24 apparently modeled on the Dawes Allotment Act in the United  
25 States. The Dawes Allotment Act, of course, was a great blow  
against collective land holding, against the reservation system,  
in the United States and later, in 1928, the Meriam Report  
suggested that the Dawes Allotment Act had laid the foundation  
for 20th century Indian poverty in the United States.

The third section of my analysis, which begins on the  
second page of the chronology, indicates some retreat from the  
policies of the late 19th and early 20th century. And I head it,  
"Collectivist reforms in the 1920s and 1930s." One, I think,

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1 starts to see the connection between minority rights concerns in  
2 international law and the treatment of indigenous populations as  
3 a specific subject matter. While minority rights provisions had  
4 been deliberately excluded from the covenants of the League of  
5 Nations, nevertheless, in the European peace treaties that marked  
6 the end of the First World War, there were specific minority  
7 rights provisions for named minorities in specific countries  
8 who had been defeated in the First World War. And the system of  
9 ... That limited system of minority rights was under the super-  
10 vision of the league. Therefore, you had, really for the first  
11 time, the internationalization of some minority rights concerns.  
12 It wasn't principled; no general principles were established, and  
13 it wasn't... it wasn't systematic and it was not seen as success-  
14 ful in the end. But nevertheless, it is one of the major policy  
15 innovations in international law which is associated with the  
16 league. And a couple of significant things do come out of it.

17 In the decision of the permanent Court of International  
18 Justice, on the question of minority schools in Albania, which  
19 has to sound like one of the most obscure references that I will  
20 come up with today, you have established in international law  
21 the principle that equality does not mean equal treatment, that  
22 when you have minority populations who significantly differ from  
23 majority populations, a uniform regime of law within the state  
24 may, in fact, discriminate against the minority population.  
25 The principle is therefore established that, to have equality in  
law and fact, the phrase used in the decision, it may be required  
that there be differential treatment. And therefore, the  
minorities were entitled, in order to maintain equality... they  
were entitled to maintain their distinctive school system. As  
well, in the international arbitration on the Aaland Islands, a  
system of regional autonomy was developed within the state of  
Finland for the Swedish-speaking majority on the Aaland Islands,  
a model that has been referred to many times since the decision was

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1 put into place.

2           The... As well, and I haven't integrated this end, you  
3 have, in the creation of the Soviet Union, after the October  
4 revolution, you have the recreation of the old czarist empire  
5 on the new principle of the free association of nations within  
6 a multinational state...and some of the most sophisticated writ-  
7 ings in terms of respect for the political autonomy of separate  
8 populations within the nation state.

9           The reality of that, at least in modern times, has often  
10 been challenged, but the theoretical work in terms of the structure  
11 of the Soviet Union is fascinating and extremely well written.  
12 And it may be that it had some impact on the pattern of collectiv-  
13 ist reforms that happened in Western countries during the period  
14 between the wars.

15           You have, also, in Mexico a realignment of national  
16 symbolism after the Mexican revolution and the development of  
17 a policy entitled indigenism, in which respect for pre-contact  
18 cultures and languages is established as a major part of state  
19 policy. You have the United States equivalent in the Indian  
20 New Deal, which produced the Indian Reorganization Act of 1934  
21 and I mentioned a couple of other more minor parallels in the  
22 same period, New Zealand reforms of some reconsolidation of  
23 Maori lands and Japanese reforms of some reconsolidation of Ainu  
24 lands in the same period.

25           The only impact in Canada... and you mentioned the  
roller coaster phenomena in the United States... In Canada we  
seem to have been much calmer and not gone through quite as  
dramatic a fluxes. But in the 1930s, there were reforms in re-  
lation to Metis people on the prairies and the establishment of  
a system of Metis colonies in Alberta under the Metis Betterment  
Act of 1938. It's the major Canadian reform in the period.

I next turned to the period after the Second World War,  
what I call the termination reforms of that period. Termination

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1 of course, is a term most clearly identified with the United  
2 States, but if one tries to survey various kinds of countries I'm  
3 talking about in the periods immediately after the Second World  
4 War, one finds this policy of assimilation as the most common  
5 term is firmly in place, integration and assimilation. The...  
6 And various countries are boasting that they have an enlightened  
7 policy of assimilation. That's how limited the debate is in that  
8 period. And, again, there's a relationship between indigenous  
9 policy and minority policy in general. After the Second World War,  
10 minority policy was out of favor, internationally. It was seen  
11 that Hitler had exploited minority arguments in consolidating  
12 power, vis a vis German minorities and other countries, that that  
13 had significantly lead into the Second World War. The League of  
14 Nations... which of course, seriously discredited minority concerns  
15 ... The League of Nations was seen as having been very concerned  
16 with minority rights and having been a very significant failure.  
17 And so you didn't get any positive carryover from the league's  
18 work.

19 The cold war atmosphere after the Second World War  
20 also seemed to be hostile to respect for difference. You also had  
21 a strong period of U.S. cultural and political homogeneity and  
22 with the U.S. melting pot theory in terms of its internal social  
23 patterns, and a human rights policy now projected internationally  
24 from the United States which stressed international rights. And  
25 so, in the... In the charter of the United Nations, you have a  
26 commitment to human rights but in individual rights terms. While  
27 self-determination of peoples is mentioned, you do not get...  
28 internal concepts of the application of that principle. You don't  
29 even get, immediately after the Second World War, any international  
30 law commitment to decolonization. That takes at least another  
31 decade before it enters international law as some kind of principle.

32 So, in terms of termination, you have the U.S. Indian  
33 Claims Commission Act of 1946. It's terminationist because any

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1 rights which have been improperly taken away are to be translated  
2 into monetary compensation only. No land is to be restored, no  
3 international rights are to be recognized. And the United States  
4 then, in parallel, pursues policies of paying off claims, buying  
5 off the past in a sense, and formally terminating the special  
6 legal status of Indian tribal communities within the United States,  
7 and you get the House Concurrent Resolution 108 in 1956, expressly  
8 stating the policy of termination, Public Law 280 in 1953, a major  
9 move in bringing state jurisdiction onto the reservations in the  
10 United States.

11 I also include in this list the Alaska Native Claims  
12 Settlement Act of 1971 because of the termination feature that is  
13 built into it. The developments in international law of human  
14 rights during the period do involve a convention by the inter-  
15 national labor organization on tribal and semi-tribal populations  
16 which states very clearly the goal of assimilation, and the  
17 international convention on the elimination of all forms of  
18 racial discrimination which allows temporary affirmative action  
19 programs for racial minorities but stresses very much that these  
20 must be temporary, they must not be perpetuated beyond the time  
21 that they are needed.

22 Also included in this group of actions is the Canadian  
23 White Paper of 1969 in which we proved again that we don't learn  
24 lessons from the United States and repeat old errors with a  
25 lapse of time of perhaps ten or fifteen or, to our great embarrass-  
ment, sometimes even 20 years.

You also had in 1972 one of the... a very symbolic  
story which one comes across every once in awhile. There was a  
trial in the state of Colombia in South America of a group of  
farmers who had shot a number of Indians. It was seen as very  
significant that these farmers were brought to trial. This had  
not happened in the past. The farmers, in their defense, said  
that they had not understood that it was a criminal offense to kill

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1 Indians. They did not regard Indians as being human. They were  
2 convicted at trial. The appeal went to the Colombian supreme  
3 court and they were acquitted on the basis of their statements  
4 that they did not understand it was an offense, the court noting  
5 that measures to protect Amer-Indian populations in Colombia were  
6 very recent.

7 That's a kind of symbolic story. It's a true story.  
8 It got covered in the press at the time. There were also the  
9 stories of the ethnocide and the genocide in the Silva and  
10 forest interior of South America, which became... This set of  
11 stories became a major stimulus to international humanitarian  
12 concern for indigenous populations.

13 I use that as a bit of transition to what I suggest is  
14 the current pattern in which we have had a reemergence of concern  
15 for indigenous populations, both in the domestic law of various  
16 countries and in international law and in international institu-  
17 tions. And I list, again, in this heading, the Alaska Native  
18 Claims Settlement Act of 1971 and the Indian Claims Commission  
19 Act of 1946, because I think there are mixed signals to both of  
20 these acts. Indian questions cannot simply be dismissed. In  
21 both of the acts, institutions are established, compensation is  
22 paid, there's a recognition of the reality of rights or of claims  
23 and that some response is necessary, but both are terminationist  
24 in their character.

25 I list in (b) and (c) and (d), some of the developments  
which initiate the period that we are in. There were major  
political struggles in the United States against termination.  
There was the mobilization of Indians in Canada against the White  
Paper of 1969. There was intense Maori political activity in  
New Zealand against the Maori Amendment Act of 1967. These were  
extremely important in launching the political activism we now  
see as standard, logical part of the ongoing questions of the  
relationships between tribal populations and nation states. In



1 (c) I attempt to give a short list of demonstrations, most of which  
 2 are familiar to people. Certainly, a lot of people remember the  
 3 Alcatraz occupation and, certainly, Wounded Knee was phenomenal  
 4 in terms of the press that it got around the world. If I could  
 5 indulge myself, I remember hearing about it in the newspapers in  
 6 Papoa, New Guinea, when it was going on, indicating how wide-  
 7 spread the publicity about the occupation at Wounded Knee was.

8 Indeed, I list the establishment of support groups  
 9 internationally. The... Of course, there had been support groups  
 10 established a century before, with the establishment in 18... about  
 11 1834 of the Aboriginees Protection Society in England, and then  
 12 the establishment in about 1912 or 1916 of the International  
 13 Bureau for the Defense of Indigenous Populations in Geneva.  
 14 But in terms of the organizations that are presently active, those  
 15 are formed, really, in the last 15 years and I think the first  
 16 significant one to develop was the International Work Group for  
 17 Indigenous Affairs in 1968.

18 There are, then, the developments of the international  
 19 indigenous organizations, the International Indian Treaty Council  
 20 in 1974, the World Council of Indigenous Peoples in 1975... I  
 21 think the Inuit Circumpolar Conference... Am I right, it's 1978?

22 UNIDENTIFIED: (INDISCERNIBLE)

23 MR. SANDERS: '77. I realized  
 24 that in two separate documents, I had written two separate dates.  
 25 I'll correct this to 1977... the Indian Law Resource Center in  
 1979. Those three organizations, together with a newer organiza-  
 tion, the Four Directions Council, all have been accredited as  
 nongovernmental organizations by the economic and social council  
 of the United Nations.

The matter of indigenous rights gets onto the agenda  
 of the United Nations as a byproduct... or, in the context, is  
 perhaps a better way to put it, of the concern of the United  
 Nations with racial discrimination, and it is out of that concern



1 that the study which is still ongoing was proposed and was commis-  
2 sioned in 1971.

3 The terminology significantly begins to change. In  
4 the United States, one of the major changes from the termination  
5 terminology was in the 1972 Nixon statement, perhaps one of the  
6 few things that he's remembered for warmly, at least outside of  
7 the United States, in which the terminology of self-determination  
8 was accepted by Nixon, clearly in a domestic concept, to describe  
9 the proper situation of the Indian tribes within the country.

10 The term self-determination is a very interesting one.  
11 It is seen by some governments as politically loaded. Self-  
12 determination of peoples was most commonly understood in inter-  
13 national law as meaning full decolonization and, therefore, the  
14 emergence of the people as a separate sovereign state. There has  
15 been evolution in international law on this question and so now  
16 it is fair to say that that is not the only meaning of the term  
17 self-determination. Self-determination can be exercised in a  
18 number of ways, including compacts of free associations such as  
19 exist with Micronesia and some of the South Pacific Islands,  
20 New Zealand, and it is logical that there can be a... what would  
21 otherwise appear to be a domestic realization of indigenous  
22 rights which, nevertheless, can be seen as a fulfillment of the  
23 right of self-determination in international law. We don't...  
24 It isn't black and white as it was perceived to be in 1960 when  
25 the U.N. declaration on the ending of colonization was passed by  
the general assembly.

Canada has had particular trouble with the term self-  
determination because of the separatist claims of nationalists  
in the province of Quebec. And so to this day, you will not  
find the Canadian government throwing around self-determination  
loosely. The senate report in Australia of last fall, both says  
that we must not say things which give aboriginal people a claim  
to self-determination, and we can't use international law, quote,

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1 quote, "we can't use nations, we can't use sovereignty." It  
2 says that in one section, and then in other sections it actually  
3 uses the term self-determination. Even as radical a source as  
4 the World Bank, in their report, "Tribal Peoples and Economic  
5 Development," seems to have no problem using the term self-  
6 determination at a couple of points in the report, although they  
7 don't touch sovereignty.

8 So we're having some loosening up of terminology and  
9 self-determination has become, in many ways, the most pervasive  
10 term presently being used to describe aspirations for self-  
11 government, self-determination self control, self rule, regional  
12 autonomy, political autonomy, whatever other terms are being  
13 used at the present time.

14 I note in my listing under this section, and this is  
15 sub (j), the question of individual rights versus collective  
16 rights emerged in litigation in both the United States and  
17 Canada. There was some parallels in other countries, and  
18 emerged before the Human Rights Committee of the United Nations  
19 under the terms of the international covenant on civil and  
20 political rights. The U.S. and... And that was a case from  
21 Canada. These cases posed individual rights questions against  
22 the collective question of the determination of tribal membership.  
23 These cases had the potential of attacking the collective notion  
24 of tribal membership as a separate grouping of rights within  
25 Canada and the United States, striking that the decisions  
involved all sustained the collective systems as opposed to the  
individual rights systems. So in that litigation, the individual  
rights arguments did not succeed in attacking the collective  
rights systems.

Some criticism of the details of the collective rights  
systems were involved, but no challenge to the basis, to the  
concept of the collective rights system, was involved.

I note in (n) the decision of the International Court

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1 of Justice and the advisory opinion on the Western Sahara. Here,  
2 a population in the Western Sahara, which by earlier international  
3 law standards or colonial standards would have been treated as a  
4 population without law or political organization and, therefore,  
5 a territory technically unoccupied and open to acquisition, those  
6 arguments which had been fundamental to many of the earlier claims  
7 by Western European colonial powers, were rejected by the Inter-  
8 national Court of Justice, therefore reopening, in many ways,  
9 legitimating the reopening of the questions of acquisitions of  
10 sovereignty and, therefore of the political and territorial claims  
11 of indigenous populations.

(TAPE 37, SIDE A)

10 MR. SANDERS: I would like to  
11 add, on the last page, a few items. The 1982 World Bank publica-  
12 tion, "Tribal Groups and Economic Development," this has been  
13 regarded by many indigenous spokespeople as a gussying up of modern  
14 economic imperialism and so there may be questions about my  
15 adding it.

15 I find it interesting that the World Bank found it  
16 necessary or appropriate to explicitly deal with the question of  
17 economic development in tribal areas. They were talking about  
18 essentially Third World situations, particular African, South  
19 Pacific and Interior of South America situations. They noted that  
20 previous funding arrangements through the World Bank for projects  
21 in this area had simply not mentioned the existence of tribal  
22 populations in the area at all and that this had often resulted  
23 in problems with the project. So, at least in the self interest  
24 of the World Bank and these development projects, a somewhat more  
25 realistic approach would be necessary. In that context, the  
World Bank study suggests that since nation states commonly  
recognize that individuals and groups within the states can  
acquire property rights by prescription, that is by long use,  
that it would be a denial of equality not to recognize the same



1 principle, in terms of indigenous population. Therefore, in-  
2 digenous populations, still in the use of their land, should  
3 have the territorial rights respected by the law of the nation  
state.

4 The World Bank study also suggests...

5 MR. EDWARDSSEN: (INDISCERNIBLE)

6 MR. SANDERS: (LAUGHTER) They  
7 don't say that. The World Bank study also suggests that, in  
8 addition to recognition of land rights, there is a need for  
9 special protective measures if the indigenous populations are,  
in fact, going to have some hopes of survival within the nation  
states.

10 Another thing I would add is the interesting coincidence  
11 of the publication of the report of the Special Committee on  
12 Indian Self-government in Canada in November of 1983, and the  
13 report of the Australian Senate Committee on the idea of a  
14 compact between aboriginals in Australia and the state of  
15 Australia. There are certain problems, of course, with... I  
16 think particularly the second report, the Australian report.  
17 It has not accepted, it seems to me, one of the fundamental  
18 concepts that political power, by the analysis of indigenous  
19 populations, is with the traditional political units and therefore  
the whole way in which new political relationships are to be  
negotiated, it seems to me, is structured in a colonial way still  
in that report.

20 I would note also the Koowarta, K-O-O-W-A-R-T-A, de-  
21 cision of the Australian high court in 1982 in which you get an  
22 interesting interaction of the international law on human rights  
23 and the questions of domestic aboriginal policy. The Queensland  
24 state policy of refusing to transfer leasehold lands to aboriginal  
25 collectivities was declared to be invalid because it was in  
conflict with national legislation prohibiting racial discrimina-  
tion. But the basis on which the national legislation could apply

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1 to a matter of state policy was the external affairs power in the  
2 Australian constitution. The external affairs power was legiti-  
3 mate because of international covenants signed by Australia  
4 prohibiting racial discrimination. Therefore, elements of  
5 international law, in fact, affected the balance of power within  
6 Australia and in that case, favorably to aboriginal petitioners.

7 The... There was one more element of the... what I've  
8 described as the reemergence which I would like to talk about  
9 which is the Canadian constitutional activity, but I'm in your  
10 hands, Mr. Chairman, whether you want to declare a coffee break  
11 or whether you want to postpone this portion of my remarks.

12 MR. BERGER: Well, I think we'll  
13 declare a coffee break and you and I can discuss, perhaps, the  
14 order in which to proceed. I had hoped that... that we might,  
15 after Doug Sanders has completed his presentation, call first on  
16 Mark Gordon, of the Inuit in Canada, who is vice-president of  
17 the Makivik Corporation, to discuss the settlement reached in  
18 Canada in 1975. That was the first settlement after Alaska.

19 And I thought after that, we might ask Shorty O'Neil  
20 to discuss events in Australia and what has been happening there  
21 and then Robert Petersen from Greenland, and Alf Isak Keskitalo  
22 from Norway, so that we would at least, at the outset, hear  
23 from all the nations represented. And we might just see at the  
24 break who has arrived and who has not.

25 So we'll take a five minute break and then we'll carry  
on after that.

(HEARING RECESSED)

(HEARING RESUMED)

MR. BERGER: Well, let's drift  
back to our chairs.

(LONG PAUSE)

MR. BERGER: I have an announce-  
ment to make that... that tonight at 6:00 o'clock there will be a

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1 reception at the Westward Hilton for all of those present, includ-  
2 ing members of the public who are here, for ourselves to meet  
3 informally and get to know each other. So, of course, all of  
4 those who have traveled from afar are invited. All others on  
5 the roundtable, the media and the public... and please feel free  
6 to come to the Westward Hilton at 6:00 o'clock, and I think it  
7 is the Commadore Room. But, in any event, you will find it,  
8 no doubt.

9 Well, I think that it would be a good idea if we asked  
10 Doug Sanders to complete his presentation by discussing recent  
11 events in Canada since most of those coming tomorrow from Canada  
12 will know all about this anyway. So there's no reason why he  
13 shouldn't tell us about these things now.

14 MR. SANDERS: There was an  
15 unusual constitutional opening in Canada because of some historic  
16 unfinished business. When the Canadian constitution was enacted  
17 by the British parliament in 1967, no provision was inserted for  
18 amendment of the document. Therefore, amendments could only occur  
19 by going back to England. Some thought that this was an omission  
20 or an error. But, in fact, historically it's probably true that  
21 it was not seen as an omission, that it simply signified the  
22 belief of Canadians at that point that the colonial status, the  
23 colonial link to England, would continue, that it was not being  
24 severed by the constitution of 1867.

25 As time went on, this remaining fetter or umbilical  
cord or whatever, became completely indefensible but the politicians  
in Canada couldn't sort out their own act sufficiently that we  
could agree on a formula for amendments to be put into the  
Canadian constitution. So it took us... I think the standard  
quote is, "54 years" before we could pull off this final severing  
of the link to England. It was certainly not that England wanted  
to hold onto us with a motherly embrace. They were rather  
embarrassed by this archaic connection and were waiting for us to

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1 get our act together.

2           Because of the competition between federal and provincial  
3 politicians in any federal state, it proved not to be very easy  
4 but the peculiar character of Mr. Trudeau meant that there was  
5 someone who was willing to take some political chances and bite  
6 the bullet on it. Largely, however, in his own mind, as a  
7 vehicle for other reforms, patriation, as we came to call this  
8 event, was not the goal in itself because we, in fact, did not  
9 have problems in getting the constitution amended. We had  
10 problems in agreeing on amendments internally in Canada but we  
11 had no problems with England. But Trudeau wanted to use this  
12 occasion to put a charter of rights into the constitution and  
13 also to make constitutional reforms of rights of English and  
14 French.

15           That's simply a brief description of what the game was  
16 about. The aboriginal groupings in Canada formalized a claim to  
17 be part of this process of constitutional reform in 1978. The  
18 initial response of the Canadian government to this formalization  
19 of a claim was one of uncertainty and modest accommodation. It  
20 was not the beginning of assertion of constitutional rights on  
21 the part of Indians. I use that date in terms of a formalization  
22 of a role in this particular sequence of constitutional reforms.  
23 There had been long-standing positions by Indians, particularly  
24 on the prairies, that the treaties were properly constitutional  
25 documents and should be formally recognized as such by the  
Canadian constitution.

          The Canadian government, as an initial response,  
invited representatives of the aboriginal groupings to a consti-  
tutional conference in the fall of 1978 and to another one in  
February of 1979. It's something of a symbol of the marginality  
of all this that the 1979 one was actually a closed conference  
so they were invited to something that they could not, in fact,  
attend, even with an invitation. Nevertheless, the politicians

1 did add Canadian indigenous people and the constitution as an  
2 agenda item, but one of many. And so it was seen by Indians that  
3 it was necessary to apply heightened political pressure if this  
4 was going to go anywhere and there was a major delegation that  
5 went to England in the summer of 1979 to lobby with British  
6 parliamentarians and British political leaders on the question of  
7 patriation and reform of the constitution. And there was con-  
8 siderably more support for the Indian cause in England than the  
9 Canadian government had anticipated.

10 The... In the ins and outs of the next few years, the  
11 heads of the three national political parties officially promised  
12 first, that aboriginal questions were substantial constitutional  
13 questions to be considered in the constitutional reform process,  
14 and secondly, that the aboriginal leadership should be participants  
15 in the process of constitutional review. The significance of the  
16 word participants was striking in that no other groups within  
17 Canada were accorded any similar recognition. So women's  
18 organizations, business organizations, trade union organizations,  
19 minority organizations, were all invited at various points to  
20 make submissions, to take stands and make them known. But to no  
21 other groups was participation offered.

22 Now, one of the basic things that happened was that  
23 though participation was offered, it had the familiar history of  
24 being offered and then being denied in practice, apparently  
25 because the non-indigenous politicians had such troubles with  
their own agendas and disputes that they never got to a point of  
actually making any kind of participation in the review process  
possible. But at a certain point, when the federal government  
had decided to ignore the provinces and move unilaterally, and  
were getting a tremendous amount of political problems on it,  
they tried to strike a deal with the aboriginal organizations and  
insert into the constitution a clause which would recognize and  
affirm the aboriginal and treaty rights of the aboriginal peoples

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1 of Canada, defining the aboriginal peoples of Canada to include  
2 the Indian, Inuit and Metis peoples. That section went in,  
3 only to be pulled less than a year later at the insistence of  
4 certain of the provincial premiers at a first ministers conference  
5 composed of the prime minister and the provincial premiers.

6 This lead to a major protest in the country and the  
7 considerable public attention and political embarrassment and the  
8 reinsertion of the clause, modified now by the addition of the  
9 word existing. The modifications, the process, the breach of  
10 faith that it involved, resulted in none of the aboriginal leader-  
11 ship in Canada supporting the patriation of the constitution in  
12 the form that it was eventually agreed to by the federal govern-  
13 ment and the provincial premiers. The litigation was begun in  
14 England which succeeded in delaying patriation by two or three  
15 months.

16 The federal government had always been trying to  
17 organize a mid-winter holiday for us in February and were hoping  
18 to patriate by February so we could have a constitution day which  
19 would give us this missing mid-winter holiday. And one of the  
20 byproducts of this whole process was that patriation was delayed  
21 until April.

22 And so Indian questions, aboriginal questions, were one  
23 of the final questions and one of the two final most significant  
24 questions in the politics of patriation process. That would be  
25 acknowledged by all observers of the situation, political scien-  
tists and politicians and journalists. And one of the byproducts  
of this was a clause which I think first appeared in the spring  
of 1981, committing the governments to a future meeting of the  
prime minister and the provincial premiers, a future first  
ministers' conference, as we call them, to be concerned with  
aboriginal rights questions. And representatives of the aboriginal  
groupings in Canada were to be invited to participate in this  
conference. This clearly reflected the view that participation



1 had been promised and had been denied, and that some way had to  
2 be... some way was being sought to avoid the accusation of bad  
3 faith.

4 Of course, it was something completely different to have  
5 participation after patriation than to have participation before  
6 patriation. The political dynamics of the situation had changed  
7 very substantially.

8 The first ministers conference was held in March of 1983  
9 with representatives of four national aboriginal organizations  
10 participating and members of other organizations picketing the  
11 conference center in protest outside. The result of the 1983  
12 conference was a political accord signed by the prime minister,  
13 all of the provincial premiers except the premier of Quebec...  
14 Quebec did not sign because of their bitter rejection of the whole  
15 constitutional package. It was not because of the terms of the  
16 1983 accord... signed by the prime minister and all of the  
17 provincial premiers except for Quebec, and by representatives of  
18 the four national aboriginal organizations who attended the  
19 conference.

20 The accord made certain amendments to the constitution.  
21 It provided that there could not, in future, be an amendment to  
22 certain portions of the constitution, those that specifically  
23 dealt with aboriginal peoples, without there first being a  
24 special first ministers conference to review the amendment pro-  
25 posals, and again representatives of the aboriginal peoples would  
26 have to be in attendance.

27 The aboriginal organizations had asked for a veto on  
28 any changes of the constitution affecting them. So this clause  
29 was a rejection of that position with a more moderate proposal  
30 that, if aboriginal rights were going to be affected without the  
31 consent of the aboriginal peoples, it would have to be done on  
32 national television.

33 The second amendment provided that the constitutional

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1 process would not end with the first, first ministers conference of  
2 March 1983. There would be two more conferences required by the  
3 constitution and a third additional conference required by the  
4 political accord, itself.

5 The meeting that was held last week was, as a result  
6 of the political accord... because of a certain delay element  
7 in the constitutional provisions, the amendments have not, in  
8 fact, come into force yet but will come into force at the end  
9 of the delay period in May of this year. So the conference last  
10 week was by political agreement.

11 It was seen that one of the major developments in the  
12 first ministers conference in March '83, was some movement on the  
13 part of the federal government, in terms of recognition of self-  
14 government on the part of indigenous people in Canada... I'll  
15 read to you just a brief portion from the prime minister's  
16 statement of last week, his opening statement.

17 "There is nothing revolutionary or threatening about  
18 the prospect of aboriginal self-government. Aboriginal communities  
19 have rightful aspirations to have more say in the management of  
20 their affairs, to exercise more responsibility for decisions  
21 affecting them. These functions are normal and essential to the  
22 sense of self worth that distinguishes individuals in a free  
23 society. The government of Canada remains committed to the  
24 establishment of aboriginal self-government and it is my impression  
25 that the provinces are very much of the same mind. And so we are  
not here to consider whether there should be institutions of  
self-government, but how these institutions should be brought into  
being, what should be their jurisdictions, their powers, how they  
should fit into the interlocking system of jurisdictions by  
which Canada is governed."

Of course, his... That's the end of that quote. Of  
course, his statement about the attitudes of provinces was, at  
least, over optimistic and his description of the federal government



1 commitment was, perhaps, over optimistic, as well.

2 He tabled proposed amendments which would involve a  
3 constitutional recognition of a right to self-governing institu-  
4 tions subject to some content being given, some powers or juris-  
5 dictions being elaborated... by a process of negotiation in  
6 which apparently some jurisdiction on the part of the provinces  
7 would be recognized. This would then be implemented in the  
8 Canadian system by legislation at the federal and provincial  
9 levels.

10 This was rejected by the aboriginal organizations  
11 because it did not include a true recognition in the constitution  
12 of a right of self-government because it was subject to a  
13 process and was, therefore, an unenforcable constitutional pro-  
14 vision. There was also concern on the part of the Assembly of  
15 First Nations that the involvement of the provinces was incon-  
16 sistent with certain of the political and constitutional positions  
17 that had been taken by the Assembly of First Nations and there  
18 was a rejection of implementation by legislation alone. There-  
19 fore, the proposal of the prime minister... and I'll table with  
20 the inquiry, for your purposes, both the federal proposal and the  
21 opening speech of Prime Minister Trudeau. Therefore, there was  
22 a rejection of a political accord and a rejection of the federal  
23 proposals for constitutional amendment by the aboriginal organiza-  
24 tions.

25 This puts matters apparently on hold between... for  
awhile. One of the reasons, it seems clear, why there was a  
reluctance, particularly on the part of some of the provinces, to  
move at this point was their anticipation of a change in federal  
liberal leadership and a national election probably this year.  
Some of members of the conservative party were preferring, it  
seemed, that the matter go to what they hoped would be a conserva-  
tive government in Ottawa in the future.

The sense, I think, on the part of the leadership of

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1 the Assembly of First Nations was not one of frustration but a  
2 sense that they had remained consistent to the position that they  
3 had taken over the last year and that there was some indication  
4 of movement. Premier Hatfield of New Brunswick particularly  
5 described in the conference his recent conversion to the idea of  
6 self-government, attributing it to lobbying by Canadian Inuit  
7 which had taken place in the two weeks before the conference.

8 So while there was a very clear grouping of opposition  
9 by four provinces, the three Western provinces plus Nova Scotia,  
10 there was a sense that, nevertheless, there had been some evolu-  
11 tion of thinking, at least on the part of some people.

12 There will, as I say, be two more conferences required  
13 by the constitutional amendments which will be proclaimed in May.  
14 The Canadian government's response to the Special Committee on  
15 Indian Self-government Report... This is a formal response which  
16 was published on March fifth, takes pride in saying that Canada  
17 is unique in the world in having a constitutional process in  
18 place. They may have found it a little bit more difficult to  
19 boast a week later.

20 I would note, however, that Canada is not the only  
21 country in which these questions have been raised at the consti-  
22 tutional level. The Karsten Smith commission in Norway was  
23 instructed to draft a constitutional amendment to give some  
24 recognition to the Sami population within Norway. That, in fact,  
25 was its first assignment, not its only assignment. And the  
Senate Committee Report in Australia of last fall suggests  
constitutional amendment to empower the commonwealth, or national  
government, to negotiate a compact with aboriginal peoples in the  
country and therefore is suggesting that relationships should be  
handled on the constitutional level and not simply on a legisla-  
tive or policy level.

MR. BERGER: Well, thank you,  
Mr. Sanders... Professor Sanders.



1 In terms of the James Bay and Northern Quebec Agreement,  
2 Mark Gordon, who's the vice-president of Makivik and who was one  
3 of the chief negotiators of the James Bay Agreement and of the  
4 agreement in principle that was signed before the James Bay  
5 Agreement... He's also been involved in implementation of the agree-  
6 ment over the last eight or nine years and he brings a lot of  
7 experience to these hearings. So I'm going to leave a lot for him  
8 to cover in terms of that.

9 But what we were planning to do is to examine the agree-  
10 ment, examine the James Bay Agreement, because a lot of its pro-  
11 visions, a lot of its chapters, are based upon provisions of the  
12 ANCSA. Some of the things we did in the James Bay Agreement  
13 were efforts to avoid certain things that we felt were not what  
14 we wanted and which do appear in ANCSA. For instance, we don't  
15 have shareholders, we have membership in our corporations. Monies  
16 and rights are not distributed to individuals. They're retained  
17 by landhold... what are called landholding corporations, which  
18 are basically village-type corporations, and the monetary compen-  
19 sation is retained by Makivik and invested for all Inuit in  
20 Northern Quebec..

21 As you know, Northern Quebec has about 5,800 Inuit and  
22 Makivik Corporation is the successor to the Northern Quebec Inuit  
23 Association, which was formed back in 1971 to negotiate claims in  
24 Northern Quebec.

25 So, after an analysis of the agreement, itself, to give  
you some idea of what the agreement contains and some of the  
problematic provisions of the agreement, we'd like to get into  
the whole area of the negotiation process, and I think this is  
of relevance and of interest to other Native groups in Canada who  
are now engaged in negotiations with the federal government and  
other governments and to share some of our experience there. Now,  
it hasn't always been a pleasant experience, but I think there are  
certain common themes which we came across in our negotiation

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1 process that... that we feel that should be shared with other  
2 groups at this time.

3 Even in looking at some of the difficulties that faced  
4 Alaskan Natives prior to '71, there's a lot of similarities as  
5 to how governments deal with Native peoples in these types of  
6 negotiation processes. Many times, we're reticent to even refer,  
7 in Quebec, to this whole process which preceded the James Bay  
8 Agreement as a negotiation process. Negotiation suggests give and  
take. It suggests... In many cases it suggests a certain degree  
of equality in bargaining position.

(MICROPHONE IS ADJUSTED)

9 MR. SILVERSTONE: Am I talking  
10 too far or too close?

UNIDENTIFIED: Too close.

11 MR. SILVERSTONE: In our case,  
12 much of the time it wasn't a true negotiation because there  
13 wasn't equality in negotiating strength. On the one hand, you  
14 had two governments, the government of Canada and the government  
15 of Quebec. You had a number of public... publicly owned corpora-  
16 tions, the James Bay Energy Corporation, the James Bay Develop-  
17 ment Corporation, and the hydroelectric... hydroelectric commission  
18 which is known as Hydro-Quebec in Quebec, and we, along with the  
19 Grand Council of the Crees, we being the Northern Quebec Inuit  
20 Association, were required to face off against these five entities.  
21 So the negotiation process... I'll go a little... get into a little  
22 bit more detail just to outline the types of things we're going to  
23 discuss.

24 The negotiation process was very relevant to the type of  
25 agreement you end up with. Two often what's happened over the  
last few years is that people have analyzed the James Bay  
Northern Quebec Agreement without looking at the fact that it was  
a negotiated settlement. Now, this is not meant in the way of  
an apology or it is not meant to defend many of the things in our

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1 agreement. I, for one, think there's a lot of positive precedence  
2 in the agreement and I think there's a lot of negative precedence,  
3 a lot of things I wouldn't want to see used as precedence. I  
4 think COPE, CYI, are entering into the process now and we've  
5 looked at their agreements in principle carefully. I think  
6 they've benefited from... in a sense, from our experience and  
7 from the Alaskan experience. I see a lot of things in their  
8 agreements in principles that we did not achieve.

9 For instance, in the COPE agreement, there's a statement  
10 of principles at the beginning which we did not achieve which I  
11 believe was a mistake. These are legal documents and whether we  
12 like it or not, at some point they end up in court and it becomes  
13 very important that we give instructions, we give messages, we  
14 give signals to the judiciary as to how we think these things  
15 should be interpreted, as to what was the thinking... To put it  
16 simply, what was the thinking of the parties at the time when  
17 these things were signed. And if you get enough instructions in  
18 the context of your agreement by setting out broad principles and  
19 under each chapter more specific principles, I think this assists  
20 the courts and ultimately it assists... it works in the favor of  
21 all the parties.

22 The fact that... Well, the agreement, itself, has a  
23 lot of these difficulties, but a lot of that relates... A lot of  
24 these difficulties relate to the negotiation process. And as I  
25 was trying to say before, when you look at the agreement in the  
absence of an analysis of the negotiation process, it's easy  
to say, "Well, your hunting, fishing and trapping rights are not  
priority rights. It's not clearly stated that they take priority  
over any forms of large scale development of nonrenewable resources  
in the territory." Well, this is true. They don't. That's  
clearly a defect with this agreement. Subsistence rights do not  
take priority over development rights. But one of the reasons  
they don't is because development corporations, such as Hydro-Quebe



1 and James Bay Energy Corporation, were intimately involved in the  
2 negotiation process of the agreement and the Department of Mines,  
3 for instance, and Natural Resources in Quebec, was intimately  
4 involved. And they made it very clear that Inuit land selections  
5 in Northern Quebec, the Inuit environmental and social impact  
6 assessment regime in Northern Quebec, would all be negotiated  
7 once... or, would all be negotiated around existing mining claims  
8 and around existing proposed... and future... future proposed  
9 hydroelectric projects. These entities were to be excluded from  
10 examination by the impact assessment procedure and would be  
11 excluded from land selection. So when people say, "Well, look,  
12 your land selections look very wierd on the map. They look like  
13 you haven't managed through land selection to secure protection  
14 of your subsistence use of the coast." I would say, "Yes, you're  
15 right, they haven't." There's vast gaps along the coast which  
16 have remained crown land and over which Inuit have no substantive  
17 rights.

18 So I guess what I'm saying is that you can't separate  
19 the text from how we came about in reaching the text. I think the  
20 two processes are relevant. Of course, in the end result you're  
21 left with this, and as history evolves and as history goes on,  
22 people tend to forget that there was a process behind this.

23 Finally, I guess the third area, aside from the agree-  
24 ment and what's in the agreement, the rights contained in the  
25 agreement and the negotiation process which lead up to the agree-  
ment, there's also the implementation of the agreement and I  
think we have... both Cree and Inuit from Quebec have very im-  
portant messages to tell the other groups. That is, once you  
achieve your agreement, that's only 50 percent of the battle.  
Then you have to implement that agreement and you have to make  
sure that governments and other parties to the agreement that  
have responsibilities and obligations under the agreement live  
up to them. So, in other words, the process didn't stop on

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1 November 11th, 1975, when this agreement was signed, the James  
2 Bay Agreement. For us, the process really began.

3 Many times I look with a lot of interest, and I guess  
4 concern, at what happened to the land selection provisions under  
5 ANCSA where the act provided for certain... the act provided for  
6 certain criteria for selection and then regulations, as I under-  
7 stand, were passed subsequent which differed slightly in their  
8 interpretation... Well, more than slightly. They were substantive  
9 differences with respect to compactness of selections.

10 Now, we ran into the same type of difficulty. There's  
11 many, many common themes. We negotiated this agreement and then  
12 every one of the 30 chapters of this agreement had to be adopted  
13 into provincial legislation. Now, the negotiation of that legis-  
14 lation took place after all the parties had signed the agreement.  
15 So you had an agreement being signed in 1975 and then you had  
16 another three years of negotiations taking place to negotiate  
17 legislation which was supposed to reflect each of these chapters.

18 Now, this was a crazy process. We had spent hours, days,  
19 weeks negotiating precise wording for some of these sections, not  
20 all, and then we had to renegotiate over another three year period  
21 wording which was more appropriate for legislation. And in that  
22 three year period, there were real dangers that things, rights  
23 which the government parties had not achieved, that they would  
24 sort of get a second kick at the can and they did attempt to do  
25 this and many of the provisions that we had secured in here were  
in great jeopardy during that three year period.

And then, finally in 1978, most of this agreement had  
been legislated in the form of provincial legislation and from  
'78 onwards again it's been a continual battle in terms of  
implementing this agreement to the point where, in 1981, both the  
Crees and the Inuit of Quebec had to go before a commission, a  
parliamentary commission in Ottawa, to bring our grievances and  
lay them before government to say, "Look, this agreement is not



1 working. The governments are not living up to their obligations  
2 and we're having to use our own compensation monies to do basic  
3 things like provide simple health and social services to the  
4 communities."

4 Now, I've brought a lot of this documentation with us  
5 and I don't know if it's going to be read into the record or,  
6 perhaps just the titles will be read into the record and the  
7 documents will be made available, but there's a whole history  
8 to the implementation process and we're still fighting it every  
9 day, every time we come across some provision. Right now, we're  
10 dealing with priority for Inuit employment and service contracts  
11 in Northern Quebec. In chapter 29 of this agreement, there was  
12 a provision in our favor that provided that Inuit would have  
13 priority in terms of employment and service contracts relating to  
14 any type of development taking place or any type of government  
15 activity in the territory. Now, this hasn't been happening. One  
16 of the reasons it hasn't been happening is because unions are  
17 very strong in Quebec and... not that our interests are always  
18 against those of the unions but obviously the government has not  
19 spent enough time in working out a lot of these details. Inuit  
20 who want to work require cards, according to certain unions.  
21 These types of things would have to be examined and we are... we  
22 are examining them now. We're in the process of examining the  
23 whole construction industry in Northern Quebec to see how our  
24 rights in here can be assured.

20 Doug Sanders referred to... and I don't know if I have  
21 it exactly right, but in terms of equality or laws being applied  
22 in an equal manner... I think I've seen the quote somewhere from  
23 ... from Mr. Justice Morrow where he said at one time, it seems  
24 to me, that to obtain equal treatment, to give equal justice, then  
25 it requires some form of special treatment and... this is... this  
is the situation we're involved in now where we're looking into  
the... into affirmative action programs and the degree to which

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1 the provisions in this agreement call for affirmative action  
2 program.

3 Now, to show you how complicated that can get, there are  
4 many organizations within our region which are against affirmative  
5 action programs because it may prejudice their rights. So in  
6 working out and implementing a lot of these provisions, it was a  
7 lot more complicated than a lot of people anticipated, including  
8 the negotiators, including government people. A lot more money  
9 was involved in implementing this agreement than government --

(TAPE 37, SIDE B)

10 MR. SILVERSTONE: -- anticipated  
11 and this was said in their statement, in their concluding statements  
12 and recommendations of that parliamentary commission which took  
13 place in Ottawa two years ago.

14 Now, since then certain positive things have happened.  
15 The government recognized, at least the federal government recog-  
16 nized in reviewing the James Bay Agreement and its implementation  
17 that they had been remiss, that they weren't living up to all  
18 its obligations and they did provide certain additional funding  
19 with respect to schools and housing at least.

20 Quebec... The government of Quebec has not conducted such  
21 a review, though we... we requested that they do so and a review  
22 is called for to see the extent to which Quebec is living up to  
23 its obligations under the agreement.

24 The other element... I think I'm going to leave to Mark  
25 the whole history which surrounded the James Bay Agreement because  
it's significant. The 1898 and the 1912 Boundaries Extension Act  
which included certain obligations for Quebec to settle Native  
claims, the whole history which followed that, the suddenness with  
which the Borrasa government announced the project in 1971, the  
types of technical environmental studies which took place which  
didn't justify the project and yet the project just proceeded  
irrespective of those studies, the whole history is relevant and

1 it suggests that when a government wants to proceed with a project,  
2 or a corporation wants to proceed with a project, how easily they  
3 can rationalize it and how easily they can proceed irrespective  
4 of aboriginal title or irrespective of studies to the contrary  
with respect to environment.

5 And I guess the interesting thing and the horrendous  
6 thing about it is that you would think, from this type of process,  
7 that governments and corporations will learn but, in fact, on a  
8 day to day, a week to week basis, in Northern Quebec we're faced  
9 with the same thing. Hydro-Quebec still wants to proceed with  
10 additional projects to the James Bay project. There's the Great  
11 Whale River hydroelectric project which is, perhaps, almost  
12 big as the James Bay project. Studies are going ahead. We never  
13 really get to see the studies, or at least the studies which have  
14 negative results. We're never fully consulted in Northern Quebec  
on these studies, except in an ex post facto manner, and all of  
this suggests that little, I think, in certain areas has been  
learned.

15 The spirit and the letter of the James Bay Agreement  
16 attempt to involve Cree and Inuit in almost any major decision  
17 which affects the territory. The whole theme of the agreement  
18 is consultation and participation. This is exactly what did not  
19 happen when the James Bay project was planned and executed and  
20 this is what we hoped would not happen again. And yet, irre-  
21 spective of those rights relating to consultation and participa-  
22 tion, governments still tend to proceed without consultation,  
23 without our participation.

24 So, I guess what I'm saying there is, irrespective of  
25 the agreement and its implementation problems, there has to be a  
constant vigilance as to whether the spirit and... rather, the  
letter and the spirit are being respected. The media play an  
important role and have played an important role in our region.  
The publicity attached to certain environmental issues has provided

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1 a lot of support to Inuit and Cree in terms of the James Bay  
2 case, the court case which preceded the negotiations and in the  
3 negotiations, itself. Many times, the negotiations, when they  
4 would take place in the absence of any type of publicity, this  
5 ended up meaning a lack of accountability as well. Governments  
6 felt, "Well, we're negotiating with Native peoples in closed rooms.  
7 We could say whatever we want." And they did say whatever they  
8 wanted in many cases. So I think an important element is publicity,  
9 is the role of the media, is the role of the public.

8 And, of course, you have to educate the public. The  
9 public... Once they understand, the public is not stupid. Once  
10 the public understands the issues, they can participate. And  
11 I think it's in... in the interest, perhaps, of all parties that  
12 they do participate. Now, this wasn't the case in our agreement.  
13 In the early stages of the negotiations, the government had  
14 insisted that there be a media blackout, that these sessions be  
15 in camera, and not only that they be in camera, but that we not  
16 speak freely with the press, with the media, after each negotiation  
17 session. And, in the earlier stages, our negotiators had agreed to  
18 that on the basis that the government said, "We're going to give  
19 you certain confidential documents and certain confidential  
20 information which you can use in your negotiations but we can't  
21 share with the public at this point." In the end, there was no  
22 confidential documentation and we ended up losing a lot of valuable  
23 time and a lot of valuable assistance we could have had from the  
24 media.

21 In terms of... In terms of what the governments got out  
22 of this settlement and what Inuit obtained from the settlement,  
23 I think the government managed to satisfy its goals. They got  
24 clear title to the region. They secured our surrender and  
25 extinguishment --

MR. BERGER: How large a region  
are you talking about?



1 MR. SIVERSTONE: Okay, we're  
2 talking approximately 250,000 square miles.

3 MR. BERGER: Is that the Cree  
4 as well as the Inuit?

5 MR. SILVERSTONE: No, I'm  
6 talking about north of the 55th parallel. If you include Cree  
7 and Inuit, I believe... I don't have the exact figure but I believe  
8 it's closer to 400,000 square miles. It's one-third the size of  
9 Quebec. It's a vast region and... So, in addition to Quebec  
10 securing... clearing its title as per the 1912 Boundaries Extension  
11 Act, it permitted development to proceed.

12 So those were their main goals and they made their goals  
13 fairly well known throughout the process. There was no question  
14 as to what their goals were, and they used every strategy and  
15 every bit of leverage they had to achieve those goals. And a lot  
16 of the leverage they had was far in excess of the leverage that  
17 the Native groups had. They had resources. They had hundreds,  
18 perhaps thousands, of technical persons working on these claims.  
19 They could draw upon any department in the government to come  
20 up with a position paper, to send people... because human resources  
21 became very important when you're negotiating 24 hours a day for  
22 three months. To be able to change your people in the negotiating  
23 room every seven or eight hours, that becomes a very important  
24 element and if you don't have the monies to do that, to have  
25 enough negotiators to do that, as the Native parties did not have,  
then you end up with five or six negotiators for the Native  
parties negotiating for a three-month period straight, and the  
government's having hundreds being interchanged during that same  
period.

23 Now, I don't have to go into all the psychological  
24 dynamics of going without sleep for many hours or many days, but  
25 all of this comes to bear on the process and I say it... I say  
it as a warning to other groups that are in the process or about



1 to go into the process, that it is an exhausting... It is an  
2 exhausting process and in many cases people may agree to something  
3 just so that they can get some sleep.

4 Now, that is the nature of negotiations, not just Native  
5 claims but in any process that one party attempts to exhaust the  
6 other and sometimes succeeds.

7 In terms of our objectives, just briefly, Inuit, at  
8 least, were looking for certain... a right to a great amount of  
9 self-determination. To a certain extent, that was achieved  
10 through the establishment of a regional government. We were  
11 looking to establish our right to adequate services. This is  
12 key. This... Particularly essential services, community infra-  
13 structures, water systems, airstrips for the communities... I'm  
14 talking about 14 communities... the right to participate in  
15 economic development which takes place in the region and to  
16 expand the economic opportunities available to people in the  
17 communities, the right to harvest wildlife and to participate in  
18 wildlife management, and, basically, the right to remain a distinct  
19 people and to achieve certain cultural rights and protections.  
20 The agreement is very weak in terms of cultural protections and  
21 Bill 101, which is the charter of the French language in Quebec,  
22 quickly underlined to us... In only two years after the agreement  
23 had been signed, it quickly underlined the fact that the cultural  
24 protections contained in the agreement are weak, if not nonexistent.

25 So, though the agreement is looked at as a living  
document, not as a static thing that fixes Inuit and Cree rights  
for all time, though I'm only speaking for Inuit, it's something  
which evolves, it's something which can be added to, it's some-  
thing which can be amended by all the parties, and it's something  
which has to be kept timely and up to date. If other legislation  
comes into existence, the agreement should benefit from it.

Certain provisions of the agreement, in my view, are  
already outdated when you look at some of the newer settlements or

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1 when you look at some of the newer programs, policies or legisla-  
2 tion that comes out of the provinces or out of the federal govern-  
3 ment. But those were basically the elements that... basically  
4 our goals and basically the government goals.

5 In terms of the agreement, itself, there's land provisions  
6 in there, there's environmental protections, there's subsistence  
7 protection provisions, there's certain governmental provisions,  
8 there's social and economic provisions, there's monetary provisions  
9 and there's remedial and technical provisions which relate to the  
10 James Bay project, itself. I guess, if I had to sum it up very  
11 briefly, there's... there's land, there's... land provisions,  
12 government provisions and monetary provisions. Often when people  
13 examine the agreement, they focus more on the land and on the  
14 money than they do on the governmental powers, and the governmental  
15 powers, as the North Slope Borough knows, can be many times much  
16 more interesting and much more powerful in terms of their imple-  
17 mentation than the actual monetary and land provisions because  
18 governmental powers evolve, as the whole issue of self-government  
19 now... We're talking about throughout... well, throughout North  
20 America and beyond.

21 In terms of Quebec, we've set up a task force to  
22 examine self-government and one of the elements we're looking at  
23 is to possibly strengthen the regional government, to make sure  
24 that it gets more independent-type of funding from government  
25 so that it's not so dependent on government for funding, to  
strengthen some of its powers in terms of land use planning, in  
terms of culture, et cetera, et cetera.

And so, the governmental powers are becoming very  
important because long after the money is gone and long after  
many of the lands have been developed or encroached upon, the  
governmental powers may still be there and evolving. In any  
case...

The other final element... and this is just under the

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1 negotiation process, is... And I'm going to leave this to Mark  
2 because Mark was involved in this process quite closely. I'm not  
3 sure if he was one of the negotiators who came to Alaska in 1974  
4 but there were a few negotiators from Northern Quebec that did  
5 come to Alaska to discuss, on a type of fact-finding mission, to  
6 discuss ANCSA. And they looked at the land selection issue, the  
7 corporate structure, the way the compensation monies were being  
8 received and distributed, the whole question of eligibility,  
9 hunting, fishing, trapping rights and we did learn a lot from  
10 ANCSA.

11 But in terms of the... And I'll leave that to Mark,  
12 but in terms of the negotiation process, one of the things that  
13 I hope we can discuss with some of the other groups that I know  
14 have had similar experiences... are certain critical elements in  
15 the negotiation process, things that these groups that are  
16 negotiating now in Canada, these comprehensive claims, should be  
17 aware of and... and perhaps can learn something from.

18 One is the importance of the agreement in principle.  
19 Many people don't look at an agreement in principle as a contract.  
20 It's an agreement in principle. It's going to lead to a final  
21 agreement. It's the final agreement many view as important. And  
22 yet, many of the determining factors of what that final agreement  
23 is going to look like is found in your agreement in principle, and  
24 that requires as much energy as the final agreement.

25 The whole issue of... Well, at least in Canada, that  
faced us was the degree of federal support that we got, the role  
the government plays, the degree to which the government lives up  
to its federal trust responsibility in assisting the groups. The  
whole issue of an adequate negotiating team, what constitutes a  
negotiating team, who do you get, how are they trained, what  
experience do you put together, how do you operate as a team,  
what is a team, can all your negotiators function as a team?  
Sometimes people can't function... certain people can't function

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1 as a team and that may affect your negotiations. The whole ques-  
2 tion of equality of bargaining position between you and govern-  
3 ment... If government is funding you, how can you really be said  
4 to be equal. If the funding you receive from government to study  
5 your claims and to negotiate them have all kinds of strings attached  
6 such as you cannot use the monies to go to court should negotia-  
7 tions break down... well, those are limiting factors on you and  
8 many funding agreements with government do contain those clauses.

9 MR. BERGER: Excuse me, Sam.  
10 Could I interrupt? We have to give this hall up right about now,  
11 and if you will --

12 MR. SILVERSTONE: I'll conclude  
13 right away.

14 MR. BERGER: All right.

15 MR. SILVERSTONE: So, these  
16 are... I guess I've spoken too much but this is an overview of  
17 the type of thing we'd like to get into in the next few days.

18 MR. BERGER: All right. Thank  
19 you, Sam.

20 Tomorrow morning I thought we would ask Shorty O'Neil  
21 to lead off when we're fresh and we can hear about the Australian  
22 experience from a representative of the Federation of Land  
23 Councils of Australia, and then we could ask Alf Isak Keskitalo  
24 to speak for the Sami and then Robert Petersen from Greenland  
25 and then Mark Gordon from Canada. And I think we'll do that  
tomorrow morning.

Just before we adjourn tonight, Maureen Kelly... I  
want to give the floor to Maureen Kelly of the Pilbarra Land  
Council of Western Australia.

MS. KELLY: Thank you very  
much. The aboriginal Pilbarra Land Council have asked me to  
bring over these artifacts to present them to the Alaska Native  
Review to keep here in commemoration of my visit here.

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C E R T I F I C A T E

1 UNITED STATES OF AMERICA )  
2 ) ss.  
3 STATE OF ALASKA )

4 I, Sunshine V. Sheffler, Notary Public in and for  
5 the state of Alaska, residing in Anchorage, Alaska, and Certified  
6 Electronic Court Reporter for Accu-Type Depositions, do hereby  
7 certify:

8 That the annexed and foregoing pages numbered 934  
9 through 993 contain a full, true, correct and verbatim transcript  
10 of the proceedings in the matter of the Alaska Native Review  
11 Commission, Overview Roundtable Discussions, as transcribed  
12 by me to the best of my knowledge and ability from cassette  
13 tapes provided by the Alaska Native Review Commission.

14 That the original transcript has been retained by  
15 me for the purpose of filing the same with Don Gamble,  
16 Coordinator, Alaska Native Review Commission, 429 "D" Street,  
17 Suite 304, Anchorage, Alaska, as required by law.

18 I am not a relative, or employee, or attorney, or  
19 counsel to any of the parties, nor am I financially interested  
20 in this proceeding.

21 IN WITNESS WHEREOF, I have hereunto set my hand and  
22 affixed my seal this 10th day of April, 1984.



23  
24  
25  
*Sunshine V. Sheffler*  
SUNSHINE V. SHEFFLER  
NOTARY PUBLIC IN AND FOR ALASKA  
MY COMMISSION EXPIRES 8/06/84

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