An Evaluation of the Implementation of the Environmental Regimes Established by Comprehensive Claims Settlements in Canada

Prepared for the Royal Commission on Aboriginal Peoples

by

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EXECUTIVE SUMMARY

The objective of the report is to evaluate the implementation of the environmental regimes created by comprehensive claims settlements in Canada. In practice, however, only the regimes created by the James Bay and Northern Québec Agreement ("JBNQA") have been implemented for long enough to permit meaningful evaluation.

The structure and functioning of the environmental regimes established by the JBNQA are described, including the contents of the EISs, the objectives of the Regimes, and the mandates and structures of the Review Bodies that implement them.

An historical overview of the implementation of the Regimes is presented, based on annual reports, minutes of meetings, and previous implementation reviews. The topics covered include year of establishment, frequency of meetings, place of meetings, communications programmes, aboriginal membership, continuity of membership, attendance, budgetary issues, remuneration of members, language of operations, availability of documentation in Cree and Inuktitut, secretariats, and the numbers and types of projects reviewed.

The Regimes are then evaluated in light of the following criteria: their stated objectives; the situation prevailing in the area in question prior to their establishment; the situation prevailing in other areas; the standards normally applied to consultative committees; and the opinions of the parties.

With respect to meeting their stated objectives, we conclude that the Review Bodies have made sincere efforts, but that their success has been limited. Nevertheless, we find that the Regimes constitute a very significant improvement over the situation preceding their creation. When measured against the standards that normally apply to consultative committees, our evaluation is mixed. We find that the screening and review bodies satisfy those criteria relatively well, although recourse to *ad hoc*, project-specific committees is attractive. The two advisory committees fare less well under this criterion, largely because their mandates are unduly broad. The Regimes compare favourably in their performance with provincial and federal assessment regimes of general application in other areas, save for their structural inability to incorporate methodological and procedural changes that have occurred since their creation. The opinions of the parties regarding the success of the Regimes vary: the Crees are seriously dissatisfied with many aspects of the implementation of their Regime, which has been tested on a wide variety of projects; the Inuit acknowledge a certain level of success with their Regime, although, until the Great Whale Project Review, it had not been tested on a large and complex project with a non-Inuit proponent; Québec acknowledges some shortcomings in the provincial Regimes, but appears on balance to be satisfied with them; we can find no evidence that Canada has expressed an opinion on this topic.

Finally, we discuss several matters relevant to making a general assessment of the Regimes: the objectives of environmental assessment; criteria for approving or rejecting projects; the content

of environmental impact statements; the consequences of poor drafting; the lack of baseline data; the absence of independent data; the lack of intervenor funding; the failure to define procedures; the lack of commitment to the process; and the scope of the Regimes.

We conclude that the Regimes have had comparable success in their implementation to other federal and provincial regimes. We believe, however, that the JBNQA imposed on the Regimes objectives relating to the Crees, the Inuit, and the Territory that go beyond those of regimes of general application elsewhere. We acknowledge that the Review Bodies have made efforts to attain those supplementary objectives, but we conclude that their success has been limited.

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The opinions expressed herein are those of the authors, who also are responsible for any errors or omissions.

LIST OF ABBREVIATIONS

BAPE	Bureau d'audiences publiques sur l'environnement
CEAA	*Canadian Environmental Assessment Act*
CEQ	Council on Environmental Quality
CHA	Cree Housing Authority
CKJSG	Caniapiscau-Koksoak Joint Study Group
COFEX-North	Environmental and Social Impact Review Panel (JBNQA, Section 23)
COFEX-South	Environmental and Social Impact Review Panel (JBNQA, Section 22)
COMEV	Evaluating Committee (JBNQA, Section 22)
COMEX	Environmental and Social Impact Review Committee (JBNQA, Section 22)
CRA	Cree Regional Authority
DIAND	Department of Indian Affairs and Northern Development
DOE	Department of the Environment
DND	Department of National Defence
EARP	Environmental Assessment and Review Process
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EQA	*Environment Quality Act*
FCNQ	Fédération des Coopératives du Nouveau-Québec
FEARO	Federal Environmental Assessment Review Office
FSC	Federal Screening Committee (JBNQA, Section 23)
GCCQ	Grand Council of the Crees (of Québec)
HFTCC	Hunting, Fishing and Trapping Coordinating Committee (JBNQA, Section 24)
HQ	Hydro-Québec
JBACE	James Bay Advisory Committee on the Environment (JBNQA, Section 22)
JBNQA	James Bay and Northern Québec Agreement
KEAC	Kativik Environmental Advisory Committee (JBNQA, Section 23)
KEQC	Kativik Environmental Quality Commission (JBNQA, Section 23)
KRG	Kativik Regional Government
MENVIQ	Ministère de l'Environnement du Québec (now Ministère de l'Environnement et de la Faune)
MRJBC	Moose River/James Bay Coalition
MLCP	Ministère du Loisir, de la Chasse et de la Pêche du Québec
NBR	Nottaway-Broadback-Rupert Hydroelectric Project
NEPA	*National Environmental Policy Act*
NEQA	Northeastern Quebec Agreement
OMNR	Ontario Ministry of Natural Resources
SAGMAI	Secrétariat aux activités gouvernementales en milieu amérindien et inuit
SOTRAC	La Société des Travaux de Correction du Complexe La Grande
TEK	Traditional Ecological Knowledge

The James Bay Agreement implies a significant commitment to environmental protection, in two ways. First, many activities in the territory will be subject to a review and assessment process. Secondly, the native people will play a major role in this process. While these factors suggest the possibility of better decision-making and careful planning, a cautionary note must be sounded. There are a number of ways in which projects may be exempted from the review process; and, generally the powers of the reviewers are only advisory. Thus, the effectiveness of the environmental regime will ultimately depend upon the government's commitment to its goals.

Hunt, 1978:16

1.0 DEFINITIONS

Unless the context clearly indicates otherwise, the following words and terms are defined as follows:

"Category I lands" are those lands defined as such in the JBNQA. Category IA lands are areas transferred by Québec to Canada for the exclusive use and benefit of the Cree Bands, and they have some similarity to "reserves" as that term is popularly understood. Category IB lands are areas the ownership of which has been transferred by Québec to Cree landholding corporations. In the case of the Inuit, Category I lands are areas the ownership of which Québec has transferred to Inuit Village Corporations;

"Category II lands" are those lands defined as such in the JBNQA. They are Crown lands on which the Cree and Inuit beneficiaries enjoy exclusive harvesting and outfitting rights;

"Cree" means a person who is, or who is entitled to be, a Cree beneficiary in virtue of Section 3 of the JBNQA;

"Cree Regime" means the review and assessment procedures established by Section 22 of the JBNQA;

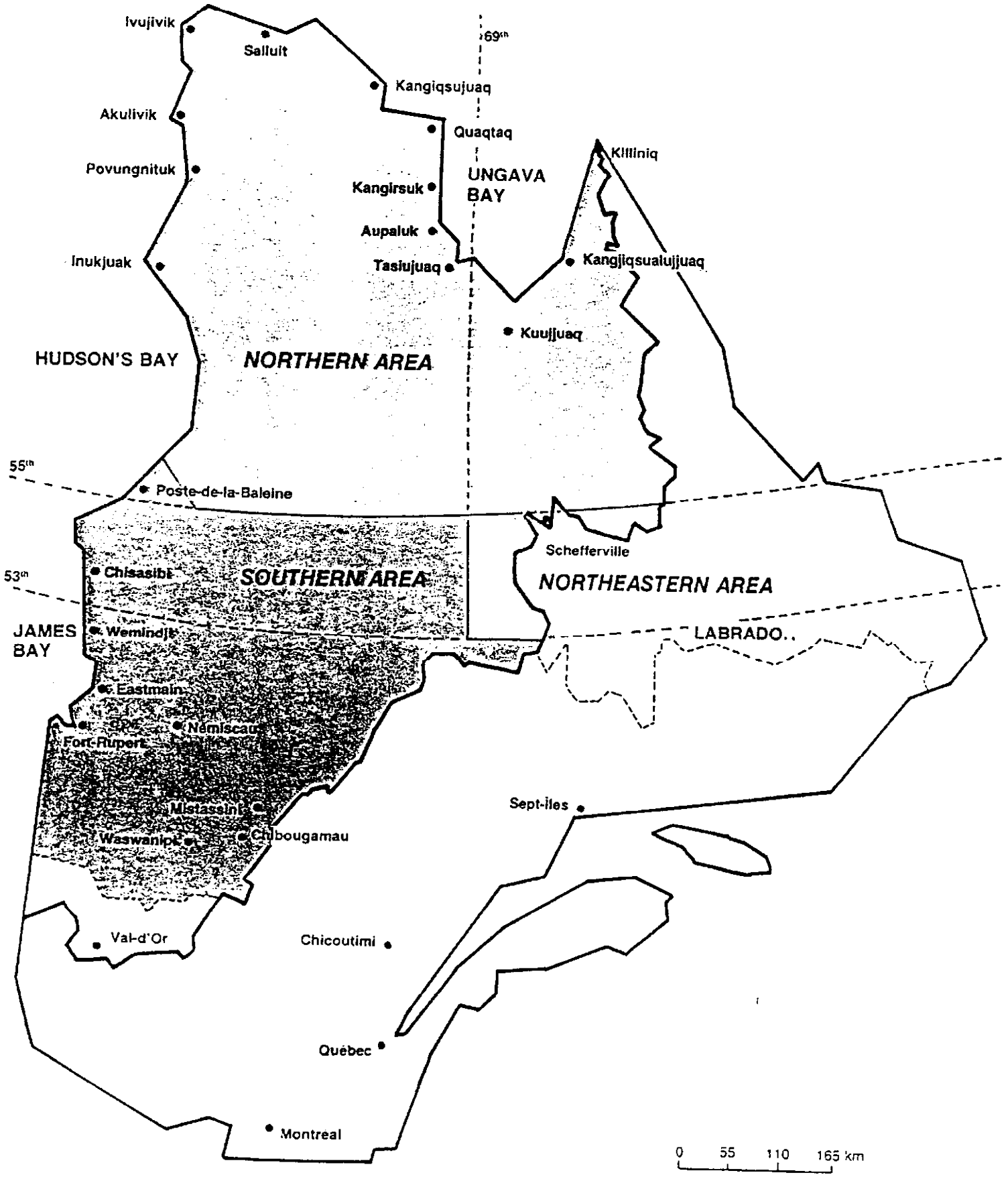
"Cree Region" is the area to which the Cree Regime applies. It is shown in Figure 1. It is the area in Québec south of the 55th parallel of latitude (excluding the area in the vicinity of Schefferville south of the 55th parallel of latitude) and west of the 69th meridian of longitude, and including the Category I and II lands of the Crees of Great Whale, and with the southern boundaries coinciding with the southern limits of the Cree traplines;

"Harvesting" refers to hunting, fishing, and trapping by Crees, Inuit, and Naskapis in conformity with Section 24 of the JBNQA for subsistence and other purposes. It is distinguished from sport hunting and sport fishing, which are practised by non-beneficiaries, subject to laws and

Figure 1-

Territory covered by the James Bay and Northern Québec Agreement

(Environment Canada, 1989)



regulations governing zones, seasons, bag- and possession-limits, and numerous other matters;

"Inuit Regime" means the assessment and review procedures established by Section 23 of the JBNQA;

"Inuit Region" is the area to which the Inuit Regime applies. It is shown in Figure 1. It is the area in Québec north of the 55th parallel of latitude, excluding the Category I and II lands of the Crees of Whapmagoostui;

"Inuk" or, in the plural, "Inuit" means a person who is, or who is entitled to be, a beneficiary in virtue of Section 3 of the JBNQA;

"James Bay and Northern Québec Agreement" means the Agreement executed in November, 1975, and the twelve complementary agreements that have subsequently amended it;

"Native" means Cree, or Inuit, and, in certain circumstances, Naskapi;

"Review Bodies" refers collectively to the JBACE, COMEV, COMEX, COFEX-South, KEAC, FSC, COFEX-North, and KEQC;

"Native Party" means, in the case of the Crees, the Grand Council of the Crees (of Québec) and/or the Cree Regional Authority, and, in the case of the Inuit, Makivik Corporation;

"Territory" is the area defined at Section 1.16 of the JBNQA. It is the entire area of land contemplated by the 1912 Québec boundaries extension acts (*An Act respecting the extension of the Province of Québec by the annexation of Ungava,* Qué. 2 Geo. V. c.7, and the *Québec Boundaries Extension Act, 1912*, Can. 2 Geo. V. c.45) and by the 1898 acts (*An Act respecting the delimitation of the Northwestern, Northern and Northeastern boundaries of the Province of Québec*, Qué. 61 Vict. c.6, and *An Act respecting the Northwestern, Northern and Northeastern boundaries of the Province of Québec*, Can. 61 Vict. c.3).

2.0 INTRODUCTION

2.1 Statement of Purpose and Scope

Initially, the purpose of this report was to evaluate the implementation of the environmental impact assessment and review regimes that have been established by comprehensive land claims agreements in Canada, with the exception of the regimes established by the Northern Flood Agreement of 1977 and the Inuvialuit (Western Arctic) Agreement of 1982, which are reviewed elsewhere (Cobb, 1993; Staples, 1993). A preliminary survey revealed, however, that the only such settlements for which there has been sufficient time to gain meaningful experience in implementing the environmental regimes is the JBNQA of 1975. This report deals only with the permanent assessment and review bodies created by the JBNQA, and it therefore excludes such bodies as the CKJSG, the Environmental Expert Committee, and SOTRAC, which were oriented towards project-specific remedial measures and monitoring, and which had only a limited lifespan.

The JBNQA did not establish any mechanism for the periodic evaluation of the environmental regimes. Not surprisingly, therefore, the Review Bodies have not organized their operations systematically so as to collect information relevant to assessing their functioning. Nevertheless, there have been at least three evaluations of the implementation of the JBNQA. The first, the so-called "Tait Report" (Indian and Northern Affairs Canada, 1982), took place in 1981 and 1982 as a result of an appearance by the Crees and Inuit before the House of Commons Standing Committee on Indian Affairs and Northern Development on 26 March, 1981. The second, involving the Crees and Québec, took place in 1984, while the third, between Canada and the Inuit, was in 1989 and 1990. The Tait Report addressed primarily financial matters, and it is not surprising that neither the Crees nor the Inuit raised the implementation of the environmental regimes in it. The implementation of the Cree Regime was, however, a major preoccupation for the Crees in their inconclusive 1984 discussions with Québec. The 1989-90 Canada-Inuit exercise was designed to permit the Inuit to raise any areas of dissatisfaction with Canada's discharging of its responsibilities under the JBNQA. We can find no evidence, however, that the implementation of the Inuit Regime was raised, which is surprising in the light of evidence

in Subsection 5.5.2 that the Inuit are not entirely satisfied with its implementation by Canada.

On 1 October, 1991, the KRG wrote to the KEAC requesting its involvement in a review of Section 23 initiated by Makivik Corporation and other regional organizations (KEAC, 1992:20). The members of the KEAC agreed to prepare their individual written comments, to be discussed later in the year, but it appears, however, that the KEAC has never produced a document (P. DiPizzo, pers. comm., July, 1993), and we have found no evidence that the other Inuit entities have pursued this study. In July, 1992, the JBACE officially recognized the need to evaluate the implementation of the Section 22 regimes. After consulting the Crees and representatives of government and industry, it submitted a request for 40 000$ to fund such a study to MENVIQ in June, 1993. MENVIQ rejected the request for funding, but it offered to provide the JBACE with a researcher for three months, although that offer was never followed-up on. On 20 January, 1993, the Government of Québec named M Yves Fortier as its representative for "pre-negotiations" with the Crees on the implementation of the JBNQA, but the subjects addressed and the results of the pre-negotiations have not been made public.

The result of the foregoing lack of data is of course that the following descriptions, analyses, and judgments are at best fragmentary and tentative.

Throughout this report, we refer to the relevant provisions of the JBNQA rather than to Chapter II of the EQA, which gives legislative expression to provincial responsibilities under Sections 22 and 23 of the JBNQA. Canada never adopted legislation to give effect to those sections. There are differences between the texts of Sections 22 and 23 and that of the EQA. Our decision to refer exclusively to the text of the JBNQA was primarily one of convenience, but it was influenced by the stipulation in Subsection 2.5 of the JBNQA that:

> *Canada and Quebec undertake that the legislation which will be so recommended will not impair the substance of the rights, undertakings and obligations provided for in the Agreement.*

While we have strived for objectivity, the reader should know that the senior author has over the past twenty years acted as a consultant almost exclusively to aboriginal groups in Québec, Ontario, and Labrador and was until recently a nominee of the CRA/GCCQ on the JBACE. The views expressed herein are solely ours, and they make no use of privileged information that we have as a result of our professional relationship with aboriginal clients.

3.0 DESCRIPTION OF THE ENVIRONMENTAL REGIMES ESTABLISHED BY THE JAMES BAY AND NORTHERN QUÉBEC AGREEMENT

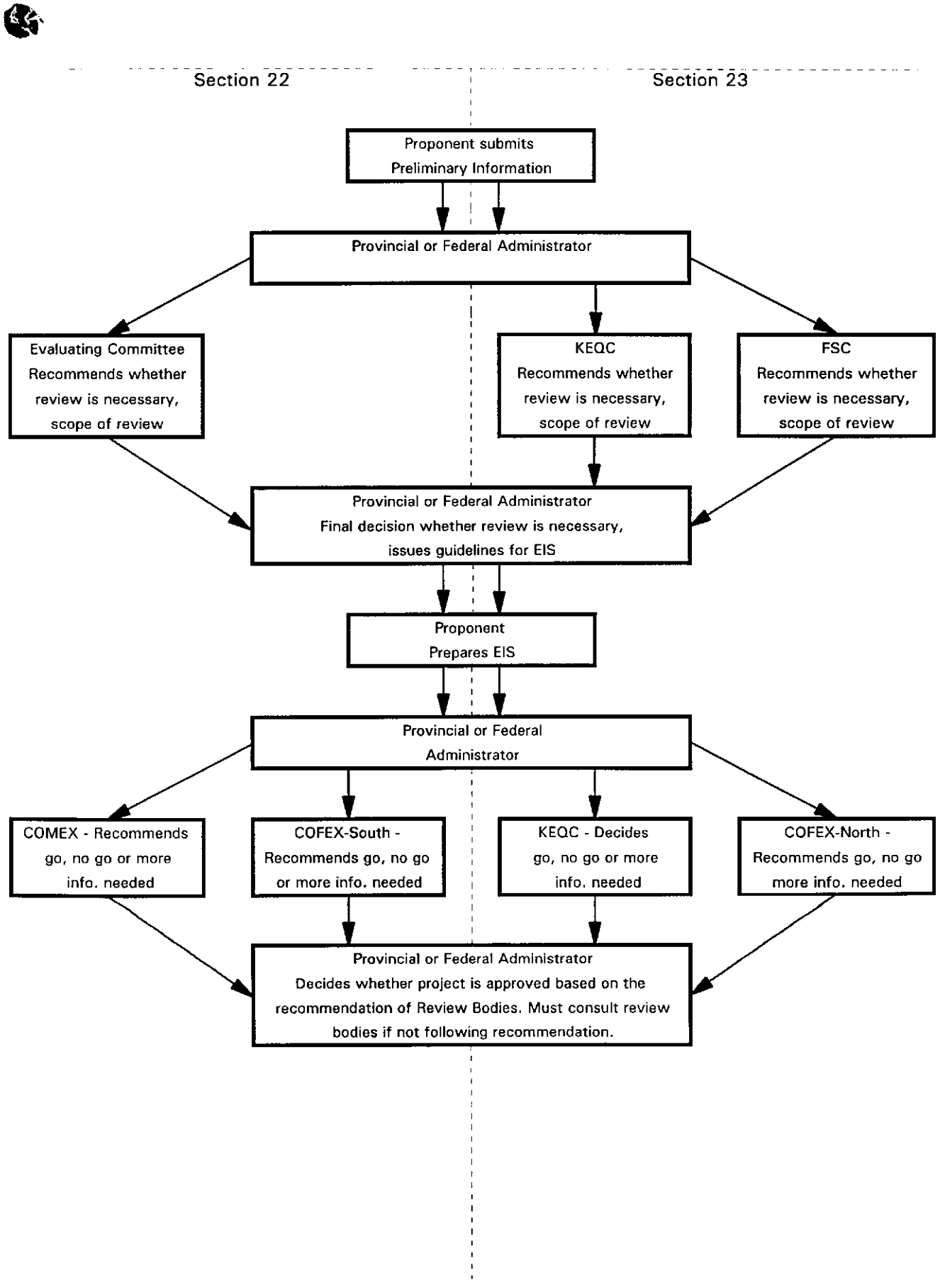
The JBNQA provides for the creation of two environmental and social protection regimes, each comprising several distinct processes or procedures. One, Section 22, applies throughout most of the area of primary interest for the Crees, the other, Section 23, over the areas of primary interest of the Inuit and the Naskapis.

Sections 22 and 23 are very similar to one another: each creates Native-Government bodies to implement the assessment procedures; each establishes an advisory committee to monitor general environmental concerns and the implementation of the assessment procedures; each accords an explicit priority to minimizing the negative impacts of development on Natives, both individually and collectively; each guarantees a level of Native involvement greater than that of the general public; each attaches special importance to protecting the harvesting rights of the Crees and the Inuit, their economies, and the wildlife resources on which they depend; each contains lists of projects automatically subject to or exempt from assessment and provides for the screening of other projects; both regimes are specifically linked to the Hunting, Fishing, and Trapping Regime established by Section 24; finally, both regimes recognize the right of third parties to develop, as defined at Subsections 5.5 and 7.4 of the JBNQA, in the Territory.

The JBNQA establishes four separate impact review procedures (Cree-Québec, Cree-Canada, Inuit-Québec, Inuit-Canada), but they constitute no more than variations on a basic theme (See Figure 2). Under certain circumstances, the federal and provincial procedures can be combined, provided that the rights and guarantees of the Natives are not affected. Paragraphs 22.5.7 and 23.7.6 specifically contemplate the notion of *...development projects of joint or mixed federal and provincial jurisdiction....*

The two federal regimes operate under the authority of the Minister of the Environment or a person or persons appointed by the Governor in Council, known as the "Administrator". The provincial regimes are also under the authority of an "Administrator", who is either the Director

Figure 2 : Environmental and Social Impact Review Procedures



of the Environmental Protection Service or his successor, or a person or persons appointed by the Lieutenant-Governor in Council.

Both regimes apply only to "developments" or "development projects", which are defined as:

> *consisting of any work, undertaking, structure, operation, [or] industrial process which might affect the environment or people of the Territory, exclusive of the operation and maintenance of such project after construction. However, the operation of such project shall form part of the considerations in the assessment and review procedures for the construction of such project.* (Paragraph 22.1.4 and, with minor differences, Paragraph 23.1.1)

More specifically, appendices to the two sections establish which developments are automatically subject to assessment and which are automatically exempt. Developments listed in neither appendix are subject to screening. These schedules are supposed to be reviewed every five years, but no such review has ever taken place, despite efforts on the part of the Crees and Inuit. Indeed, MENVIQ refused to amend the schedules when it was asked to do so by MLCP in 1992 at the request of the Native parties as part of a proposal to legalize, among other things, certain types of commercial hunting.

The procedure begins with the submission to the Administrator of preliminary information about the project by the proponent (See Figure 2). The Administrator transmits that information to the relevant Review Body, which recommends to the Administrator whether projects not listed in either of the schedules should be subject to or exempt from the impact assessment procedure, and, if appropriate, the extent of the review. If the project is automatically subject to the procedure, the Review Body makes recommendations about the nature and extent of the EIA, whether preliminary or final. In both cases, the Administrator makes the final decision and, if appropriate, issues guidelines for the EIA to the proponent. If the Administrator does not accept the recommendation of the relevant Review Body, he is obliged to consult it again before acting. A schedule to each of the relevant sections describes the overall structure and contents of an EIS. There is no provision for public consultation at this stage, and the public has no right to make representations during screening and the preparation of guidelines, although it was given

that opportunity during the recent review on the Great Whale Hydroelectric Complex.

The proponent then prepares the EIS and submits it to the Administrator. The Administrator transmits the EIS to the appropriate Review Body, which recommends within a specified delay whether the project should be approved and, if so, under what conditions. The Review Bodies may also ask the Administrator to request further information from the proponent. During the evaluation and review stages, the Review Bodies may hold consultations with the concerned Native communities or may invite their written representations. The Administrator decides whether and under what conditions a development may proceed. Once again, if the Administrator is unwilling or unable to follow the recommendation of a Review Body, he must consult it before acting otherwise. The governments may reverse the Administrator's decisions, or they can alter the terms and conditions established by the Administrator.

The implementation of each of the Cree and the Inuit regimes is overseen by a tripartite advisory committee, the JBACE and the KEAC respectively, which also acts as a preferential and official forum for consultation on proposed environmental laws and regulations and on other relevant matters. The JBACE and the KEAC can also recommend environmental laws, regulations and other measures, as well as participating in the formulation of land-use plans, commenting on forestry plans for Crown lands, and providing technical advice to the communities upon request.

The differences between the Cree and Inuit regimes include the following:

(1) unlike any other Cree or Inuit body, the KEQC can decide, rather than recommend, *...whether or not a development may be allowed to proceed by the Québec Administrator and what conditions, if any, shall accompany such approval or refusal* (23.3.20). The provision is especially powerful in that the Québec Administrator must obtain the approval of the Lieutenant Governor in Council if he does not wish to follow the decision of the KEQC;

(2) by way of exception to the general rule described above, the COFEX-North can issue

"specific guidelines" in addition to those decided upon by the Federal Administrator in consultation with the FSC (23.4.16). This appears not to have been appreciated until the COFEX-North reviewed the DND's proposed Forward Operating Location at Kuujjuaq in 1989. The members of COFEX-North appointed by the KRG insisted that Paragraph 23.4.16 referred clearly to specific guidelines issued by the COFEX-North. The Federal Administrator avoided commenting on that paragraph, preferring to argue that COFEX-North should operate in the same manner as the other Review Bodies. In order not to delay unduly the review, the COFEX-North agreed to submit the guidelines to the Federal Administrator without prejudice and to ask the KEAC to resolve the dispute. As far as we are aware, however, neither the Administrator nor the KRG subsequently submitted the question to the KEAC;

(3) the general rule that proponents submit EISs to the Administrator, who then forwards them to the relevant Review Body, may not apply to the COFEX-North. Paragraph 23.4.15 specifies that *the proponents...shall submit impact statements to the Environmental and Social Impact Review Panel.* Paragraph 23.4.18, on the other hand, specifies that *the proponent shall submit its impact statement to the Federal Administrator, who shall forthwith transmit it to the Review Panel.* It is difficult to ascribe such inconsistencies to anything other than hasty drafting;

(4) the Cree Regime shows a more marked bias in favour of tripartite, Native-Canada-Québec bodies than does the Inuit regime. The JBACE and the COMEV are both tripartite bodies, whereas the only Inuit body that is tripartite is the KEAC;

(5) likewise, the Inuit Regime is slightly less "fragmented" than the Cree Regime, in the sense that the KEQC is responsible for both screening and assessing projects under Québec jurisdiction, whereas under the Cree Regime all screening and assessment are carried out by different bodies;

(6) Appendix 1 illustrates several intriguing differences between the guiding principles

of the Cree and Inuit Regimes: the Cree Regime is to strive to minimize negative impacts on ... *Native people and Native communities...*, whereas the Inuit Regime seeks to do the same for ... *Native people and non-Native people and Native and non-Native communities...*; the Cree Regime promotes the involvement of the Cree people, while its Inuit counterpart strives for the involvement of the "Native people", who are defined to include the Crees, as well as the other inhabitants of the Region; the Cree regime includes specific references to Category I and Category II lands, which the Inuit regime does not. The reasons behind these differences, if they were intentional, can no longer be known with certainty. They may, however, reflect the fact that the JBNQA gave the Inuit a greater degree of regional authority than the Crees, and that it created non-ethnic bodies to exercise it;

(7) there are also differences between projects automatically subject to review under the Cree and Inuit Regimes. They include the following: only "major" mining operations are automatically subject to review under the Cree Regime, whereas all new mining operations and significant additions or alterations to existing mining operations in the Inuit Region are subject; nuclear installations are not explicitly subject to assessment in the Cree Region, unless they classify as fossil-fuel powered generating plants above 3 000 kW; in the Cree Region, only access roads to or near Native communities are subject to review, whereas all such roads are subject in the Inuit Region. Once again the reasons, if any, for those differences are difficult to ascertain, but they are striking and, under the rules of judicial interpretation, potentially very important, because the remainder of the two texts are identical;

(8) the only striking difference between the lists of projects automatically exempt from assessment in the Cree and Inuit Regions respectively is that it is only in the Inuit Region that ... *the extraction and handling of soapstone, sand, gravel, copper, timber for personal and community use* are automatically exempt from EIA;

(9) in recognition of the special responsibility of the Cree Regime to protect harvesting rights, the Chairman of the HFTCC is an *ex officio* member of the JBACE, except when the Chairman is appointed by the Inuit. There is, however, no similar relationship between the HFTCC and the KEAC, even though the Inuit Regime recognizes the same special responsibility to protect harvesting rights;

(10) the only differences in the contents of the environmental and social impact statements prescribed by Schedules 3 of the regimes are as follows: the Cree schedule states that the Administrator shall give due consideration to the provisions of the schedule, ... *but shall not be restricted or bound by or to the said provisions*, while there is no such qualification attached to the Administrator's consideration in the Inuit Schedule 3; in the Cree schedule, the objective of an EIS to identify and assess the environmental and social impacts of a project is stated to apply especially to the Cree populations potentially affected, while the Inuit schedule applies that objective especially to the Native populations; finally Schedule 3 to Section 22 applies pursuant to paragraphs 22.5.15, 22.6.15, and 22.5.16, which provide for the Administrator to make decisions with respect to the recommendations of the COMEV, COMEX, and COFEX-South, while Schedule 3 to Section 23 applies pursuant only to paragraph 23.3.17, respecting the KEQC's recommendations to the Administrator regarding the contents of EISs. In other words, it does not appear, strictly speaking, to apply to assessments of projects under federal jurisdiction. Whether it applies to projects of mixed federal-provincial jurisdiction is quite unclear;

(11) the considerable uncertainty surrounding the scope of and level of detail to be included in EISs is highlighted by Paragraph 23.3.30, which specifies that:

> *The Québec Administrator, in collaboration where necessary with the KEQC, shall ensure that the plans and specifications for construction of the development and operation thereof conform to the terms and conditions, if any, established by the assessment process.*

This provision has no counterpart in the Cree Regime or, indeed, elsewhere in the Inuit Regime. At first reading, it seems to suggest that the plans and specifications of projects should not form part of an EIS, in which case one must assume that important impacts might escape scrutiny. Equally, it suggests that the impacts of the operation of developments would not be scrutinized at the time of the review of the EIS. Such would be consistent with Paragraphs 22.1.4 and 23.1.1 which, as already noted, define "Development" and "Development Project" to exclude their operation and maintenance after construction, although both note rather cryptically that *...the operation of such project shall form part of the considerations in the assessment and review procedure for the construction of such project.* It is not obvious, however, how operation and maintenance can *...form part of the considerations in the assessment and review procedures...* other than by being subject to the same scrutiny as the impacts of construction. In the same way, Paragraph 23.3.30 appears upon reflection to be illogical, in that it is difficult to imagine how the terms and conditions established by the assessment process could anticipate and be relevant to the operation of a project if the operation had not already been described in the EIS, and its possible impacts considered. The situation is further complicated by the fact that Schedules 3 to both Sections 22 and 23 include under the rubric Description of the Project *Physical and human requirements for operation phase of the project.*

Thus there is considerable confusion and uncertainty as to how and to what extent the regimes should consider the impacts of project operations. In addition there is an important difference in that respect between the KEQC and all the other Review Bodies. In the absence of clear guidelines, the Review Bodies have tended to require proponents to describe the planned operations of their projects and to assess their impacts. In the case of smaller developments, that is often not onerous, but the situation with mega-projects can be quite different. Indeed, proponents have complained that requiring them to describe and evaluate the operations of their projects imposes on them the expense and delay of preparing detailed plans, drawings and specifications before they have any

reasonable assurance t at t e pro ects w e approved. On t e ot er and, t e Nat ve parties, among others, have pointed out that it is inconsistent with the objectives of the regimes to approve projects before the full range and likely severity of all the associated impacts are known. This issue assumed particular importance in relation to the assessment of the Great Whale Project. One solution that appears permissible under the JBNQA would be to review the gross impacts of proposed development in preliminary EIAs and, where appropriate, to consider other impacts, including those of operations, in a final EIA. In the case of the Great Whale Project, Makivik proposed such an approach (Makivik, 19 March, 1992), but the Review Bodies did not accept its recommendation.

The MENVIQ has also started to use Section 22 of Part 1 of the EQA to regulate the detailed impacts of projects and their operation. We consider that to be undesirable, since Section 22 does not require a proper review, and it does not have to follow the guiding principles of the Cree and Inuit Regimes or provide for Cree and Inuit participation.

3.1 Contents of Environmental and Social Impact Statements

Schedule 3 to each chapter describes the objectives, preparation and contents of an EIS. The requirements of each regime are essentially the same: both direct that a preliminary EIS should include an evaluation of site alternatives for the development and should provide the information required to determine the need for a final statement, based mainly on existing information; a final EIS, on the other hand, is to be prepared for the retained alternative and should provide more detail with respect to the implications of the development; an EIS should be concise and should contain a summary of the main findings; it may be in either French or English at the choice of the proponent; it must include a description of the project, a description of the pre-development environment and social setting, the identification, evaluation and synthesis of probable impacts, alternatives to the proposed project, and a section identifying corrective and remedial measures; the discussion of probable impacts should include, whenever appropriate, consideration of direct, indirect and cumulative impacts, as well as of short-term and long-term

impacts, and reversible and irrevers b e mpacts; fina y, an EIS shou d d st nguish between t e local, regional, and national scale impacts occurring at each phase of the development.

A few brief comments are in order.

First, the treatment of alternatives appears on a strict reading to be restricted to site alternatives, although it is not at all clear what is meant by that concept in many cases. It is easy to imagine, for example, that site alternatives exist for such projects as airports, railroads and even nuclear generating stations, in that a substantially identical project can, at least theoretically, be built in a variety of different locations. It is less obvious, however, in what way the concept could be applied to, for example, hydroelectric power plants or mines, which are in practice among the more numerous and more important forms of development in the Territory, particularly in the Cree Region (Appendix 7). That is so because hydroelectric plants and mines, among other forms of development, are influenced in important respects by local conditions.

Perhaps more important, the two schedules 3 do not appear to address clearly the questions of alternative methods of carrying out the project and alternatives to the project. Admittedly, one of the stated objectives of an EIS is to identify and assess *alternatives to the proposed action, including alternatives to individual elements of large scale projects....* Given, however, that all of the other references to alternatives are to site alternatives, considerable ambiguity as to the intent of this provision and uncertainty as to its strength persist. In the light of the foregoing, there may be no clear obligation on the proponent of a hydroelectric generating station, for example, to compare, perhaps at the level of preliminary assessment, alternative configurations of dams, reservoir, and other installations, or to examine whether the energy to be generated could be produced by means of an alternative fuel with fewer or less severe impacts. It is to be emphasized, however, that the schedules 3 are merely illustrative, and the Administrators can impose additional requirements.

Secondly, the schedules 3 do not appear unequivocally to require a proponent to demonstrate the need for its project, although there is a requirement to describe its *purpose and objectives*. We

believe that the attainment of the objectives of the regimes specified at paragraphs 22.2.4 and 23.2.4 requires clear and full justification of the need for a project, it is regrettable, therefore, that neither Section 22 nor 23, including their respective schedules 3, is clearer on this topic.

Finally, we note that the schedules 3, which were negotiated in 1974, refer to cumulative impacts, whereas the concept of cumulative impacts first acquired legislated status in 1978 in the regulations for implementing the procedural provisions of the NEPA. We assume that the negotiators of Sections 22 and 23 were influenced by the concept of cumulative impacts that was emerging in the U.S. in the mid 1970s. It is instructive, therefore, to consider the then-current definition:

> *"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency...undertakes such actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.* (cited by Irwin and Rodes, 1992:34, Appendix B).

3.2 Objectives of the Regimes

The two schedules 3 cast light on the objectives of the regimes. They provide that the main objective of an EIS is to identify and assess the environmental and social impacts induced by a development project, with particular reference to those impacts that have implications for the Cree and Inuit populations potentially affected. More specifically, the preparation of an EIS is intended to ensure that: environmental and social considerations are integrated into the proponent's planning and decision-making process; potential impacts resulting from a development are identified systematically; alternatives to a proposed development, including alternatives to the individual elements of large-scale projects, are evaluated in terms of minimizing within reason their impacts on Native people and wildlife resources and of maintaining the quality of the environment; remedial and preventive measures are incorporated into developments; and the relevant Review Bodies are adequately informed to be able to take

t e ec s ons or w c t ey are respons e.

3.3 Mandates and Structures of the Bodies

Sections 22 and 23 each establish four review bodies to implement the regimes (See Appendix 3 for details).

The JBACE (Section 22) and the KEAC (Section 23) are mandated to oversee the implementation of the regimes; to advise on, review, or propose laws, regulations and other measures relevant to the regimes; to recommend assessment mechanisms and procedures; to provide technical data and advice to the Cree communities and Kativik villages; and to review forestry management plans. Both are tripartite bodies, with representation divided equally divided between the federal, provincial and Native parties. The JBACE has a total of 12 members plus one *ex-officio* member who is the Chairman of the HFTCC (except when he is appointed by the Inuit), while the KEAC has nine members. The quorum for meetings of the JBACE is a minimum of one member per party always, a total of five members for matters of federal or provincial jurisdiction, and seven members for matters concerning both jurisdictions. The quorum for meetings of the KEAC is a minimum of one person per concerned party, a total of four members for issues of federal or provincial jurisdiction, and six members for matters concerning both jurisdictions. In both cases, each member has one vote, except when both the federal and provincial representatives vote, in which case, the Native representatives have two votes.

The remaining review bodies are mandated to carry out impact assessment procedures. In the Cree Region, COMEV screens "grey zone" projects and recommends the scope of assessments for all projects that require review under both federal and provincial jurisdictions. It is a tripartite body having a membership of six, divided equally between the federal, provincial, and Cree parties. For projects that fall under provincial jurisdiction, federal representatives do not vote, and vice versa for matters under federal jurisdiction. If a project falls under both jurisdictions, then all parties vote, but each Cree member has two votes. The quorum is not specified.

The COMEX is responsible for reviewing projects under provincial jurisdiction. It recommends whether developments should proceed and, if so, what terms and conditions, including preventative and mitigative measures, should be attached. It may also recommend that a development be subject to further assessment, and request that more information or data be supplied by the proponent. The COMEX has five members, of which two represent the CRA and three the provincial government. The COFEX-South has a similar mandate and structure, but is concerned with projects of federal jurisdiction. The quorum is not specified for COMEX or COFEX-South.

The KEQC screens "grey zone" projects, recommends the contents of EISs, and decides whether and under what conditions projects under provincial jurisdiction may proceed. It has nine members: four per party and one Chair who is appointed jointly. The quorum for meetings of the KEQC is a minimum of two members per party.

The FSC recommends to the federal government whether a preliminary and/or final impact statement should be carried out and, if so, its extent. It has four members, two appointed by each of the KRG and the federal government. The Chair is appointed from among the members for a one year term, alternating between the parties. Each member has one vote, except for the Chair, who has two.

On the basis of the EIS provided by the proponent of a project under the federal jurisdiction, the COFEX-North recommends whether developments should proceed and, if so, under what terms and conditions, including, where appropriate, remedial measures. Like its counterpart south of the 55th parallel, it can also recommend that a project be subject to further assessment and review, and can specify the data and information required. It has five members, two of whom are appointed by the KRG and three by the federal government, which also appoints the Chair. The quorum is not specified for either the FSC or COFEX-North.

4.0 HISTORICAL OVERVIEW OF THE IMPLEMENTATION OF THE ENVIRONMENTAL REGIMES ESTABLISHED BY THE JAMES BAY NORTHERN QUÉBEC AGREEMENT

Very little is known of the period between the signing of the JBNQA and the initial implementation of the Regimes. The federal government had played a relatively minor role during the negotiations, striving mainly to avoid assuming any greater obligations towards the Crees and the Inuit than for other bands under the *Indian Act*. It is surprising and paradoxical, therefore, that one of its greatest implementation initiatives related to the Regimes. The federal Department of the Environment established the James Bay and Northern Québec Office with a staff of eight civil servants, including biologists and other technical experts. The Office's mandate was to collect baseline data and to act as a technical resource for federal participation in the Regimes. The Office was disbanded in the Spring of 1986 (B. Taillon, pers. comm. December, 1993).

The Review Bodies were all operational by the end of 1980. With the exception of COFEX-South and COFEX-North, they have all been functioning on a regular basis since they were established. COFEX-South and COFEX-North are activated only on an *ad hoc* basis, when specific development projects require them to be active. The present section reviews the implementation of the Regimes, with particular reference to the functioning of the Review Bodies, discusses some of their successes and failures, and points to selected differences between the operation of the Cree and Inuit Regimes.

The following discussion emphasizes the Cree Regime, for several reasons: written sources on the Cree Regime proved to be more numerous and accessible than those on the Inuit Regime; the senior author has more knowledge of and experience with the Cree regime; in the case of the Cree Regime, the minutes of meetings of the JBACE and the COMEX and material produced with respect to the various past evaluations of Section 22 referred to in Subsection 2.1 were obtained, in addition to annual reports for those committees and the COMEV; in the case of the Inuit Regime, however, only the annual reports could be obtained.

Appendix 7 summarizes the material collected and permits the following observations:

4.1 Year of Establishment

The Review Bodies were all created between 1978 and 1980, some three to five years after the signing of the JBNQA, and one to three years after the enactment of Québec's Bill 32 and Canada's Bill C-9 giving effect to the JBNQA, on 31 October, 1977.

The view expressed earlier that the environmental regime may not have been a priority for the Crees is possibly substantiated by the fact that many of the other bodies foreseen in the JBNQA were made operational within roughly one year of its signing. Those bodies include the Cree Regional Authority, the Cree Construction Company, the Cree Trappers Association, the Cree Arts and Crafts Association, the Cree Housing Corporation, the Cree School Board, the Cree Income Security Board, and the Cree Regional Board of Health and Social Services. The HFTCC began meeting at the start of 1976, and it established its Secretariat, opened its office, and held its first formal meeting by September of that year. An alternative view is that the urgency of making the Cree Regime operational was less than that of the other bodies.

In fact, none of the Review Bodies was made operational until the EQA had been amended in 1978 to give legislative expression to the portions of Sections 22 and 23 under provincial jurisdiction. We have already referred in Subsection 2.1 to differing views on the status of the JBNQA versus the laws that give legislative expression to portions of it. Had the Regimes truly been priorities for the Crees and the Inuit, one has to wonder whether the Review Bodies could not have been established and activated more rapidly.

Clearly, it was not the intention of the negotiators of Section 23 that there should be a delay of several years. Paragraph 23.7.1 provided that:

> *The Environmental and Social impact assessment and review procedure which requires the establishment of the EQC, the Screening Committee and Review Panel shall be fully operative within a period of four (4) months following the date of the coming into force of the Agreement. Between the date of the coming*

into force of the Agreement and the time that the EQC becomes operative, t. e Québec Administrator shall assume the responsibilities of the EQC insofar as possible.

Paragraph 23.7.4 contemplated even greater urgency in creating the KEAC:

> *Notwithstanding anything in this Section, Québec and Canada shall forthwith upon execution of the Agreement, take the necessary measures to implement the provisions of Sub-Section 23.5 of this Section respecting the Advisory Committee, with the exception of the provision respecting the secretariat.*

Section 22 contains identical provisions at Paragraph 22.7.6 and Subparagraph 22.7.7 f).

4.2 Frequency of Meetings

Significantly more meetings have been held by the Cree than by the Inuit committees, approximately one-third more by the JBACE than the KEAC, and almost twice as many by the COMEV as by the KEQC. In fact, if one considers that the KEQC both screens proposals and reviews EISs for projects under provincial jurisdiction, whereas the COMEV merely screens projects and the COMEX reviews the resulting EISs, then the COMEV and COMEX combined have met almost four times as often as the KEQC. The differing frequency of meetings is probably due to the significantly greater number and complexity of developments proposed in the Cree Region.

The larger number of JBACE meetings, despite the fact that it met only twice between 1987 and 1989, may be attributed to several factors: first, the JBACE has had to carry out its responsibilities with respect to overseeing forest management in the Cree Region, a responsibility that the KEAC has not faced, given the absence of commercial forests in the Inuit Region; secondly, the proximity of the Cree Region to the industrial south has, as noted above, resulted in a greater number of proposed developments, especially by third parties, than has been the case in the Inuit Region, which means that the Crees have had a more urgent interest in attempting to ensure that the Cree Regime is fully and properly applied.

4.3 Place of Meetings

One of the stated objectives of establishing EIA in the JBNQA was to ensure that there would be a high degree of Cree and Inuit participation in the protection of their environment. Ensuring Cree and Inuit representation on the Review Bodies was one way of achieving that goal, although, as we have noted elsewhere, the only body that actually requires representation by beneficiaries is the KEQC. In order to facilitate Native participation, to have a visible presence in the communities that they serve, to develop a relationship of sharing information with the communities, and to permit the non-Native members to familiarize themselves with the Territory and to benefit from the traditional knowledge of the Crees and Inuit, one might expect that the Review Bodies would meet more often than not in the Territory. Experience has, however, been rather different.

Shortly after its creation, the KEAC resolved to hold every second meeting in the Inuit Region (KEAC, 1981). While it has not been able to hold completely to that decision, it has made a sustained and largely successful effort to do so. As a result, it has held almost as many meetings in the Territory as outside of it, as well as three meetings in Radisson, not far from the Inuit Region and close to the small Inuit population in Chisasibi. For its part, the KEQC has held approximately one-third of its meetings in the North. The Inuit Review Bodies have also met relatively frequently in the Inuit Region, and in 1985 the KEAC felt that in general *...the review mechanisms and procedures were generally working well and in accordance with the spirit and letter of the JBNQA* (KEAC, 1986).

The Cree Review Bodies have met far less frequently in the Territory that they serve, which may have contributed to an alleged lack of confidence in the Cree Regime on the part of the Crees (Penn, 1989). It appears that the communities are poorly informed about what the JBACE is doing (Penn, 1992). Although the JBACE has a nominal head office in Mistissini, it is no more than a postal address.

4.4 Communications Programmes

In its early years, the JBACE was anxious to publish an information package about the Cree

Regime for the Crees and the public, including developers. Indeed, a draft text of a bulletin was approved by the members in 1983-84. At that time, however, the JBACE still wanted to publish two additional documents, one in the form of a brochure and the other a more detailed text designed to inform project proponents of the operation of the Cree Regime. Unfortunately, the JBACE could never agree on texts for those documents, and the project was never completed. Penn (1992) attributes the failure of the JBACE to produce a manual for proponents to its inability to agree on the nature and objectives of impact assessment, even though they are at least partially spelled out in Section 22.

On the other hand, both the KEAC (1982) and the KEQC (1984) published documents in Inuktitut, English and French respectively advising the public and proponents of the impact assessment regime. In addition, the KEQC published an article explaining its composition and mandate in the June 1982 issue of *Taqralik*, a Makivik publication well-known in Northern Québec (KEQC, 1983).

4.5 Aboriginal Membership

Native membership on the Review Bodies was intended to ensure that Cree and Inuit concerns would be adequately considered. Aboriginal members must, however, be able to participate in a meaningful manner in order for that goal to be achieved. Barriers to full Native participation include the technical language of EISs, as well as the fact that they are usually produced in French, with English summaries often being produced considerably later, if at all (KEAC, 1986). Language difficulties also limit the appointment of Aboriginal members to those persons, usually younger, who are at least English-speaking, and who are not necessarily especially knowledgeable about or dependent on the environment. Moreover, the technical complexity of most of the issues addressed by the Review Bodies often results in an undesirable degree of dependence on non-Native consultants and employees (La Rusic, 1979). The drafting of recommendations is time-consuming and, combined with language difficulties and the fact that work of the Review Bodies often takes place in the South, membership on the Cree Review Bodies becomes unattractive to many Native persons (Penn, 1989). Another barrier to Aboriginal participation, at least in the case of the Crees, is that the majority of meetings are

e n t e Sout , putt ng t e onus an t e expense o trave on t e ree mem ers an t e bodies appointing them. Aboriginal members accounted for 97% of the absences incurred by the Cree delegation at the JBACE. In spite of the preceding barriers, the Crees and the Inuit have maintained a presence at all times on most of the Review Bodies. The COMEX is a striking exception, since it lacked Cree members for five years, and had only intermittent Cree membership for another four years.

4.6 Continuity of Membership

The average term of membership ranges from 3.27 years on the KEAC to 4.67 years on the KEQC. Of the five Review Bodies that have met regularly since their establishment, only the membership of the JBACE has experienced the simultaneous replacement of almost all of the members. It was virtually inactive between 1987 and late 1989, and, when it resumed activity, all but two of its members were new. Although each committee has had several members who sat for one year or less, each also has a small number who have been members since it became operational. On all of the committees the Native members have had the highest rate of turnover, particularly in the cases of the COMEV, the COMEX, and the KEQC. In the cases of the JBACE and the KEAC, the difference in rates of turnover between Native and non-Native members and between parties is slight. The Quebec representatives on the JBACE and the federal representatives on the KEAC each have had slightly higher rates of turnover than those of the other parties.

4.7 Attendance

Regular attendance at meetings is obviously essential if members are properly to fulfil their responsibilities. Data on the attendance of members of the JBACE, the COMEX, and to a certain extent the KEQC demonstrate that Native members have missed more meetings than their non-Native counterparts. The reasons for that may be logistical - it is more difficult for members who live in the North to travel to southern locations, although that could hardly be true for the KEQC; alternatively, it may point to a general belief on the part of Native members that the impact assessment procedure has no real influence on whether or how projects are carried out; finally, implementing the JBNQA has placed excessive demands on the relatively few Cree

and nu t w o have t e e ucat on an nc nat on to assume comp ex a m n strat ve an tec n ca responsibilities, and many of the absences by Native members may reflect nothing more than that they had conflicting commitments.

4.8 Budgetary Issues

The budgets allocated to the Review Bodies are to cover operating expenses, such as the salaries and travel expenses of secretariat staff, office rental, stationery, photocopying, telecommunications, and the costs of translation. The amounts are decided by MENVIQ, although each of the Review Bodies usually submits a written request annually for an amount that it considers appropriate. Although the JBNQA does provide for the hiring of consultants for research purposes at the expense of the Review Bodies (paragraphs 22.3.22, 23.5.22), the budget granted to the JBACE has never been large enough for such purposes. Québec has stated that the research capability within MENVIQ is available to the Review Bodies (Groupe de travail sur l'environnement, 1984), but the Review Bodies have made little use of it, perhaps because they do not consider it to be independent, at least in appearance. In spite of that, there has been much frustration on the part of the Crees, who feel that *...the resources needed to provide even basic research support have just not been available* (Penn, 1988).

4.9 Remuneration of Members

The members of all the Review Bodies are remunerated by the party that appoints them. The JBNQA specifies that the expenses of the representatives of the CRA on the COMEX are to be assumed by the secretariat, but it has no equivalent provision for the CRA representatives on the COMEV. Pursuant to Article 135 of the EQA, the Québec representatives are not remunerated for their time spent on the work of the Review Bodies. That is not a problem for members who are civil servants, but it does limit the recruitment of Québec appointees from outside the civil service and restricts the time that they can spend on the business of the Review Bodies. Indeed, one member of the JBACE, a lawyer in private practice, threatened to resign because he could not afford to be a member. Formal representations by the JBACE to the MENVIQ did not succeed in changing the situation. The fact that the annual reports of the JBACE for 1991-92 and 1992-93 list among the issues discussed a *recommendation to remunerate Québec-appointed*

Advisory Committee members to ensure their full participation in Committee activities (JBACE, 1992, 1993) indicates the seriousness of this problem.

4.10 Language of Operations and Availability of Documentation in Cree and Inuktitut

The Cree and Inuit members of the Review Bodies, as well as the Cree and Inuit populations in general, have been at a disadvantage due to delays in or lack of translations of documents into Cree or Inuktitut. Most EISs are produced in French, a language not spoken by most Crees or Inuit, and English summaries are often received much later than the impact study (KEAC, 1986; JBACE, Minutes of Meetings).

The JBACE has expressed concern that most documentation from proponents, as well as most Québec government documentation, is produced only in French. It has attempted to remedy the situation by ensuring that proponents supply, at a minimum, summaries of important documents in English, so that translation into Cree can be facilitated and accelerated (JBACE, 1992) and that the concerned communities are consulted about the quality and comprehensiveness of the translations. The availability of project descriptions in Cree is particularly important if the Cree communities are to be involved in the assessment procedure. By exception, the Guidelines for the assessment of the Great Whale Project required Hydro-Québec to produce its EIS in French and English and to provide extensive summaries in Cree, Inuktitut, and Naskapi. The Memorandum of Understanding concerning the assessment of the Great Whale Project between Canada, Québec, and the Native parties, signed in January, 1992, further specified that key documents and information, *...as identified by the Committees*, must be available in English and French, with summaries being provided in Native languages when appropriate. It seems not improbable that the foregoing will serve as a precedent, if only for mega-projects.

The KEAC has also commented on this problem (KEAC, 1986). While its language of operation is usually flexible, there have been periods when the KEAC has had only French-speaking members and has operated exclusively in French (K. Rosen, pers.comm., August, 1993). The KEQC, on the other hand, has always had Inuit members, and has therefore always operated on a basis of informal translation, with members speaking the language in which they

are the most comforta le, muc as the J has one. orrespon ence w t u ec y ot the KEAC and the KEQC is usually in French. Minutes are produced in French and English, and although the KEAC and the KEQC attempt to have all minutes translated into Inuktitut, it is a slow process. Early in the operation of the KEQC, Québec informed it that the government of Québec's translation service was slowing down the transmission of English translations (KEQC, 1982). Shortly thereafter, the KRG agreed to assume responsibility for translating documents that were submitted to the KEQC. The JBACE usually produces correspondence and minutes in both French and English, but it has never produced Cree translations. While all the Review Bodies are sensitive to the problem of language, a way of speeding up translation of important documents, particularly information relevant to impact assessments, has yet to be endorsed by the government (JBACE, Minutes of Meetings; Penn, 1992).

4.11 Secretariat

The annual reports of the JBACE reveal a long-standing preoccupation with the status of its secretariat, the Committee's autonomy, and the administrative ties between the JBACE and the COMEV. Indeed, setting up the secretariat seems to have consumed much of the JBACE's administrative energies between 1979 and 1987. Nevertheless, its functioning, budget, relationship to the Québec civil service, and staffing problems are matters that still arise regularly in its minutes and annual reports. Devoting excessive time to settling administrative matters can compromise the efforts of committees to carry out their mandates (Landmann, 1988), which has probably been the case with the JBACE. Although Section 22 provides for a secretariat of up to five individuals for the JBACE, it has sometimes proved difficult to retain a staff of one. There have been three secretaries over the past fifteen years, including a period when there was none. In 1982-83, the JBACE lost its secretary due to budgetary cuts and staff cut-backs at the MENVIQ, and it was forced to operate without a secretariat. It was not until 1989 that the JBACE acquired the appropriate budget to hire a permanent researcher, a position that has been vacant since 1992. Pursuant to Paragraph 22.5.6 of the JBNQA, the JBACE has provided secretariat services to the COMEV since the establishment of the latter. It agreed in 1989 to provide secretariat services also to the COMEX, although it is not obliged to do so, but that continues to be a matter of sometimes acrimonious debate, provoked at least in part by the

unusually heavy demands placed on the Secretariat by the assessment of the Great Whale Project.

The current staff is perceived as dedicated and capable of running the committees' operations efficiently (JBACE, 1990). Nevertheless, the JBACE is currently attempting to negotiate a new administrative agreement with Québec, which, based on the model of the HFTCC, would subject the it to fewer administrative constraints, and by which it would *...acquire greater control over its financial, material and human resources* (JBACE, Minutes of 76th Meetings). The proposed reorganization of the Secretariat includes moving it from the offices of the MENVIQ in Ste-Foy, possibly to Montréal, and locating it in the same premises as the secretariats of all the Review Bodies established under Section 22. The JBACE also decided to withdraw the loan of its secretary to the COMEX because of the heavy workload and the small budget of the JBACE. That decision has not, however, been implemented, pending receipt of an official response from MENVIQ.

The Inuit Regime does not seem to have been as burdened by administrative problems as its Cree counterpart, possibly because the provision of secretarial services was contracted to the KRG from the outset, meaning that the secretariat was automatically located outside a government building. The KEQC and the KEAC share a common secretary, who is located in Kuujjuaq at the office of the KRG. The secretariat has been operational since 1982, shortly after the KEQC and the KEAC became active. Until recently, all documents related to assessments in the Inuit Region were kept on file at the secretariat's office. Four individuals have occupied the position of secretary to the KEAC and the KEQC. The position of secretary fell vacant for a period in 1991, and, because of its participation in the public review of the access infrastructure of the Great Whale Project, the JBACE agreed to lend its secretary to the COMEX and KEQC for 90 days to assist in organizing the required public hearings.

4.12 Implementation of the Provincial Procedures

The Cree Regime has been applied much more often than the Inuit Regime: the COMEV has reviewed 237 projects, compared with only 73 for the KEQC. There have also been important

differences in the types of projects reviewed under each Regime. The Inuit Regime has been much more concerned with small-scale projects with Inuit proponents, such as community and municipal services, whereas the Cree Regime has addressed more large-scale projects with non-Native proponents, in such areas as energy production, mining, and forestry. In both the Cree and the Inuit Regions, the vast majority of projects reviewed have been under provincial jurisdiction. Nevertheless, the relative frequency of projects under federal jurisdiction has been considerably higher in the Inuit Region (30%) than in the Cree Region (5%).

One area in which there was initial difficulty in implementing the Cree Regime was with respect to the construction of municipal infrastructure in certain Cree communities. The construction of such facilities as water distribution and sewage systems in Cree villages greatly improves public health conditions, but the JBACE was concerned about the potential environmental problems associated with certain elements of those systems. To add to the complexity, the large number of organizations involved, including bands, DIAND and the CHA, sometimes created uncertainty as to the identity of the proponent. Recent annual reports do not reveal how or if that problem was resolved.

The majority of the projects reviewed by the COMEV and the COMEX have related to the construction of forestry and mining infrastructure and to hydroelectric facilities and transmission lines. As will be discussed in greater detail below, it has become apparent that the Cree and Inuit Regimes are not flexible enough to be appropriate to the varying scales of projects that have been subject to it. Similarly, the delays established by the JBNQA are usually too short to assess properly large-scale projects, but they are long enough to jeopardize the timely construction of smaller projects, such as community infrastructure.

The types of projects that the KEQC has examined also range from relatively simple, such as the construction of solid waste disposal sites in Inuit communities, to those as complex as the Great Whale Hydroelectric Project. Unlike the situation with the Cree Regime, however, the majority of them have been Inuit community infrastructure, such as landing strips, docking facilities, fuel tanks, water-distribution, and waste disposal systems. In cases where the siting

of the community infrastructure has been disputed by the community involved, the KEQC has held public meetings, at which the community and the developer have usually come to an agreement. For example, a public meeting was held in Aupaluk when the community did not agree with the site for the landing strip proposed by Transport Québec. An agreement was reached with the proponent, and a new site was selected. Several of the projects reviewed have been proposed by Inuit interests, such as the KRG, alone or jointly with a local government, or the FCNQ. Though not as frequently as in the Cree Region, Hydro-Québec has also been active north of the 55th parallel of latitude, proposing a new thermal generating plant and additional diesel generators in Kuujjuaq and Kuujjuaraapik respectively, exploration camps along the Great Whale River and, of course, the Great Whale Hydroelectric Project. The remainder of the proposals have been mining exploration camps, proposed by such private interests as Falconbridge Nickle Mines Limited and the Groupe Platine de la Fosse Inc..

One situation in which the Inuit Regime did not function entirely as planned was the construction of Umiujaq, a new Inuit village near Richmond Gulf. The KEQC completed its initial review of the proposed master plan and EIS for the new community in 1983. The proponent, the Umiujaq Steering Committee, submitted an addendum to the EIS in April 1985, and the project was subsequently approved subject to a number of conditions and recommendations (KEQC, 1986). Several of those conditions were not met, however, and several of the components of the master plan were not in fact built (KEQC, 1987).

4.13 Implementation of the Federal Procedures

Approximately 12 projects have been reviewed under the federal procedure in the Cree Region (G. Brousseau, pers. comm. 29 July, 1993; M. Dorais, pers. comm. July, 1993), eight of which related to community infrastructure on Category I-A land, such as landing strips, access roads, and the construction of Oujé-Bougoumou. Three federal reviews of hydroelectric developments and infrastructure were initiated, the Great Whale and the Eastmain 1 projects and the Abitibi-Lebel 315 kV transmission line. The other project to which the federal process has been applied is the Route du Nord, linking Chibougamau and Nemiscau. Cree community infrastructure projects are, of course, reviewed under the federal procedure, because Cree communities are

on Category I-A lands, which have been transferred to federal jurisdiction for Cree use. The Inuit communities, on the other hand, are located on lands under provincial jurisdiction. In absolute terms, therefore, COFEX-North has not been very active. Indeed, there have been two cases in which projects that should have been reviewed were not. The docks in Kangirsuk and Inukjuaq were both built by Transport Quebec, in 1986 and 1987 respectively, without authorization. They were built pursuant to the Canada-Quebec Subsidiary Agreement on Transportation Development and in conjunction within the Northern Airports Programme (KEAC, 1988:21-22). By special agreement with Canada, Transport Quebec was the official proponent of the planned airports *...in terms of their environmental and social impact assessment and review* (KEQC, 1986:51). It is not known whether the two docks were not assessed because of a shortcoming in the above agreement, or whether they were purposely overlooked. M Daniel Berrouard, who has been a member of the KEQC since 1981, recalled (pers. comm. 19 November, 1993) that they were built because Transport Québec wished to take advantage of the presence of construction equipment in the communities to build the landing strips. After protests by other communities where further dock construction was planned, the docks at Kangirsuk and Inukjuaq were subject to a sort of retroactive assessment, under the pretext of producing guidelines for future, similar projects.

Responsibility for ensuring that the Regimes are enforced lies with the responsible Administrator, but there is no mechanism to ensure compliance with conditions of approval, although, by convention, the DOE has assumed that responsibility. Similarly, there are no penalties for non-compliance with the Federal Regimes, although the EQA has a penalty clause for non-compliance with the Provincial Regimes.

Between 1989 and 1991, the COFEX-North reviewed a Forward Operating Location in Kuujjuaq proposed by the DND, which, however, cancelled the project before the review was complete. COFEX-North was also involved in reviews of the Raglan Mine, proposed by Falconbridge Nickle Mines Limited, and of a wharf on the Koksoak River, proposed by the Kuujjuamiut Corporation. It has now withdrawn itself from those reviews as a result of a Federal Court ruling that Canada has no jurisdiction to review projects involving activities that themselves fall

under exclusive provincial jurisdiction. In fact, Canada removed itself from a l the assessments under Sections 22 and 23 in which it was involved as a result of that decision, except for the review of the Great Whale Project, to which it was committed by virtue of the Memorandum of Understanding signed in January, 1992.

As noted elsewhere, the JBNQA provides for the possibility of combining several of the assessment processes. The federal regime in the Inuit Region provided the first example of combining regimes. The federal government decided on 13 February, 1986, to subject DND's ongoing low-level military flight training in parts of Québec and Labrador and NATO's proposal for a Tactical Fighter Weapons Training Centre at Goose Bay to review and assessment. At a minimum, the project would have had to be reviewed under the EARP, the federal regime north of the 55th parallel of latitude, and the *Environmental Assessment Act* of the Province of Newfoundland and Labrador. On 2 July, 1986, the Kativik Regional Government, the Minister of Environment, and the Federal Administrator signed a Memorandum of Understanding to combine the EARP procedure and the federal procedure under Subsection 23.4 of the JBNQA.

The approach adopted was essentially to apply the EARP regime, but to incorporate into it certain of the principles and procedures established by Section 23, including the principles established at paragraphs 23.2.2 and 23.2.4. At the insistence of the KRG, the terms of reference of the Panel were changed: the original terms of reference authorized the Panel only to *...recommend measures to minimize adverse impacts of existing low level flight training...*; the Memorandum of Understanding, on the other hand, mandated the Panel to *...recommend whether the project should proceed or not and if so under what conditions....* The Memorandum of Understanding also provided that:

> *Any questions of interpretation arising out of this memorandum will be guided by the principle that the intention of the parties is to establish an environmental assessment process providing for native involvement equivalent to the processes provided for by subsection 23.4 of the JBNQ Agreement.*

The Memorandum of Understanding gave the KRG the right to one seat on the seven-member

panel. The KRG representative was to be appointed by the Minister of Environment rom a st of two or more persons proposed by the KRG. The senior author was the KRG's representative on the Panel from 1986 until his resignation in April, 1992. The review of DND's proposal was plagued by delays and problems, but few of them related to difficulties in combining the Inuit Regime with the federal EARP.

The review of Hydro-Québec's Great Whale Project between 1992 and 1994 was another example of an attempt to integrate, at least partially, several of the Section 22 and Section 23 regimes with the federal EARP. In that case too a Memorandum of Understanding was negotiated and executed, on 23 January, 1992, between Canada, Québec, the CRA, Makivik, the KRG, and the GCCQ. The Review Bodies were not parties to the Memorandum of Understanding, but they intervened in it to agree to the provisions that concerned them. Similarly, Hydro-Québec, the proponent, did not sign the Memorandum of Understanding, but it did issue a letter on the same day that the Memorandum of Understanding was signed, saying that it had taken cognizance of the Memorandum of Understanding, and confirming that certain matters relating to the justification of the Great Whale Project referred to in the Memorandum of Understanding would be addressed in the EIS, provided that they were required in the guidelines.

Unlike the Goose Bay case, the purpose of the Memorandum of Understanding of 23 January, 1992, was not to combine several review procedures but to coordinate their application so as to maximize their effectiveness and to minimize duplication. The review of the Great Whale Project was suspended due to the postponement of the Project, and it is not possible to make any judgment as to the success of the efforts to harmonize the regimes. Nevertheless, the rapid production of a single set of guidelines by the six bodies involved suggests that it was working well.

5.0 EVALU TION OF THE SU CESS F HE EG ES

5.1 Evaluation of the Regimes with Respect to their Objectives

As discussed in Subsection 3.2, both Regimes are preceded by a list of general principles intended to direct their functioning. According to Feit (1982:103), the guiding principles were intended to balance the fact that the JBNQA did not give the Crees control over the form or rate of development in the Cree Region. The JBNQA was, however, intended to establish legally binding and enforceable principles that were intended to impose constraints on development, in the sense that certain Cree and Inuit rights had to be considered in all decisions. Feit (1982:103) also suggests that they could be used to assess *...the performance of the regime and the exercise of government authority*. Although it has proven difficult to translate those general principles into operational practice (Penn, 1988:130, 1989:8), we attempt in this subsection to determine the degree to which those objectives have been achieved by the activities of the Review Bodies.

In order to do so, we selected nine projects from the developments that the COMEX has evaluated over the past fourteen years (Appendix 8) and five projects from those that the KEQC has reviewed (Appendix 9). The resulting recommendations, including reasons, were then evaluated against the guiding principles. The projects selected were as representative as possible of those reviewed.

The EISs themselves could not be compared to the recommendations, but the published decisions and annual reports permit a judgment as to how well the COMEX and the KEQC adhered to the Regimes' guiding principles. Generally, it can be said that both the COMEX and the KEQC have enjoyed some limited success in applying the guiding principles of the Regimes.

The COMEX recommended approval of all of projects considered here, but it also recommended conditions that correspond broadly to one or more of the guiding principles of the Cree Regime. In all cases, the conditions appear to be designed to protect wildlife, the physical and biotic environment, and/or the relevant ecological systems. For example, the conditions of approval of Forest Road N-836 are designed to protect moose habitat, spawning grounds, and the

spawning season. Self-evidently, they also uphold the right to develop in the Territory. Only two of the nine decisions do not appear to strive seriously to minimize the anticipated negative environmental impacts on the Crees in any obvious way, but that may be because the expected impacts on them were not judged to be significant. The JBNQA does not define exactly what it means by the rights and interests of non-Natives, but it can be assumed safely that they include matters relating to health and safety and sport hunting and fishing rights. Five of the nine recommendations examined appear to be designed to protect the rights and interests of non-Natives, as well as those of Natives.

Cree involvement in the application of the process, other than as members of the COMEX, was discussed in only four of the nine recommendations. In its 1982-84 Biennial Report, the COMEX referred to its goal of meeting more often in the Territory and of having more direct involvement by the Cree population in the process. Nevertheless, the majority of efforts in that area have come from the Local Administrators, the Band Councils, and the Cree representatives on the Review Bodies. The COMEX tends to involve the Cree communities by establishing liaison committees composed of Band members and representatives of the proponent to discuss issues as they evolve during the construction, operation, and monitoring of projects.

The protection of Native people, their societies, communities, and economies is usually discussed in relation to larger-scale projects, such as mining and hydroelectric projects, forestry access roads, and other road construction projects. Six of the nine recommendations speak to those issues. Again, the usual way of dealing with social and economic impacts, which are often poorly dealt with in the EISs, is through monitoring and liaison. The matter that is usually dealt with most specifically by the COMEX's recommendations is archaeological resources. Only three of the recommendations contain conditions directed explicitly at the harvesting rights of the Crees, although it appears that developments frequently impact most directly on those rights. The usual recommendation of the COMEX is to have the proponent keep the Cree tallyman informed of the progress of the development.

The principle of upholding the rights and guarantees of the Native people within Category II

established by and in accordance with Section 24 until such land is developed does not apply to any of the projects that we selected as they were all proposed on Category I or III lands.

Although the COMEX's preferred method of making decisions is by consensus, any member may request a vote. In the case of the three projects reviewed with potentially the greatest impacts on Cree communities, the Cree representatives abstained from voting or dissented from the majority vote to authorize the project.

For at least one of the recommendations studied, we were able to obtain the opinion of the Cree community on which it had the most immediate impact. The Waskaganish Band submitted a document to the JBACE criticizing the impact study of the extension of Forest Road N-836 on the grounds that the quality of the scientific analysis was poor. The letter goes on to state that the acceptance of such an impact study by the COMEX subjects the whole process to ridicule (Waskaganish First Nation, 1992), and it documents several major deficiencies in the impact study in support of that contention.

Like the COMEX, the KEQC authorized all of the projects examined herein, but it subjected them to various conditions that appear to be aimed at respecting at least some of the guiding principles of Section 23. Self-evidently, all of the recommendations uphold the sixth guiding principle, namely the right to develop in the Territory. All five also attempt to minimize environmental impacts on Native people and their communities. For example, Hydro-Québec is instructed to ensure that workers respect municipal by-laws respecting alcohol consumption and drugs and relations between workers and the local population in the authorization to construct a thermal power plant in Kuujjuaq. A similar condition is imposed on Transport Québec in the authorization of the Aupaluk landing strip. It is, of course, true that proponents must respect by-laws even in the absence of such terms and conditions in project authorizations, so the contribution of the Inuit Regime in this respect is largely secondary to that of the local governments that adopt and enforce the by-laws in question. Similarly, all five projects are given conditions that specifically speak to the protection of the physical environment.

One of the five projects does not explicitly address the first guiding principle, pertaining to the protection of Native people, their societies, communities and economies. The authorization for mineral exploration at Blue Lake by the Groupe Platine de la Fosse Inc. has no explicit conditions or comments with respect to Native people, although it is located in Naskapi territory, not far from Kawawachikamach. However, the KEQC does state that the measures taken to reduce environmental impacts are considered adequate, which may indicate that the EIS included measures to protect Native people sufficiently, or that no negative impacts on Native people were expected. Only two of the five projects examined, namely the landing strip at Aupaluk and the thermal power plant at Kuujjuaq, impose any conditions with respect to the involvement of the Inuit in applying the procedure. All of the projects, with the exception of the mineral exploration, directly benefit the Inuit communities in which they are located, which presumably had an important influence on the KEQC. Two of the principles, relating respectively to the harvesting rights of the beneficiaries and to the rights and interests of non-Native people, are not addressed explicitly by any of the conditions examined. In the case of the harvesting rights, that may be because four of the five projects are in areas that are already disturbed by the presence of communities, while the fifth, the mining project, is only at the exploration phase.

5.2 Situation Prevailing in Northern Québec Prior to Establishment of the Regimes

At the time of the negotiation of Sections 22 and 23, environmental protection legislation providing for public input into environmental assessments or even requiring impact assessment was in its infancy in Canada. Environmental assessment was still a relatively new concept in Canada when the JBNQA was signed. The NEPA had been passed in the United States in 1970 as a result of growing pressure on the government to control development projects that were having negative impacts on the environment. In 1972, the Canadian government established a working group to examine the experience of other countries with environmental impact assessment. Finally, in 1973, it established the EARP by means of a Cabinet Directive. One of the goals of those who negotiated the JBNQA was to avoid a repetition of the situation in the early 1970s, in which major projects, such as the James Bay Project, with potentially numerous and serious environmental impacts, had been planned and constructed without considering the Native population (Piette, 1988).

The 1976 *Guidelines for Preparing Initial Environmental Evaluation* (Environmental Assessment Panel, 1976) listed requirements for initial assessments of hydroelectric facilities that are strikingly similar to those established by schedules 3 to Sections 22 and 23. Both require descriptions of the project and the environment, identification and evaluation of potential impacts, discussion of alternatives, and identification of remedial measures. The 1976 Guidelines are more specific than the JBNQA with respect to the evaluation of alternatives, including alternatives to the project, to the site, to the operational plans, to the no-development option, and to postponement. Unlike the schedules to Sections 22 and 23, they also require a discussion of plans for abandonment of a development after its useful life. The required contents of an EIS under the JBNQA are, however, considerably more detailed concerning social impacts. That is understandable, given that one of the general objectives of the JBNQA assessment procedures is to ... *contribute to further understanding of the interactions between Native people, the harvesting of wildlife resources and the economic development of the territory* (JBNQA, Sections 22 and 23, Schedule 3). In fact, the level of consideration of social impacts required by the JBNQA was exceptional at the time and for several years after, possibly because other jurisdictions were more realistic than the negotiators of the JBNQA about the difficulties of studying social impacts (Yergeau, 1988).

Overall, the conclusion is inescapable that the implementation of the Cree and Inuit Regimes, notwithstanding its shortcomings, led to a vast improvement over their situation prevailing in the Territory prior to their establishment.

5.3 Standards that Normally Apply to Consultative Committees

All of the Review Bodies can be considered to be "advisory committees" in the sense in which that term is normally used. According to Landmann (1988), the first question that should be asked about an advisory committee is whether or not a committee is the right mechanism for the job that is assigned to it. Landmann (1988:57-58) concludes that committees are most useful when three conditions are met:

1) the purpose is to bring particular persons or groups together;

2) *they are requested to deal with specific problems requiring the expertise of a number of people, or which call for negotiations among several parties to reach an agreement;*

3) *government is willing to accord a place for them in the decisional structure and is willing to accept some of the advice and recommendations that they generate.*

All of the Review Committees mandates satisfy the first condition, their most basic purpose being to bring together representatives of the Crees and Inuit and the federal and provincial governments as a precondition for reviewing proposed developments and, more specifically, to provide Native people with an opportunity to participate in the application of the Regimes.

The COMEX, KEQC, FSC, COFEX-North and COFEX-South generally satisfy the second condition, since their mandates focus on the specific activities of assessment and review and on well-defined projects. Nevertheless, the types and complexity of the projects reviewed vary considerably. While some projects are fairly small and simple, others, such as the Great Whale Project, are so complex that their review requires a range of expertise that is virtually impossible to obtain from small committees. The federal and Québec approach, also reflected in COFEX-North, COFEX-South, and the FSC, of striking separate panels to review individual projects offers some obvious advantages in terms of the relevance of its members' qualifications and in avoiding overload, but it runs into the problem of finding members knowledgeable about and sensitive to the cultural, economic, ecological and other characteristics of the Territory and the beneficiaries. Furthermore, such an approach does not easily permit the accumulation of the experience needed to apply the regimes consistently and to build on prior experience, although a good secretariat can make an important contribution in that regard.

It is less obvious, however, that the JBACE and the KEAC satisfy the second condition. At first sight, committees are an appropriate mechanism for overseeing the application of the regimes and for making recommendations respecting the assessment and review procedures applicable in the Territory. The mandates of the JBACE and the KEAC are, however, very broad and diffuse, potentially encompassing so much that it becomes virtually impossible to discharge

them, except perhaps with very liberal access to technical advice and with members who are available on at least a half-time basis. Paragraphs 22.3.22 and 23.5.22 do empower the JBACE and the KEAC to call upon expert advice or opinions, but they do not specify the size of the budget for such expenses, and the MENVIQ has consistently refused to provide any funds for outside expertise, maintaining that its expertise is available to the JBACE (Groupe du Travail sur l'Environnement, 1984:13) and the KEAC, although in practice that has either not been desirable or workable to the Crees (Penn, 1988:130). In practice, therefore, advisory committees such as the JBACE and the KEAC do not seem to be the best possible means of achieving their stated objectives. One alternative would be to transfer some of their responsibilities to other of the Review Bodies and to provide for periodic, independent evaluations of the implementation of the Regimes.

The place that the Review Bodies have been given by the governments to participate in the decision-making process is not evident. In the minutes of the 74th meeting of the JBACE, some members commented that the federal and provincial governments seemed to show little interest in the work of the JBACE. The Cree representatives in particular felt that it was essential to improve working relations with both governments, so that the JBACE did not end up working alone. After several years of pressure, MLCP did explicitly integrate the HFTCC into its functional organizational chart, but that does not appear to be the case for any of the Review Bodies. Civil servants have advised us privately that committees not integrated into departmental organizational charts, manuals, or procedures are easily overlooked and often carry little weight. At least some of the members of the JBACE feel that that is the case. The same is not true for the various screening and review bodies, since the JBNQA itself and the EQA specify where and how they are integrated into the governmental decision-making procedures.

The preceding problem is at least partially due to the composition of the government delegations on the Review Bodies, which are not always able to ensure that their recommendations are considered seriously. The government delegations on the JBACE, for example, consist principally of persons from outside the civil service, who appear to have little access to the senior levels of the governments that they represent; to the extent that there are or have been

members from the civil service, they have been relatively junior and have suffered from a similar problem of lack of access to decision-makers. The delegation of the CRA on the JBACE, on the other hand, has traditionally consisted of a balance senior representatives and outside experts. Possible solutions are to appoint assistant deputy ministers or members who report directly to ministers or deputy ministers. The presumed advantage of having external members is that each member can ... *weigh impartially the arguments of others and, if appropriate, to take a position that might not be in perfect accord with that of the party that nominated him or her* (JBACE, 1990:v). The disadvantage of the distance between the representatives and the appointing parties became evident in 1991-92, when the Chairman noted in his annual message that ...*the Committee's effectiveness is seriously impeded if the members do not have rapid, direct, and influential contact with the most senior levels of the organizations that appoint them* (JBACE, 1992:v). Appointing senior civil servants can, however, create its own problems. Traditionally, the governments have appointed relatively senior civil servants to the HFTCC, but the criticism has been levelled that discussions there are sterile, because the civil servants are mandated only to explain and defend the predetermined positions of their governments, thereby undermining the status of the HFTCC as an expert body. Hence our belief that government delegations must by led by at least an assistant deputy minister.

Other criteria by which to evaluate consultative committees come from the literature on co-management; indeed, it is relevant and useful to consider the Regimes and the Review Bodies as part of the system of co-management established by the thirty chapters of the JBNQA. Osherenko (1988:103) listed four criteria for successful co-management regimes that are applicable to the Regimes, and that may shed light on some of their successes and failures.

First, the regime must have the cooperation and support of the community that it is intended to serve (Osherenko, 1988:103). Above all, it is not sufficient merely to have aboriginal members on committees that nevertheless function within a bureaucratic structure that is not culturally appropriate, as is generally the case with the Regimes. The fact that the Crees and the Inuit ratified the JBNQA suggests that, at one level, the Regimes have - or had - the support of the "communities". In practice, however, it is less obvious that they still have that support, in the

sense of the local governments and the "ordinary" Cree and Inuit citizens. That situation probably has several explanations. First, and perhaps most important, the Regimes do not truly satisfy the criterion of being culturally adapted. There is no significant structural difference between the Regimes and those in non-Native areas that is obviously related to the culture of the Crees or the Inuit. Despite the fact that the Cree and Inuit cultures are based on the oral transmission of knowledge and concerns, on decision-making by consensus and locally by directly affected persons, the Regimes provide fewer opportunities for public participation than most non-Native regimes and rely at least as heavily on written materials.

Another test is the degree to which what is called Traditional Ecological Knowledge has been incorporated into the activities of the Review Bodies. To date, there appears to have been relatively little systematic effort by the Review Bodies to incorporate TEK into the impact assessment procedures for large projects, although some individual EISs have incorporated such knowledge to a modest degree. Had it not been for its premature termination, the assessment of the Great Whale Project might have provided a precedent for the greater inclusion of TEK, given that the consideration of local knowledge and values was explicitly required by the Guidelines. Jacobs (1988) commented on the success of the KEQC at integrating the types of knowledge and ways of knowing of the Inuit into the impact assessment procedure, but he appears to have been referring to that of the Inuit members of the Review Bodies rather than to that of the Inuit as a whole:

> *The Commission functions, in fact flourishes, on the variety of expertise that its members have acquired...The integration of information and even types of understanding inherent to the two cultures, has allowed the Commission to find ways of dealing with projects in a manner that was clearly not foreseen when the mandate of the Commission was originally developed* (Jacobs, 1988:57).
>
> *An institution originally designed to evaluate projects at the end of the development process has evolved into one that encourages environmental planning at the beginning* (Jacobs, 1988:58).

Secondly, Native groups must be accorded a certain amount of authority in decision-making, and must be included in the design of research programmes (Osherenko, 1988:103). That has, to

some degree, been proven possible by the Beverly-Qamanirjuaq Caribou Management Board, which, although it is also only an advisory body, is generally cited as a successful example of co-management. Usher (1993:113) reports that the Board gives users a chance to communicate directly with biologists and managers and that *users feel that, while the Board is by no means perfect, they get more respect and a better hearing, and that the situation is a vast improvement over the days when management policy was made behind closed doors.* Once again, however, the Regimes do not fully satisfy this criterion: as already noted, the Review Bodies that actually assess projects are dominated by the governments, and they have only recommendatory powers. Except for the KEQC, decision-making remains the responsibility of the federal or provincial Administrator, and the governments retain the power to change all decisions. The lack of resources for research further limits the ability of the Review Bodies to exercise any real influence or authority. While it has been rare for Administrators not to follow the recommendation of the Review Bodies, it has been equally rare for the Review Bodies not to authorize projects, albeit with terms and conditions. There have been a few instances, however, where the members of the COMEX have not been able to reach consensus on the authorization of projects, and the members have had to vote. Of the nine project decisions examined earlier, three were arrived at by vote, in two of which the Cree representatives abstained, and one in which they dissented. Québec has never rejected a recommendation on the grounds that the Cree members had abstained or dissented. Voinson (1988:109) mentioned frustration on the part of the KRG representatives on the KEAC when they were unable to instigate a public inquiry into the 1984 drowning of some 10 000 caribou in the Caniapiscau River. He noted that the Inuit Regime functions well as long as the Review Bodies respect their consultative responsibilities, and provided that their recommendations are not in conflict with the economic goals of the governments: *You quickly realize that the Inuit do not carry any weight in evaluating problems and identifying solutions as soon as serious environmental problems arise, such as the drowning of 10 000 caribou in September 1984* (Voinson, 1988:109, unofficial translation).

Third, the regime must be adequately funded to carry out its functions (Osherenko, 1988:103). As discussed previously, this has been a major concern for the Crees and the Inuit, who maintain that the budgets of the Review Bodies are either insufficient to allow them to carry out

independent research (Penn, 1988:129) or are earmarked for specific programmes that do not necessarily correspond to the priorities of the Review Bodies (Voinson, 1988:108). The Crees have also complained about the high cost of their participation on the Review Bodies (Groupe de travail sur l'environnement (Section 22), 1984). We do not have precise figures, but it is difficult to imagine that the cost of participation on the JBACE, for example, is less than 75 000$ a year for the Crees. The costs of participation on the COMEV and COMEX would depend on the number and scope of projects before them in a given year, but we estimate that it would be comparable to the preceding figure.

The fourth criterion suggested by Osherenko (1988:103) is that cultural and linguistic barriers to full Native participation must be avoided. She points to such features as the location of meetings, the availability of interpretation at meetings, the translation of key information into Native languages, and the use of aboriginal systems of decision-making as ways of reducing or avoiding those barriers. The historical overview of the implementation of the Regimes in Section 4 suggested that they suffer to varying degrees from inadequacies with respect to all of the factors that Osherenko describes. Usher (1993:117) suggests that a further criterion for successful co-management would be *...a harmonization of the state and indigenous systems or approaches to understanding*. Not only is the language of operation a barrier to full Cree and Inuit participation, but the technical language of impact studies is a further barrier. Morissette (1985:54) reports that an Inuk member of the KEQC *...told the audience [at the 1984 Kativik Environment Conference] how hard it was to be an Inuk without any recognized training and be confronted with all these developments... 'Yet, all the transformation of the Northern environment affects our social and personal lives. But only afterwards do we realize it'.*

Not only does the JBNQA not require the use of Cree or Inuktitut in the Regimes, but it provides that an EIS may be in French or English at the option of the proponent. That provision appears inconsistent with the stated objectives of the regimes to provide for a greater-than-usual level of participation by the Crees and the Inuit, which, common sense would suggest, requires documents to be available in languages that they understand. Some proponents have refused to produce even summaries of their EISs in English, and the MENVIQ has taken the position that

it cannot require proponents to produce such summaries. Since 1991, the JBACE has been discussing with the CRA/GCCQ a language policy that could be submitted to the Conseil de la langue française. There appears to be a consensus that proponents should be required to produce at least detailed summaries of relevant documents in English or Cree, and that the concerned Cree communities should be consulted regarding the scope and content of such documents, although there is no formal or final agreement between the JBACE and the Crees. There is, of course, no certainty that such a recommendation would in any case be accepted by the Conseil de la langue française. As we have already noted, the decision-making procedures of the Review Bodies are entirely Euro-Canadian, meetings are often held in the South, and interpretation usually depends on the good will of individual members of the Review Bodies who are bilingual.

On balance, therefore, it appears that the Review Bodies other than the JBACE and the KEAC satisfy moderately the standard criteria for consultative committees, but it is less obvious that the JBACE and the KEAC, are the most appropriate structures to achieve the objectives specified by the JBNQA.

5.4 Situation Prevailing in other Areas where Federal or Provincial Assessment Regimes of General Application Apply

The situation prevailing in other areas constitution another criterion against which the implementation of the Regimes can be evaluated. All assessment procedures of general application in Canada follow a generally similar structure (Emond, 1985), which is not dissimilar from that of the Regimes. That structure includes: a description of the proposed development and a preliminary assessment of potential impacts by the proponent; a decision whether it should be subject to assessment; determination of the scope and contents of the EIS; a formal assessment of probable impacts by the proponent; evaluation of the EIS by government; public reaction and comment; and, finally, a decision regarding the acceptability of the development. Some of the features of various provincial and federal procedures of general application that differ from those established by the JBNQA are: the possibility of pre-hearing mediation; guarantees as to the extent of public participation; the possibility of intervenor funding; post-

development monitoring mechanisms; and procedures for enforcement of the conditions to which developments are subject.

The Ontario Environmental Assessment Board was experimenting with pre-hearing mediation as early as 1985, based on the premise that many issues can be resolved to the satisfaction of intervenors through mediation and that only the most contentious issues need to go through the hearing process (Emond, 1985). Mediation can facilitate the assessment process by helping participants to reach agreement on what will be addressed in the formal assessment, and how. The new CEAA also provides for mediation. If the Minister believes that the parties directly affected by or having a direct interest in a project have been identified and are willing to participate in mediation, and that mediation is likely to prove successful, he may opt for mediation rather than panel review (Schrecker, 1991). Mediation is not specifically provided for in the JBNQA, but that does not preclude the possibility of pre-hearing negotiations between intervenors, governments and the proponent, as the negotiation and signing of the JBNQA Complementary Agreements Nos. 3 and 4 and the Chisasibi Agreement, Complementary Agreement No.5 and the Sakami Lake Agreement, Complementary Agreement No.7, Complementary Agreement No.9 and the Kuujjuaq Agreement, and the Memorandum of Understanding of January, 1992, regarding the assessment of the Great Whale Project, illustrate.

The Regimes remain open to public review at several points throughout the process. Unlike the regimes that apply in southern Québec or Ontario, written representations may be made to the Review Bodies at both the pre-assessment evaluation and the review phases of the procedure. There is no explicit requirement for public hearings, although sub-section 23.4.20 of the Inuit Regime states that *...this paragraph [concerning written and oral submissions] shall not be construed as limiting the right of the responsible Federal Administrator to authorize more extensive representations.* The extent of public input into the review of any given project remains at the discretion of the Review Bodies and Administrators. The Quebec and Ontario regimes guarantee public participation on request only at the review phase of the procedure. Section 31.3 of the EQA, for example, states that, once an EIS has been made public, any individual or group may request a public hearing. Section 7(2) of the *Environmental Assessment*

Act is similar.

While the necessity for some form of participant funding to encourage meaningful public participation is now generally accepted, it was not provided for by the JBNQA. Procedures legislated more recently, such as the CEAA and the *Intervenor Funding Act* of Ontario, provide for intervenor funding. The amounts of intervenor funding may be substantial: some 29$ million was, for example, allocated to intervenors in the environmental assessment of Ontario Hydro's *Demand/Supply Plan*. Although there is no legislative requirement to that effect, it has been the practice of FEARO at least since the early 1980s to provide intervenor funding, although usually in modest amounts. For example, 158 000$ was awarded to nine intervenors to participate in the drafting of guidelines for the Goose Bay Review, while 318 130$ was awarded to review DND's first EIS.

The first and only award of intervenor funding to date under the Cree and Inuit Regimes occurred pursuant the Memorandum of Understanding of January, 1992, concerning the review of the Great Whale Project. Section 8 of the MOU established a fund of 2 000 000$, two-thirds of it reserved for the Crees and Inuit. Simultaneously, Hydro-Québec agreed in writing to provide 1 500 000$ to the Cree and Inuit intervenors, as represented by the CRA/GCCQ and Makivik/KRG. It is to be noted, however, that the MOU specifically provided that its provisions would apply only to the Great Whale Project, and one cannot assume that the provision of intervenor funding under the Regimes will become a standard practice.

The absence of mechanisms for post-project monitoring and the enforcement of the conditions of approval of a project have been weaknesses in many environmental assessment processes, and the Regimes are no exceptions. In practice, the Review Bodies have often recommended that monitoring mechanisms be established as a condition for project approval, but the JBNQA does not create any bodies to ensure that monitoring is actually carried out. The authority of the Review Bodies in that respect is, to say the least, ambiguous. The practice has been that MENVIQ inspects projects, but it is not required to and does not habitually transmit the results to the Review Bodies. The lack of an effective monitoring mechanism in the assessment process

makes enforcement all the more difficult (Emond, 1985). The CEAA requires the review panel to design and arrange for the implementation of an appropriate follow-up programme for each project (Schrecker, 1991).

Definitions of "environment" have an important influence on the scope of EIAs. One important deficiency of the Regimes is that they do not contain an explicit definition of "environment", although the texts of Chapters 22 and 23, in combination with the rest of the JBNQA, require in our opinion that a very broad definition be given to that term. The difficulty is compounded by the fact that the EQA contains a highly restrictive definition of "environment" as:

> *the water, atmosphere and soil or a combination of any of them or, generally the ambient milieu with which living species have dynamic relations* (Section 1(4)).

It is true that the *Règlement sur l'évaluation et examen des impacts sur l'environnement c. Q-2, r.9* broadens the scope of the proceeding definition by requiring that EISs contain a qualitative and quantitative inventory of environmental components likely to be affected by development, including flora, fauna, human communities, sites of cultural, archaeological and historic heritage, and agricultural or other uses of the land and resources in the area. Nevertheless according to the EQA, discussion of social impacts remains limited to direct impacts on the elements described (*c.Q-2, r.9*, Section III, subsection 3(b)). In Ontario, however, the definition of environment at section 1(c) of the *Environmental Assessment Act*, is

> *(c) "environment" means,*
>
> *(i) air, land or water,*
> *(ii) plant and animal life, including man,*
> *(iii) the social, economic and cultural conditions that influence the life of man or a community,*
> *(iv) any building, structure, machine or other device or thing made by man,*
> *(v) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man, or,*
> *(vi) any part or combination of the foregoing and the interrelationships between any two or more of them,*

in or of Ontario;

Given such a definition, the scope of the EISs must include a discussion of all social impacts, as well as of impacts on the biophysical environment.

Overall, however, it appears that the Regimes and their implementation compare favourably with regimes of general application elsewhere in Canada, the more so taking into account the period when the JBNQA was negotiated.

5.5 Opinions of the Parties

Perhaps the most informed criterion against which to evaluate the success of the implementation of the Regimes is the opinions of the parties that negotiated them and that have been responsible for their implementation. The following discussion consists of a series of quotations from various sources that are intended to illustrate the parties' opinions as to the successes and failures of the Regimes.

5.5.1 The Crees

Most of the 20 problems with Section 22 or its implementation discussed in the report of the Groupe de travail sur l'environnement (1984), were raised by the Cree party. They included:

1) the failure of the Government of Québec and MENVIQ to recognize that Section 22 is the official and preferential environmental and social protection regime applicable in the Territory;

2) the inadequacy of financial and technical resources made available to the Review Bodies established by Section 22;

3) failure to attain the primary objective of the Cree Regime, to protect the rights and interests of the Crees;

4) the lack of interest on the part of many members, insufficient consultation by MENVIQ, and, the failure of Québec to provide a properly staffed secretariat;

5) the treatment of forestry operations by the Cree Regime is problematic, largely because forestry management plans are not subject to EIA;

6) the lack of financial and technical resources within MENVIQ, coupled with its failure to share those limited resources with the Cree party;

7) actions of the Québec Administrator that have not respected the provisions of the Regime;

8) lack of compliance with the Regime by developers;

9) the undue financial burden imposed on the CRA by the failure of MENVIQ to establish and fund an adequate secretariat;

10) confusion concerning the application of Chapter I of the EQA in the Territory;

11) the delays established by the Regime are too long for minor projects and too short for major projects;

12) the absence of consensus between MENVIQ and the Crees as to when projects should be submitted to the Regime;

13) the absence of norms and criteria applicable to Category IA lands;

14) the absence of a follow-up and monitoring mechanism within the Regime.

In 1985, Grand Chief Ted Moses wrote to the Associate General Secretary of the Executive

Council and Director of SAGMAI, M. Éric Gourdeau, expressing his general dissatisfaction with the review of the implementation of the JBNQA, but expressing satisfaction with the review of Section 22, from which the above-cited material was drawn: *In this area, ... substantial progress has been achieved* (Grand Chief T. Moses, 1 April, 1985).

An appendix to that letter, titled "Québec Review- Section 22, Status of Issues as of March 1985" (GCCQ/CRA, March 1985), noted the following:

> *A third unique feature of the Section 22 Review is the obvious need to go beyond merely correcting implementation problems and to propose specific modifications to Section 22 and the corresponding provisions of the Environment Quality Act. This last point should come as no surprise and is most understandable in light of the fact that the environmental and social protection regimes included in Sections 22 and 23 of the Agreement represented new approaches to environmental and social protection in Québec negotiated at a time when there was considerable opposition to even the principle of mandatory and binding environmental impact assessment. Since 1974-75 the principle has been accepted and integrated fully into Québec legislation and, over time, certain technical improvements have been made.*

Phase II of the above-cited review continued in 1986 and 1987. Although a final document does not appear to have been prepared, the minutes of the relevant meetings and related correspondence suggest that Grand Chief Moses' optimism had been premature, for the majority of issues raised in the 1984 document were never resolved either operationally or in principle (P. Awashish, 23 July, 1986; A. Penn, 1987; Groupe de travail sur l'environnement, 1986-87).

In 1992, the Chairman of the JBACE, also a Cree representative, commented that, despite hard and diligent work by the Committee and its staff, the *...appearance [of success] masks serious structural and operational difficulties. The willingness of the governments of Québec and Canada to resolve those difficulties will give a clear message as to their commitment to ensure the successful fulfilment of the Committee's mandate in the years to come* (JBACE, 1992:v). The minutes of recent meetings of the JBACE confirm that the problems raised in the mid 1980s remain for the most part unresolved. On balance, therefore, we must conclude that the Crees

consider the implementation of the ree Reg me by uébec to be ghly unsat s actory. We have located no sources indicating what they think of the implementation of the federal procedures established by Section 22.

5.5.2 The Inuit

Makivik commented on the application of the federal regime in its 1985 brief, *James Bay and Northern Québec Agreement: Ten Years of Disagreement*, as follows: *In spite of the clear undertaking in sub-section 23.4, no "Federal Environmental and Social Impact Assessment and Review" has ever been conducted by the federal government.* (Makivik, 1985). It continues:

> *Makivik believes that the federal impact assessment process in sub-section 23.4 should be amended to give the process more substance to increase Inuit involvement, and that legislation and regulations should be adopted once a suitable regime has been jointly worked out* (Makivik, 1985:21).

In its 1985 review of Section 23, the KEAC found that the review procedure was generally functioning well *...in accordance with the spirit and letter of the JBNQA and the EQA*, (KEAC, 1986:10), but it also listed four areas where improvements should be implemented. Those were:

1) the timing of the environmental and social impact assessment and review procedure;

2) follow-up and inspection of projects after authorization;

3) the working language of the KEQC; and

4) funding for KRG representatives on the KEQC.

The chairman of the KEQC was also generally satisfied with the procedure in 1986:

> *After seven years of work the results of project reviews have been helpful to many project proponents and have contributed to the marked improvement in the provision of integrated municipal services throughout the region* (KEQC, 1986:46).

One problem to which he does refer, however, deals with modifications to developments after

their authorization. He noted that some o them were occurr ng because o ... *a m n strat ve and budgetary delays or planning and management problems* (KEQC, 1986:46), and he suggested that, in his opinion, they might result ... *in real risks to the quality of the environmental and social milieu of Northern Québec* (KEQC, 1986:46). It is likely that the Chairman was referring in particular to the review of the Umiujaq masterplan, which had been modified several times due to planning problems (KEAC, 1986:48-50).

Michael Barrett, a KRG representative on the KEAC from 1980 to 1990, commented on the following in 1985 (Barrett, 1988:124-126): the slow implementation of the environmental regime due to the limited financial and human resources of the KRG, coupled with a lack of support from Québec; the impartiality of both the KRG and Québec representatives on the KEQC; the lack of field personnel; the lack of results from the Regime, particularly with respect to waste-water treatment in spite of the ... *good lines of communication with [Environment] Québec*; the lack of a built-in monitoring mechanism; the fact that the environmental regime had not really been tested by having to review a large-scale project; and, finally, the dependence of the regime on [Environment] Québec for funding, as well as the fact that the Commission's decisions can be overturned.

Peter Jacobs, Chairman of the KEQC, commented in 1990 on the perception of the Commission by the Inuit in the following terms: *The Commission has become an instrument for planning and action for the residents of the Nunavik region who perceive it as an important environmental protection organization* (KEQC, 1990:5). He went on to describe the relationship of the Commission's members as one in which there is a shared commitment to environmental and social protection ... *while taking into consideration the differences in viewpoints, culture and language* (KEQC, 1990:5).

When asked why the environmental regime had not been included in the 1982 review of the implementation of the JBNQA, Mtre Sam Silverstone, a lawyer for the Inuit, responded that it was not a priority at the time, since the Regime had only just become operational, but that it

would certainly be included in any new review.

Unlike the Crees, then, it appears that the Inuit Review Bodies, while sensitive to the Regime's structural and functional shortcomings, are generally satisfied with its implementation, but certain organizations and individuals have some reservations about it. As noted earlier, however, there has been little experience with applying the federal regime in the Inuit Region, and implementation of the provincial regime to a major development by a third party has been restricted to the review of the Great Whale Project.

5.5.3 The Provincial Government

The 1984 review of the implementation of Section 22 also records MENVIQ's opinions on various matters. In several instances, MENVIQ agreed with the issues raised by the Crees. The following points were made in response to the comments of the Crees (Groupe de travail sur l'environnement, 1984):

1) MENVIQ has sufficient resources to meet the needs of the Regime, and they are available to the Review Bodies on demand; should the need arise for expertise that is not available within MENVIQ, it can be contracted from outside the civil service;

2) the representatives of MENVIQ on the Review Bodies have been instructed to respect the letter and spirit of the JBNQA with respect to the guiding principles established by Section 22;

3) there have been instances when the budgets allocated to the Committees, in particular the COMEX, have not been fully spent;

4) meetings are sometimes difficult to organize because of the unavailability of Cree members, particularly in July;

5) the instances in which the Administrator did not respect the letter of the Regime were not intended to short-circuit the regime, but were simply to accelerate it, because the COMEV was taking too long to submit its recommendations;

6) given that Québec is already responsible for the costs of its own participation and one-half of the costs of the salaries of the Local Administrators and the secretariats, it would be unreasonable to expect it also to cover the full cost of Cree participation.

A former Québec member of the JBACE and the KEAC asserted (Piette, 1998) that the regime has, in general, attempted to meet the objectives set when it was conceived in 1975, although he recognized that the concept of environmental assessment had evolved to the point where new approaches to environmental planning and management needed to be considered (Piette, 1988).

Thus, the limited data available suggest that Québec is generally satisfied with the implementation of the provincial regimes established under Sections 22 and 23.

5.5.4 The Federal Government

We were unable to locate any documentation on Canada's evaluation of the implementation of the federal regimes.

6.0 CONCLUSION

The preceding sections illustrate clearly the impossibility of rendering a global and unequivocal judgment about the success of the Regimes. Judged against the principles and objectives enunciated in Sections 22 and 23, the most that can be said is that the Section 22 Review Bodies appear to have made serious efforts to attain them, but that their success has been limited. As for the Inuit Regime, the types of project that it has reviewed, being concerned mainly with community infrastructure designed to improve the quality of life for the Inuit, do not permit a meaningful judgment in this regard, although the review of the Great Whale Project might have permitted at least a preliminary judgment.

On the other hand, compared with the situation that prevailed in the Territory prior to the JBNQA, the regimes have been a significant success. Phase I of the James Bay Project was built without any real environmental assessment involving the Crees and the Inuit, whereas Phase II, the Great Whale Project, was subject to a multi-year, multi-million-dollar assessment in which the Crees and the Inuit were the major players.

Judged against the standards that normally apply to consultative committees, the screening and review bodies have performed relatively well, except that the governments have generally failed to integrate them adequately into their organizational structures and decision-making procedures. Nonetheless, it is not clear that permanent, as opposed to ad hoc, project-specific bodies are the most suitable structures for the task. The situation of the JBACE and the KEAC is, however, less satisfactory, in large part because their mandates are too vague, and also for the other reasons identified in Subsection 5.3.

When viewed against the situation prevailing in other areas where federal or provincial regimes of general application apply, the situation in the Territory compares favourably, particularly with respect to the representation of local persons and interests, the accessibility of the procedures and the Review Bodies, and the quality of the environmental assessments performed.

The opinions of the parties reveal a more complex picture. It is important to understand, of course, that there are inevitably political overtones to the judgments expressed by all of the parties. The nature of the JBNQA, in which the governments are in a sense "donors" and the Native parties "beneficiaries", means that it is usually in the interests of the former to take the view that implementation is proceeding well, while the latter can be expected usually to affirm the contrary in the hope of deriving more, greater, or different benefits.

The position of Canada is unknown, but none of the annual reports of the Minister of DIAND to Parliament (DIAND, 1992; 1991; 1990; 1989; 1988; 1985) indicates any dissatisfaction with the implementation of the Regimes. For its part, Québec recognizes some inadequacies in the Regimes and their implementation, but it appears on balance to be satisfied with both. The position of the Inuit is divided: on the one hand, the Review Bodies, presumably including their Inuit representatives, have expressed general satisfaction with the implementation of the Inuit Regime, although the KEAC has also attempted to initiate a review of Section 23; Makivik and the KRG, on the other hand, have expressed serious dissatisfactions, although they did not apparently use the 1988-1990 review of Canada's implementation of the JBNQA as a forum to elaborate on those dissatisfactions or to seek changes to the federal components of the Inuit Regime. It is relevant to note, once again, that the Inuit Regime has not really been tested by being applied to a major project proposed by non-Inuit interests. For their part, the Crees have been consistent critics of virtually every aspect of the implementation of the Cree Regime, especially by Québec, and it featured prominently in their implementation review with Quebec in the mid 1980s. Unlike the Inuit, the Crees have not progressed far with the review of the implementation of the JBNQA that they initiated with Canada in the late 1980s.

7.0 DISCUSSION

Earlier sections of this report have identified and discussed a variety of specific problems with the texts of sections 22 and 23 and with the implementation of the Regimes. In the present section, we shall identify and discuss a small number of matters that we feel to be relevant to forming a more general assessment of the implementation of the regimes.

7.1 The Objectives of Environmental Assessment

Whilst it is true that paragraphs 22.2.2, 22.2.4, 23.2.2, and 23.2.4 establish objectives for the Regimes, it seems to us that some of the dissatisfied expressed, especially with respect to the Cree Regime, reflect the fact that the Native and government parties have differing understandings and expectations as to what the Regimes are intended to achieve. Those differences probably find their origins in the respective positions of the Crees and Québec prior to and during the negotiation of the JBNQA: on the one hand, the Crees were determined to stop the La Grande Complex or, at the very least, to have its major components modified very significantly, so as to reduce their direct impacts on Cree harvesting, and to gain a large measure of control over future development in the Territory; Québec and Hydro-Québec, on the other hand, were determined to resist making any changes to the design of the Project, and to retain control over future development. The outcome, the JBNQA, was a compromise, in that some changes were made to the design of the Project and a small measure of control over future development was granted to government-aboriginal institutions, but it was in our opinion on balance a victory for Québec's and Hydro-Québec's position.

The continuation of the same struggle can be seen today: the Crees appear to view the Section 22 Regime as holding out the potential for deciding whether or not development projects should proceed, for addressing the need for or justification of projects, for studying design variants and project alternatives, and, through the JBACE, for contributing to some form of land- and resource-use planning. Proponents and Québec, on the other hand, seem to view environmental assessment under the Cree Regime as being an exercise designed primarily to identify mitigative measures and compensation for residual impacts, but not as a forum for participating in the

design of projects nor for regional land- and resource-p ann ng and -management.

It is our view that a careful reading of the text of Sections 22 and 24 favours the Cree view. The principles expressed in Subsection 22.2 are more consistent with a broad than a narrow view of the objects of environmental assessment, and there is no doubt whatsoever about the right of the Review Bodies to recommend that development projects not proceed. Finally, the JBNQA clearly contemplates a situation in which the JBACE concerns itself with such regional issues as land-use (Paragraph 22.3.28) and forestry (Paragraph 22.3.34). To some extent, however, we are obliged to acknowledge that Schedule 3 conveys the impression of environmental assessment as a technical exercise focusing on the details of individual projects, rather than as both a broad planning exercise and a detailed, possibly staged, scrutiny of individual development projects. It is clear, however, from several provisions (e.g. Section 22, Schedule 3, Paragraph I) that the Schedule was not intended to be limitative.

It might be argued that Sections 22 and 23 were negotiated at a time when environmental assessment was generally conceived of as a technical, project-specific exercise preoccupied with detailed mitigative measures, and that the objectives of the Regimes should be judged in that light. A close reading of the texts does not, in our opinion, support such an interpretation, which would also be inconsistent with the regional and societal preoccupations expressed by the Crees ever since the early 1970s. Moreover, the precocious reference to cumulative impacts supports the view that the negotiators of Sections 22 and 23 were determined to create regimes that went beyond what was current practice at the time.

We have alluded in Subsection 2.0 (11) to the ambiguity surrounding the level of detail appropriate to environmental assessments under each of the Regimes, and we believe that this has had an important influence on differing understandings of their objectives. Paradoxically, and particularly in the case of the Great Whale Project, the Crees have advocated a detailed review of the engineering specifications of the Project that seems more consistent with a project-specific, mitigative-measure-oriented approach than with a broad, planning exercise. As we have noted, we are sympathetic to the concern of proponents that they not be required to prepare

detailed design specifications until they have some reasonable assurance that their projects will be approved. On the other hand, we are also sympathetic to the view that the selection of detailed design elements can sometimes result in differing environmental impacts and should therefore be subject to EIA. The failure here is, in our view, partly that of the JBNQA and partly that of the Review Bodies. The JBNQA is inadequate in that it does not provide clearly enough for staged reviews, whereby the assessment of projects would proceed from a broad evaluation of their regional and large-scale impacts (including a full consideration of alternatives and major design variants) through progressively more detailed consideration of the impacts of individual components (and their design variants). We believe, however, that the Cree Regime clearly contemplates such an approach. The provisions of Section 22 dealing with the preparation of guidelines by the COMEV and the Administrators are certainly clear in contemplating staged reviews: Paragraph 22.5.1 requires project descriptions to be submitted by the proponent *...during the preliminary planning stage...*"; Paragraph 22.5.4 mandates the Administrator, after receiving the recommendation of the COMEV, to decide *...the extent of impact assessment which shall be required and the stages at which such assessment and review shall occur*; Paragraph 22.5.11 speaks of the "preliminary information" that a proponent must supply, describing the purpose of the project, its nature and extent, and the proponent's intention to study alternative sites or explanation of why there are no site alternatives; upon receipt of the information referred to in Paragraph 22.5.11, the COMEV *...shall recommend the extent of impact assessment and review and whether or not a preliminary and/or a final EIS should be done by the proponent*. Subsection 22.6, which deals with the preparation and review of EISs is also sufficiently clear in this respect: Paragraphs 22.6.15 and 22.6.16 distinguish between the Administrator's decisions for preliminary and final EISs. Nevertheless, Subsection 22.6 contains little guidance as to the level of detail about project construction and operation that has to be presented at each level of assessment.

Subsection 23.3, which establishes the Inuit-Québec Regime, on the other hand, does not distinguish between preliminary and final reviews. It does, however, contain Paragraph 23.3.30, which provides that:

> *The Québec Administrator, in collaboration when necessary with the EQC, shall ensure that the plans and specifications for construction of the development and the operation thereof conform to the terms and conditions, if any, established by the assessment process.*

We have alluded above to the lack of clarity of that provision, but it is difficult to avoid concluding that the intention of the negotiators of the Inuit Regime was that plans and specifications were not to be addressed in the review and assessment process. That does not mean, of course, that such was the intention of the negotiators of the Cree Regime. The situation respecting the Inuit Regime is, however, complicated further by the fact the Schedule 3 to Section 23 does distinguish between preliminary and final EISs, but Schedule 3 is not, of course, binding. The situation in the Inuit Region is further complicated by the fact that the Inuit-Canada Regime established by Subsection 23.4 does distinguish between preliminary and final EISs in much the same way as do Subsections 22.4 and 22.5.

In practice, however, the Review Bodies have not made good use of the possibility of staged reviews, and proponents, especially Hydro-Québec, seem also to have resisted them, presumably because they wish to maintain exclusive control over major planning and design issues. A staged review would have been particularly appropriate for the Great Whale Project, since there are several project variants recognized by Hydro-Québec and project alternatives identified by various intervenors, the gross impacts of which could have been compared in a preliminary fashion. Indeed, Makivik Corporation suggested to the Review Bodies in its brief on the draft guidelines (Makivik, 19 March, 1992) that a three-step approach be applied: a preliminary assessment focusing on the justification of the Project, alternatives to it, and alternative ways of carrying it out; if appropriate, a more detailed review of the alternative retained, leading to a decision in principle whether to authorize the Project, to reject it, or to submit it to further study; and, if appropriate, a more complete assessment leading to a final decision. Such an approach, or some variation on it, might well have avoided the situation that arose in which intervenors were faced with a 5000-page EIS and several hundred supporting studies.

7.2 Criteria for Approving or Rejecting Projects

A major failure of the Regimes - and one that is shared by all review and assessment processes with which we are familiar - is that they provide insufficient direction as to standards or criteria for approving or rejecting proposed developments. The result is, of course, that each Review Body, and even each member of each Review Body, establishes and applies - often subconsciously - his or her own standards. The situation is further compounded by the fact that the Review Bodies and their members rarely, if ever, explicitly describe the standards that they have established. It is our view that the duration and frequent acrimony of public hearings and of the meetings of the Review Bodies could be very substantially reduced if the guidelines issued to proponents identified, in quantitative terms wherever possible, the criteria that would determine the acceptance or rejection of a proposed development. It goes without saying that the guidelines, including the criteria, would have to be produced in consultation with the interested Native parties and non-Native intervenors.

It is true, of course, that the principles enunciated at paragraphs 22.2.2, 22.2.4, 23.2.2, and 23.2.4 and, to varying degrees, all the other provisions of the JBNQA constitute in a very general sense the criteria against which decisions about specific development projects must be taken. In practice, however, those principles need to be refined, expressed in greater detail, updated periodically, and evaluated against the likely impacts of each proposed development project. The guidelines for the assessment of the Great Whale Project also explicitly addressed the issue of assessment criteria at paragraphs 111-114. The criteria proposed were those set forth in Sections 22 and 23, plus the concept of sustainable development, respect for local rights, the irreversibility of impacts and biodiversity, amongst others.

Examples of possible criteria that come readily to mind include: the species, numbers, and distribution of animals that the Native parties need, now and in the future, to sustain their harvesting activities and associated cultural practices; the area, distribution and floristic composition of the wetlands needed to sustain migratory waterfowl populations at levels that ensure their continued health and that meet needs for sport hunting; the specific stretches of "wild" rivers that Québec society wishes to see preserved; and the numbers, types, and locations

of wage employment required or es re by t e Nat ve part es.

As Penn pointed out in his review for the Royal Commission (Penn, 1993), the Government of Québec had by the early 1970s defined at least the broad outlines of the uses that it foresaw for the Territory. Section 8 of the JBNQA, for example, contained relatively detailed descriptions of future hydroelectric developments, and long-term plans for forestry and outfitting were to some degree known. Some of the difficulties experienced in the implementation of the Cree Regime undoubtedly reflect the fact that Hydro-Québec and the Government of Québec have predetermined, for example, that virtually no social or biophysical impact would be great enough to lead to the cancellation of a major hydroelectric project. Similarly, Subsection 5.2.5c) contains the remarkable assertion that *forest operations are compatible with hunting, fishing and trapping activities*, and forestry operations are not, therefore, subject to environmental assessment, even though it is universally recognized that they inevitably have major adverse impacts on aboriginal groups and individuals! The situation is, therefore, that Québec and its crown corporations have tacitly established assessment criteria, which they have consistently, and with no little success, sought to apply since the first implementation of the Regimes. The Native parties, especially the Crees, on the other hand, have reacted to proposed developments on a piecemeal and occasionally inconsistent basis, which may explain some of their stated frustration with the implementation of the Regimes. It might be thought that land-use plans, the preparation of which is required by the *Act respecting the Land in the Public Domain*, could play a useful role in that regard. A draft land-use plan for the Cree Region was submitted to the GCCQ/CRA and the JBACE by Québec in 1990, but both of them rejected it as being unacceptable. The JBACE based its rejection principally on the facts that the draft plan did not adequately take account of Cree activities, interests and aspirations, and that it appeared to have been drafted as if the JBNQA did not exist. In fact, the plan consisted largely of a cartographic representation of the Government of Québec's development orientations, and it even went so far as to depict a particular variant of the NBR, even though it had not been subject to environmental assessment, had not received any form of approval, and was no longer even in Hydro-Québec's development plan. The KRG has received a contract from the Government of Québec to prepare a first draft of a land-use plan for the Inuit Region, which holds out hope for

a document that is more reflective of Native rights and prior ties.

Given the above, we believe that significant improvement in the quality of the implementation of the Regimes will not be achieved until the Crees and the Inuit publish long-term statements, where possible quantitative, of their social, cultural, and economic needs and requirements, against which the impacts of proposed developments can be measured. Even were that to be done, however, it would only clarify that different elements of Québec society have differing, and often conflicting, plans for the Territory and its resources, but it would not provide a complete basis for resolving those conflicts. The JBNQA, by specifying the rights, privileges and obligations of its signatories, will continue to constitute an important tool for resolving such conflicts, but it does not offer guidance on a large number of issues. It is necessary, therefore, for the Review Bodies to face up more openly and explicitly to the fact that environmental assessment is largely concerned with reaching and applying value-based decisions.

We have suggested above that considerable time is wasted in environmental assessments because intervenors start from radically differing premises concerning the best future use of territory and resources. We suggest now that even more time is wasted because intervenors are applying differing values to the issues under study without explicitly recognizing that that is what they are doing. We believe, therefore, that the interests of all parties would be well served by a common effort to identify mutually acceptable ethical principles to assist in environmental decision-making. Important progress in that area was made by the MRJBC in the environmental assessment of Ontario Hydro's *Demand/Supply Plan* (McDonald, Stevenson & Cragg, 1992). On the basis of consultations with Elders, a review of the relevant literature on aboriginal value systems, consideration of the literature on axiology (the study of that which is worth valuing), justice, and applied ethics, and a thorough reading of the documents tabled by Ontario Hydro, McDonald and his colleagues identified five principles that they considered to be cross-culturally valid and acceptable, as well as relevant to decision-making about proposed energy-related developments. The principles in question were those of welfare, equal consideration, equitable participation, distributive justice, and stewardship. Unfortunately, Ontario Hydro withdrew from the environmental assessment before the MRJBC had an opportunity to present its case, and the

acceptability and value of the principles therefore remains untested. The preceding principles might not be entirely relevant to the Territory and the Crees and the Inuit, but we believe that they constitute a starting point.

7.3 The Contents of Environmental Impact Statements

There has been increasing recognition in recent years of the need to keep EISs to a manageable length by requiring them to focus on substantive issues and to eschew an encyclopaedic approach; indeed, the CEQ (1978) has established strict limits on the length of EISs. Unfortunately, Sections 22 and 23 encourage, if they do not require, an encyclopaedic approach to EIA. Despite reasonable expectations to the contrary, that tendency reached a peak in the assessment of the Great Whale Project, the guidelines for which are 102 pages long, and the EIS, including the supporting studies, probably in excess of 40 000 pages!

It is not entirely fair to blame the JBNQA for the preceding situation, since the Review Bodies are given considerable latitude to determine the content of an EIS, and Subsection I to each of the Schedules 3 stipulates that:

> *The inclusion of specific items in the preparation of an EIS will depend upon the nature and extent of the proposed development. Items potentially affected should be included in the report.*

The reasons why EIA in the Territory continues to reflect an encyclopaedic approach are difficult to ascertain, but the following factors probably contribute to varying degrees: the lack of expertise within or available to the Review Bodies and intervenors, causing them to lack the confidence necessary to exclude irrelevant matters from guidelines or EISs; the desire of proponents to impress reviewers, governments and the public by the apparent scope and volume of their research; the lack of expertise in EIA among many proponents; the role of consultants in encouraging proponents to undertake work that may not be essential; the apparent vulnerability of the Review Bodies to pressure from intervenors, which sometimes seems to lead them to take the approach of giving something to everyone in the preparation of guidelines; and

perhaps even the desire of proponents to deflect scrutiny away from sensitive issues by deluging readers with a mass of relevant and irrelevant data.

7.4 Consequences of Poor Drafting

It is undeniable that Sections 22 and 23 of the JBNQA are poorly drafted. Given the haste with which they were negotiated, ambiguities, errors, and inconsistencies between the French and English versions were probably inevitable. They may not have seemed too important to the negotiators, since many of them seem to have believed that the JBNQA would be a dynamic document, and that there would be periodic opportunities for revision, correction, and improvement. Although the JBNQA has been amended twelve times over the past 18 years, only one of those amendments has affected the Regimes, and its purpose was merely to integrate the Naskapis into the Inuit Regime when the NEQA was signed, in 1978.

Most of the drafting inadequacies are without serious consequences, but some of them have important implications. Perhaps the most important one to date has centred on the question of whether a development project can fall simultaneously under the jurisdiction of Canada and Québec with respect to its environmental impacts. The text of Section 22 certainly suggests the possibility of joint jurisdiction: Paragraph 22.3.4 refers to matters of *mixed jurisdiction* being voted on by the JBACE; Paragraph 22.5.7 refers to *...development projects of joint or mixed federal and provincial jurisdiction*; Subsection 22.6 does not need to use such terms as joint and mixed jurisdiction, since it creates the COMEX and COFEX-South to deal respectively with projects under provincial and federal jurisdiction, but it does provide at Paragraph 22.6.7 for the combining of the two review committees, which is consistent with the concept of projects of mixed jurisdiction.

It seems to us essential that the concept of jurisdiction (which may have been an unfortunate choice of word by the negotiators) be interpreted in the context of chapters dealing with environmental assessment. Since jurisdiction in the strict legal sense of the term over categories of development is established by the Constitution, it would be unreasonable to assume that the negotiators of the JBNQA were referring to jurisdiction in that sense. Unless their words are

meaningless, the only logical interpretation of them is that they refer to something relating to the environmental effects of proposed development projects. More specifically, it would appear that they are recognizing that the environmental impacts of a project in an area of one government's constitutional competence remain subject to the other government's assessment and review procedures if they affect an area under that government's constitutional jurisdiction. For example, the impacts of a hydroelectric project (provincial constitutional jurisdiction) on migratory birds, navigable waters and Indians (all of federal constitutional jurisdiction) would have to be reviewed under EARP or the applicable Native-Federal Regime as well as under the Native-Québec Regime. The Crees and the JBACE both adopted that interpretation, and it was accepted by Justice Rouleau of the Federal Court Trial Division in 1991, when he ruled that the Eastmain-1 Project was subject to review under the EARP (*The Cree Regional Authority and Bill Namagoose v Raymond Robinson*, 1991). In the following year, however, the Federal Court of Appeal overturned the Rouleau Judgment. The Court of Appeal's judgment was based more on two principles than on a detailed textual analysis (*A.G. of Québec v. Eastmain Band et al*, 1992).[1] First, the justices argued that virtually all developments have impacts on matters of both federal and provincial jurisdiction, and that Section 22 would not have established separate federal and provincial review and assessment processes, if in fact all developments would be reviewed under both. Secondly, they argued that it was the clear intention of the parties to the JBNQA to avoid overlap and that they established the general rule that a project would normally be subject only to a single review and assessment process. They cited as examples of joint or mixed federal and provincial jurisdiction a project involving a federal airport accessed by a provincial road, or projects that extend beyond the boundaries of the Territory.

The purpose of the preceding is not to resolve the debate, but merely to indicate the seriousness of the consequences that have flowed from this one ambiguity in the drafting of Section 22. It has to be pointed out, however, that the view that virtually all developments have impacts on matters of federal and provincial jurisdiction is at best naive.

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[1] Not being a legal text, the present discussion does not distinguish between the judgment itself and the reflections and observations supporting it, although the latter are *obiter dicta*.

7.5 Lack of Base ine Data

Success in implementing the Regimes has been seriously hampered by an inexcusable lack of baseline data. The Government of Québec has known since the 1960s and early 1970s in some detail its own long-term objectives for hydroelectric development, forestry, and mining in the Territory. It has known since 1975 that hydroelectric and mining developments would have to be subject to environmental assessment, while forestry management plans would have to be submitted to scrutiny by the JBACE, KEAC, and others. Moreover, Québec experienced between 1971 and 1973 the litigation, adverse publicity, and other negative effects of attempting to proceed with a major hydroelectric project in the absence of sound environmental studies. Despite that, Québec has put in place no mechanism for the continuing collection of the baseline data needed to carry out sound and useful environmental assessments of its proposed development projects. Canada, too, has been aware of Québec's plans and of their likely impacts in areas of federal jurisdiction. Its performance temporarily slightly better than that of Québec, in that Environment Canada operated the James Bay and Northern Québec Office for several years, and it still has a Direction des évaluations environnementales et du Nord québécois within its Regional Office in Québec. Unfortunately, however, neither of those two organizations has ever had sufficient funding to carry out comprehensive and long-term baseline studies.

Hydro-Québec has been exceptionally negligent in this regard, since, as the proponent of the major hydroelectric projects, it has the principal responsibility for ensuring that the baseline data needed for sound environmental assessments are collected in a timely and systematic manner. When Hydro-Québec first submitted the Great Whale Project for assessment, at the beginning of the 1980s, its draft EIS was subject to numerous constructive comments by the Native parties and the Review Bodies, among others. Hydro-Québec's decision, in 1982, to postpone the Project provided it with an excellent opportunity to initiate programmes to fill in the gaps and shortcomings that had been identified in its data and to collect the types of long-term data that are generally acknowledged to be essential to describe and understand northern ecosystems. When Hydro-Québec reactivated the Great Whale Project, in 1988, it became apparent that it had made virtually no effort during the intervening years to improve or expand its data-base.

The situation in Québec is, we believe, worse than that in some other jurisdictions, and Québec's universities, among others, have not played the role that they might have done in the 1980s, although some of them were, as noted in Appendix 4, very active during the 1970s. The systematic collection of baseline data relevant to understanding the impacts of development actually has a long tradition in Canada, going back at least to the Arctic Land Use Research and the Area Economic Surveys carried out by the Federal Government in the 1960s. In 1982, researchers at McMaster University founded the Research Programme for Technology Assessment in Subarctic Ontario. Its purpose was precisely to avoid the type of situation that had arisen in Québec in the early 1970s, when aboriginal groups were faced with reacting to large-scale energy developments in the absence of baseline data and unbiased technical advice. To date, TASO has published 37 major reports, on topics as diverse as the environmental impacts of hydroelectric development (Muller & George,1982), hydrology (Woo & Waylen, 1983; Heron *et al*, 1988) the theory and practice of social impact assessment (Brizinski, 1983), and wildlife harvests (Berkes *et al*, 1992). In 1991, the federal, Alberta and Northwest Territories governments initiated the 12.3$ million, 3½-year Peace-Athabaska-Slave River Basin Study to gather comprehensive information for assessing the cumulative impacts of development, principally pulp and paper mills. Finally, the Government of Ontario has recently initiated the Moose River Basin Environmental Information Partnership (OMNR, 1994), the purpose of which is to collect and analyze the data that will be needed to evaluate the impacts of any future development in the Moose River Basin, with particular reference to its cumulative impacts.

7.6 Absence of Independent Data

To the extent that data are available for the environmental assessment of developments in the Territory, they tend to be treated sceptically by many intervenors, because they have usually been collected by proponents. Indeed, given Québec's difficult financial circumstances in recent years, it has abdicated much of its responsibility for northern research to Hydro-Québec and, to a lesser extent, to DND. The preceding is not a reproach against Hydro-Québec or other developers, for the JBNQA clearly requires them to collect the data and perform the analyses that are needed for their EISs. Those provisions were, however, negotiated in the expectation that Québec and Canada would continue to carry out or to fund research that was, if not

independent, at least not controlled and directed by those with vested interests in promoting development. Delegating responsibility for research to proponents also creates serious problems of access to raw data by unaffiliated scientists and by intervenors.

7.7 Lack of Intervenor Funding

When the Regimes were negotiated, there was no tradition in Canada of granting intervenor funding, so it is not surprising that they do not provide for it, although it is not prohibited by anything in Sections 22 or 23. Experience during the 1970s revealed that providing for public participation in environmental assessments was of little more than symbolic value unless the intervenors were provided with the financial resources at least to analyze thoroughly EISs, and preferably to undertake some research to support their own viewpoints. The provision of intervenor became a standard practice for the Federal Government by the early 1980s, and the Government of Ontario even adopted an *Intervenor Funding Act* in 1988. The *Act* was adopted for a three-year experimental period, after which it was renewed on the basis of a generally positive evaluation. Pursuant to the *Act,* some 29$ million were awarded to intervenors in the assessment of Ontario Hydro's *Demand/Supply Plan*. Individual intervenors in the *Demand/Supply Plan* Hearing received as much as 4$ million. Despite those precedents and practices, intervenor funding had never been provided for an assessment pursuant to either of the Regimes prior to 1992, when some 3$ million was awarded to the Crees and the Inuit, and approximately 1$ million to other intervenors for their participation in the EIA of the Great Whale Project. It is impossible at this stage to predict whether intervenor funding will become a practice in future assessments under the Regimes.

7.8 Failure to Define Procedures

Section 3.0 revealed that Sections 22 and 23 of the JBNQA do not specify the assessment and review procedures in detail. We believe that that is as it should be, since a land-claims agreement cannot be changed frequently or easily, and the negotiators of the JBNQA cannot but have known that assessment and review procedures, which were in their infancy in Canada at the time, were likely to evolve rapidly in the years to come.

It seems clear to us that the negotiators intended the Review Bodies to have the power to spec y from time to time the details of the assessment and review procedures to be followed: Paragraph 22.3.27 mandates the JBACE to *...examine and make recommendations respecting the environmental and social impact assessment and review mechanisms and procedures for the Territory*; Paragraph 22.3.28 mandates the same body to *...advise responsible concerned governments on the implementation of the environmental and social protection...regimes...*; Paragraph 23.5.25 authorizes the KEAC to *...with adequate justification, recommend to responsible governments legislation, regulations and other appropriate measures related to the Environmental and Social Protection Regime for enactment or action by the appropriate authority*; Paragraph 23.5.27 authorizes the KEAC to *...examine and make recommendations respecting the Environmental and Social impact assessment and review mechanisms and procedures for the region*; for its part, the KEQC *...may establish and adopt rules regulating its internal operations and governing its involvement in the assessment process...and such rules shall be subject to the approval of the parties naming the members of the Commission* (Paragraph 23.3.11).

We have identified in an unpublished study at least 70 substantive procedural questions that are not addressed in Sections 22 and 23. They include the following: the confidentiality of the deliberations of the Review Bodies; the criteria to be applied in conformity analysis; the right of a proponent to contest a decision of non-conformity of an EIS; the duration of the recommendations or decisions of the Review Bodies and of the associated authorizations by Administrators or governments; time-limits for correcting deficiencies identified during conformity analysis; the form of oaths or solemn declarations; the qualifications of witnesses; the right to be represented by legal counsel in public meetings; the obligation of proponents and intervenors to answer questions; the preparation and distribution of transcripts; the power to compel witnesses to appear; and the right of members of the Review Bodies to dissent from majority recommendations or decisions.

We can find no evidence that any of the Review Bodies has made a systematic effort to define

more fully the processes and procedures to be applied in the Territory. Defining procedures s essential in itself, since there is a growing tendency, especially in Ontario, to challenge decisions on procedural grounds. In the case of proposed landfills at Meaford and St Vincent and North Simcoe, such challenges have succeeded. Given the current political context, we believe that there is a very real possibility that one or more intervenors would have challenged the decision of the Review Bodies on the Great Whale Project. We note that the Review Bodies for the Great Whale Project did not respond favourably to Makivik's (19 March, 1992) recommendation *...that the form and procedures of the assessment be clarified by the Committees after appropriate consultation.* Establishing procedures would also be an efficient way of avoiding the difficulty, to which we referred in Subsection 4.12, of applying the Regimes to proposed developments of vastly varying scope and complexity, since different procedures could presumably be developed for different types or scales of projects.

7.9 Lack of Commitment to Process

It is difficult to avoid the impression that governments and some proponents are not fully committed to ensuring the full and timely application of the Regimes; indeed, it is tempting at times to view certain of their actions as indicating bad faith. For example, after Hydro-Québec reintroduced the Great Whale Project, the provincial government informed the COMEV that the transmission and access infrastructure for the Great Whale Project should be assessed separately from the generating infrastructure even though both had previously been considered to be related parts of a single project. None of the Review Bodies agreed with the decision to review the components of the Project separately: the COMEV was unable to come to consensus concerning the issuing of guidelines and the Crees withdrew from the process and instituted legal proceedings against Québec over the separation (JBACE, 1991); the JBACE recommended unanimously that the Minister review his position and consider a global assessment of the Project (JBACE, 1991); the KEAC also advised the Minister of the Environment that *a project of the scope of Great Whale should be the subject of a comprehensive study...completed in one single phase* (KEAC, 1991); and the KEQC also became involved in litigation relating to the assessment of the Great Whale Project (KEQC, 1991), but, nonetheless, the Inuit continued participating in the process. Although a global assessment was finally initiated in 1992, the

efforts of Hydro-Québec and the Government of Québec to assess the access infrastructure for the Great Whale Project separately from the generating infrastructure are difficult to characterise in terms other than bad faith or lack of commitment.

7.10 Scope of the Regimes

The scope of the regimes is defined by the definitions of "Development" and "Development Project" in Sections 22 and 23, where they are described as meaning

> *a project consisting of any work, undertaking, structure, operation, industrial process which might affect the environment or people of the Territory, exclusive of the operation and maintenance of such project after construction..*

The principal problem with that definition is that it precludes the evaluation of plans and policies. The preliminary stages of the review of the Great Whale Project revealed that many of the principal issues that the intervenors wished to address derived more from the Government of Québec's Energy Policy than from the Project itself. If the Review Bodies cannot address matters of policy, it is difficult to see how they can adequately or satisfactorily discharge their duty to review developments such as the Great Whale Project. Indeed, it seems likely that a separate evaluation of Québec's energy policy would be a virtual prerequisite for the review of the Great Whale Project. As we have noted above, the Federal Government has been undertaking concept reviews since the early 1980s, while the Government of Ontario subjected Ontario Hydro's *Demand/Supply Plan* to environmental assessment in 1989, and the CEAA specifically provides for the assessment of some federal policies.

7.11 Overview

On balance, we feel that the fairest judgment is that the Regimes have worked similarly to and about as well as most other regimes in Canada. We are, however, of the view that the Regimes were intended to work differently from those elsewhere in Canada. In particular, they were intended to reinforce the special situation of the Crees and the Inuit and to protect and preserve the totality of their rights under the JBNQA. From that perspective, we consider that the

implementation of the Regimes has been only a qualified success, despite the very real efforts of the Review Bodies.

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APPENDICES

APPENDIX 1: COMPARISON OF THE GUIDING PRINCIPLES OF CREE AND INUIT REGIMES

CREE REGIME		INUIT REGIME	
22.2.4	The responsible governments and the agencies created in virtue of this section shall within the limits of their respective jurisdictions or functions as the case may be give due consideration to the following guiding principles:	23.2.4	The concerned responsible governments and the agencies created in virtue of this Section shall within the limits of their respective jurisdictions or functions, as the case may be, give due consideration to the following guiding principles:
a)	The protection of the hunting, fishing and trapping rights of Native people in the Territory, and their other rights in Category I lands, with respect to developmental activity affecting the Territory;	c)	The protection of the hunting, fishing and trapping rights of Native people in the Region and their other rights therein with respect to developmental activity affecting the Region;
b)	The environmental and social protection regime with respect to minimizing the impacts on Native people by developmental activity affecting the Territory;	b)	The environmental and social protection regime with respect to minimizing the impacts on the Native people by developmental activity affecting the Region;
c)	The protection of Native people, societies, communities, economies, with respect to developmental activity affecting the Territory;	a)	The protection of Native people, societies, communities and economies, with respect to developmental activity affecting the Region;
d)	The protection of wildlife resources, physical and biotic environment, and ecological systems in the Territory with respect to developmental activity affecting the Territory;	d)	The protection of wildlife resources, physical and biotic environment, and ecological systems in the Region with respect to developmental activity affecting the Region;
e)	The rights and guarantees of the Native people within Category II established by and in accordance with section 24 until such land is developed;		
f)	The involvement of the Cree people in the application of this regime;	e)	The involvement of the Native people and other inhabitants of the Region in the application of this regime;
g)	The rights and interests of non-Native people, whatever they may be;	f)	The rights and interests of non-Native people, whatever they may be;
h)	The right to develop by persons acting lawfully in the Territory;	g)	The right to develop, in accordance with the provisions of the Agreement, by persons acting lawfully in the Region;
i)	The minimizing of negative environmental and social impacts of development on Native people and on Native communities by reasonable means with special reference to those measures proposed or recommended by the impact assessment and review procedure.	h)	The minimizing of negative environmental and social impacts of development on Native people and non-Native people and on Native and non-Native communities by reasonable means with special reference to those measures proposed, recommended or determined by the impact assessment and review procedures.

APPENDIX 2: COMPARISON OF CREE AND INUIT DEVELOPMENTS AUTOMATICALLY SUBJECT TO ASSESSMENT

CREE REGIME	INUIT REGIME
1. All New Major Mining Operations Excluding Explorations.	1. All mining developments. However, air and ground reconnaissance, survey, mapping and core sampling by drilling shall be permitted without the preparation of impact statements. Any significant additions, alterations or modifications to existing mining developments.
2. Siting and Operation of Major Sand and Gravel Pits and of Quarries.	2. Siting and operation of major sand and gravel pits and quarries.
3. Energy Production: a) Hydro-electric power plants and their associated works. b) Storage and water supply reservoirs. c) Transmission lines of 75 kilovolts and above. d) Extraction and processing of energy yielding materials. e) Fossil-fuel fired power generating plants above three thousand (3,000) kilowatts.	3. Energy Production: a) Hydro-electric power plants and nuclear installations and their associated works; b) Storage and water supply reservoirs; c) Transmission lines of 75 KV and over; d) Extraction and processing of energy yielding materials; e) Fossil-fuel fired power generating plants above three thousand (3,000) Kilowatts.
4. Forestry and Agriculture: a) Major access roads built for extraction of forest products. b) Pulp and paper mills or other forestry plants. c) In general, any significant change in land use substantially affecting more than 25 square miles.	4. Forestry: a) Major access roads built for extraction of forest products; b) Wood, pulp and paper mills or other forestry plants; c) In general, any significant change in land use substantially affecting more than 25 square miles.
5. Community and Municipal Services: a) new major sewage and waste water collection and disposal systems. b) solid waste collection and disposal, including land fill and incineration. c) proposals for parks, wilderness areas, ecological reserves or other similar land classifications. d) new outfitting facilities for more than thirty (30) persons, including networks of outpost camps. e) new communities or significant expansion of existing communities.	5. Community and Municipal Services: a) new significant sewage and waste water collection and disposal systems; b) solid waste collection and disposal, including land fill and incineration; c) proposals for parks, wilderness areas, ecological reserves or other similar land classifications; d) new outfitting facilities for more than thirty (30) persons, including networks of outpost camps; e) new towns, communities or municipalities or significant expansion thereof.

CREE REGIME	INUIT REGIME
6. Transportation: a) access roads to and near Native communities. b) port and harbour facilities. c) airports. d) railroads. e) road infrastructure for new development. f) pipelines. g) dredging operations for navigation improvements.	6. Transportation: a) access roads to and near communities; b) port and harbour facilities; c) airports; d) railroads; e) road infrastructure for new development; f) pipelines; g) dredging operations for navigation improvements.

APPENDIX 3: PRINCIPAL FEATURES OF REVIEW BODIES

KEY: N/S -Not specified in JBNQA
( ) -Information in parentheses describes practices that are not, however, specified in the JBNQA.
U -Unknown

	JBACE	COMEV	COMEX	COFEX-SOUTH	KEQC	FSC	COFEX-NORTH	KEAC
Membership	CRA - 4 Québec - 4 Canada - 4 HFTCC - 1	CRA - 2 Québec - 2 Canada - 2	CRA - 2 Québec - 3	CRA - 2 Canada - 3	KRG - 4 Québec - 4 Québec/KRG - 1	KRG - 2 Canada - 2	KRG - 2 Canada - 3	KRG - 3 Canada - 3 Québec - 3
Qualifications for Membership	N/S	N/S	N/S	N/S	At least 2 KRG members must be Inuit residents or authorized reps	N/S	KRG reps must be Inuit or authorized reps	N/S
Change to Number of Members	Unanimous consent of parties	N/S	N/S	Federal Administrator	N/S	N/S	Federal Administrator	Unanimous consent of parties
Capacity of Members to Sit on Other S22 or S23 Bodies	N/S (Yes)	N/S (Yes)	N/S (Yes)	N/S	COFEX-North	N/S	N/S	N/S
Chair	Rotates annually	Rotates annually	Québec	Canada	Québec/KRG	Rotates annually	Canada	Rotates annually
Vice-Chair	Rotates annually	Rotates annually	None	None	None	None	None	Rotates annually
Power to Appoint Other Officers	Yes	N/S	N/S	N/S	N/S	N/S	N/S	Yes
Term of Office								
Chair	1 year	1 year	Québec decides	Canada decides	Appointing parties	1 year	N/S	1 year
Vice-Chair	1 year	1 year	N/S	N/S	N/S	N/S	N/S	1 year
Members	Parties decide	N/S (Parties decide)	Parties decide	Parties decide	Appointing parties	N/S (Parties decide)	N/S (Parties decide)	Appointing parties

	JBACE	COMEV	COMEX	COFEX-SOUTH	KEQC	FSC	COFEX-NORTH	KEAC
Quorum	Minimum 1 person per party always; 5 for matters of federal or provincial jurisdiction; 7 for matters of federal and provincial jurisdiction.	N/S	N/S	N/S	5 - Minimum of two members per party	N/S	N/S	Minimum 1 person per concerned party; 4 for issues of federal or Québec jurisdiction; 6 for issues of federal and Québec jurisdiction.
Quorum Amendment	Unanimous consent of members	N/S	N/S	N/S	N/S	N/S	N/S	Unanimous consent of members
Remuneration	Appointing party	Appointing party	Appointing party	Appointing party	Appointing party	Appointing party	Appointing party	Appointing party
Expenses	Appointing party	N/S (Appointing party)	Québec	Canada	Appointing party	N/S (Appointing party)	Canada	Appointing party
Voting Right	By jurisdiction	By jurisdiction	N/S (1/member)	N/S (1/member)	All members but not Chair	All members	N/S (All members)	By jurisdiction
Number of Votes	1/member. Crees have 2 when both governments vote	1/member. Crees have 2 when both governments vote	N/S	N/S	N/S (1/member)	1/member	N/S (1/member)	1/member. Inuit have 2 when both governments vote.
Casting vote	Chair	Chair or vice-Chair	N/S	N/S	Chair	Chair	N/S	Chair
Decisions	Majority vote	N/S (majority vote)	N/S (majority vote)	N/S (majority vote)	Majority vote	N/S	N/S	Majority vote
Proxies	Obligatory; written	N/S (no)	N/S	N/S	N/S	N/S	N/S	Obligatory; written

	JBACE	COMEV	COMEX	COFEX-SOUTH	KEQC	FSC	COFEX-NORTH	KEAC
Mandate	Oversee regime implementation. Advise on, review or propose laws, regulations, other measures. Recommend assessment mechanisms/ procedures. Provide technical data/advice to communities. Review forestry management plans.	Screen "grey zone" projects and recommend scope of assessments for all projects reviewed.	Advise on alternatives, additional studies, and acceptance of projects.	Advise on alternatives, additional studies, and acceptance of projects.	Recommend contents of EIS. Decide if projects should proceed. Screen "grey zone" projects.	Screen "grey zone" projects. Recommend scope of EIS.	Recommend whether developments should be authorized or studied further.	Oversee regime implementation. Advise on, review or propose laws, regulations, other measures. Recommend assessment mechanisms/ procedures. Provide technical aid to villages. Review forestry management plans.
Powers	Advise	Recommend	Recommend	Recommend	Decide/ Recommend	Recommend	Recommend	Advise
Head Office	Prov. Québec (Mistissini)	N/S	N/S	N/S	Prov. Québec (Kuujjuaq)	N/S	N/S	Prov. Québec (Kuujjuaq)
Other Offices	Prov. Québec (Ste-Foy)	N/S	N/S	N/S	Prov. Québec (None)	N/S	N/S	Prov. Québec (None)
By-law Power	Yes. All members may vote. By-laws subject to approval of parties.	N/S	N/S	N/S	Yes. Subject to approval of parties.	N/S	N/S	Yes. All members may vote. By-laws subject to approval of parties.
Delays	N/S for most issues. 90 days for forestry management plans.	<30 days	45 days	45 days	45 days for "grey zone" projects. 90 days for other projects.	N/S	N/S	N/S for most issues. 90 days for forestry management plans.
Extension of Delay	N/S	Administrator	Administrator	Administrator	Administrator	N/S	N/S	N/S

	JBACE	COMEV	COMEX	COFEX-SOUTH	KEQC	FSC	COFEX-NORTH	KEAC
Meeting Frequency	Minimum 4 annually (As needed)	N/S (As needed)	N/S (As needed)	N/S (As needed)	N/S (As needed)	N/S	N/S (As needed)	Minimum 4 annually (As needed)
Special Meetings	Chair calls within 20 days of written request from 4 members.	N/S	N/S	N/S	N/S	N/S	N/S	Chair calls within 20 days of request from 3 members.
Meeting Place	N/S	N/S (Montreal, Val d'Or)	N/S	N/S	N/S	N/S	N/S	N/S (Montréal, Hull, Québec, Kuujjuaq)
Access to Meetings	N/S (Interested parties)	N/S	N/S	N/S	N/S	N/S	N/S	N/S
Operations Language	N/S (English & French)	N/S (English & French)	N/S (English & French)	N/S (English & French)	N/S (English, French & Inuktitut)	N/S	N/S (English & French)	N/S (English & French)
Minutes	Yes	N/S (Yes)	N/S (Yes)	N/S (No)	Yes	N/S	N/S (Yes)	Yes
Minutes Public	N/S (Yes)	N/S (Yes)	N/S (Yes)	N/S (Yes)	Yes	N/S	N/S	N/S
Annual Report	N/S (Yes)	N/S (Yes)	N/S (Not since 1988)	N/S (No)	N/S (Yes)	N/S (No)	N/S (No)	N/S (Yes)
Links to other JBNQA Bodies	HFTCC	N/S (No)	N/S (No)	N/S (No)	N/S (No)	N/S (No)	N/S (No)	N/S (No)
Autonomous	Yes	Under "administrative supervision" of JBACE.	Yes	Yes	Yes	Under "administrative supervision" of COFEX-North.	Yes	Yes
Access to Information	N/S	N/S	N/S	N/S	"Ordinarily available from government departments"	N/S	N/S	N/S

	JBACE	COMEV	COMEX	COFEX-SOUTH	KEQC	FSC	COFEX-NORTH	KEAC
Secretariat	Yes	No[3]	Yes	Yes	Yes	N/S	Yes	Yes
Maximum Size	5	N/S	"Adequate"	"Adequate"	N/S	N/S	"Adequate"	5
Actual Size	1[1]	1	1	0.5[4]	0.5	U	0.5[6]	0.5
Location	Prov. Québec (Ste-Foy)	N/S	N/S (Ste-Foy)	N/S (Montréal)	N/S (Kuujjuaq)	N/S	N/S (Montréal)	N/S (Kuujjuaq)
Funding Source	Québec (50%) Canada (50%)	N/S	Québec	Canada	Québec	N/S	Canada	Québec (50%) Canada (50%)
Funding Amount	N/S (127 000$)[2]	N/S	N/S (U)	N/S (U)	N/S (57 750$)[5]	N/S	N/S	N/S (68 250$)[7]
Outside Experts	Paid from budget if requested by JBACE	N/S	N/S	N/S	Subject to budget approval	N/S	N/S	Paid from budget if requested by KEAC.
Fusion with another Body Provided for	N/S	N/S	With COFEX-South	With COMEX	N/S	N/S	N/S	N/S

Notes

1. Three individuals constitute the secretariats of the JBACE, the COMEV, and the COMEX. The actual time they devote to the business of each committee varies from time to time.

2. Includes expenses of the Evaluating Committee.

3. Secretariat provided by JBACE.

4. Not permanent. For Great Whale Project review only.

5. KEQC revenue for 1990-91.

6. Not permanent. For Great Whale Project review only.

7. Fiscal year 1991-92.

APPENDIX 4: KEY DEVELOPMENTS IN THE NEGOTIATION OF THE JBNQA

DATE	EVENT
1967	Creation of IQA
1970	IQA negotiates temporary agreement with Québec concerning subsistence harvesting. Territorial claims set aside for later consideration.
February, 1971	Dorion Commission Report recommends extinguishment of Indian rights.
30 April, 1971	Québec announces James Bay Project.
May, 1971	Crees alert DIAND to issues of Indian land rights posed by the Project.
June, 1971	DIAND transmits Cree concerns to Québec. Work of Canada/Québec/IQA Tripartite Committee is accelerated.
29 June, 1971	Cree chiefs meet in Mistissini to consider implications of Québec's announcement.
1 July, 1971	Cree chiefs declare opposition to Project and request DIAND intervention to halt it. IQA mandated to represent Cree interests.
14 July, 1971	Bill 50 creates the JBDC.
August, 1971	Public outcry leads to creation of Federal-Provincial Task Force on James Bay Ecology.
October, 1971	DIAND funds IQA to provide information to Cree communities.
December, 1971	SEBJ is incorporated. Task Force indicates undesirability of NBR and limited knowledge of effects of La Grande Complex.
10 January, 1972	First meeting between Crees and JBDC.
January, 1972	Québec refuses to discuss a claim for compensation proposed by the IQA.
January, 1972	Federal funding received. JBDC announces that the La Grande Complex may replace the NBR Project. Crees initiate communication project. Agents hired.
February, 1972	Québec/Canada Committee on the Ecological Effects of the Project identifies important impacts on the Crees.
March, 1972	Information campaign in Cree communities.
18-20 April, 1972	Cree chiefs and Directors of IQA meet in Fort George. NQIA associates itself with the Crees to oppose the Project. IQA mandated to initiate legal proceedings to stop the Project. First Cree/IQA reference to possibility of a negotiated settlement.
3 May, 1972	IQA forms a Task Force, principally with McGill researchers.
5 May, 1972	Litigation against Québec, Hydro-Québec, JBDC, and contractors initiated. DIAND meets Québec to discuss Project impacts on Crees.
8 May, 1972	DIAND funds IQA for research and litigation.
16 May, 1972	Québec announces switch from NBR to La Grande Complex as first major hydroelectric project.

DATE	EVENT
mid June, 1972	Canada and Québec meet. Agreement to initiate four-party (IQA, NQIA, Québec, Canada) negotiations to determine if the Project can be modified so as to make it acceptable to the Crees and Inuit.
Summer, 1972	Crees hire specialists to study the effects of the Project. Information and negotiation meetings with Canada, Québec, and JBDC. Canada grants IQA 250 000$ for research on behalf of the Crees.
October, 1972	Research results presented to Cree and Inuit communities and to Québec. Crees request that Project be stopped to permit negotiations. JBDC reasserts its refusal to modify the Project. Crees and Inuit reconfirm intention to litigate.
23 October, 1972	Cree chiefs, Inuit representatives, and executives of IQA and NQIA meet in Montréal. Québec announces policy of "no modifications" to the Project.
25 October, 1972	Crees, Inuit, IQA meet Premier Bourassa, Gilles Masse (Minister of Natural Resources), Lionel Chevrier (Québec negotiator). Meeting gives no results.
late October, 1972	Meetings in Cree and Inuit communities. Communities execute power of attorney for purposes of litigation. Mtre James O'Reilly and Mtre Jacques Beaudoin mandated to take necessary proceedings.
7 November, 1972	Request for temporary injunction to suspend work on Project filed in the Superior Court in Montréal.
5 December, 1972	Preliminary injunction hearing commences. Court decides to focus on whether Indians have rights before hearing detailed arguments on the injunction request.
8 December, 1972	Justice Malouf concludes that Crees/Inuit have shown sufficient proof of apparent rights to justify a hearing on the injunction application.
11 December, 1992	Injunction hearing begins: 167 witnesses called, including 46 Crees and Inuit; 312 exhibits filed; 71 hearing days; 10 000 pages of testimony.
1973	Construction of Matagami-LG2 road and of LG2 airport.
21 June, 1973	Justice Malouf takes the case under advisement.
early September, 1973	Québec proposes a form of settlement and suggests negotiation. Crees and Inuit refuse.
15 November, 1973	Justice Malouf grants the requested injunction.
19 November, 1973	Premier Bourassa offers to negotiate and tables an 11-point proposal. John Ciaccia appointed as Québec Negotiator.
22 November, 1973	Québec Court of Appeal suspends the injunction.
late November, 1973	Visits to Cree communities to explain Malouf decision and suspension of injunction. Communities refuse to negotiate.
10 December, 1973	Cree chiefs meet in Val d'Or. Jean Chrétien, Minister of DIAND, invited to Val d'Or to discuss possible negotiations. Chrétien favours negotiations and indicates willingness to provide loan funding. Cree chiefs decide IQA must consult communities before initiating negotiations.
21 December, 1973	Cree motion to the Supreme Court to appeal the Québec Court of Appeal decision is denied.

DATE	EVENT
1 January, 1974	Crees/Inuit file motion in Québec Court of Appeal for leave to continue proceedings for a permanent injunction against the Project.
24 January, 1974	Premier Bourassa makes 11-point proposal public.
25 January, 1974	Cree chiefs meet at Val d'Or and develop a counter-proposal - "Our Land, Our Demand".
26 January, 1974	IQA begins tour of communities. Communities endorse negotiations.
January, 1974	Jean Chrétien threatens to cut off funding if the Crees do not seriously consider Bourassa's proposal. He later backs down.
13 February, 1974	Justice M. Crête refuses to allow request for permanent injunction to proceed until the Court of Appeal has rendered its decision on the Malouf Judgment.
February, 1974	Negotiations under way at Main Committee and sub-committees.
March, 1974	NQIA representatives visit all Inuit communities to obtain mandate to negotiate. IQA representatives visit all Cree communities.
10 April, 1974	Cree chiefs meet in Fort George and express dissatisfaction with progress of negotiations, especially failure to obtain changes to plans of LG-2. They consider focussing efforts on obtaining changes to LG-1 and Eastmain and Opinaca diversion. Chiefs partially cancel mandate of IQA to negotiate on their behalf. Chiefs start second draft of "Our Land, Our Demand". First reference to inclusion of environmental protection regimes in negotiations. Québec negotiators invited to a meeting in Fort George.
April, 1974	Supreme Court denies Crees leave to appeal Justice Crête's ruling.
10 June, 1974	Hearing of the Court of Appeal on the Malouf Judgment begins.
13 June, 1974	IQA mandate further limited.
July, 1974	Main negotiating committee completes its work. Sub-committees continue.
16 August, 1974	Grand Council of the Crees (of Québec) incorporated. Shortly thereafter, the Board of Directors meets in Eastmain.
1-14 October, 1974	Crees and Québec define basic elements of Agreement-in-Principle.
14-15 October, 1974	Crees and Québec exchange final offers.
15 October, 1974	GCCQ and Québec Negotiator meet to discuss willingness to sign Agreement-in-Principle.
October, 1974	Crees tour villages to consult about Agreement-in-Principle. 9 November, 1974 accepted as deadline for answer. Communities endorse Agreement-in-Principle.
7 November, 1974	GCCQ informs Québec Negotiator of its willingness to sign the Agreement-in-Principle. GCCQ fixes 15 November, 1974, as the deadline.
15 November, 1974	Agreement-in-Principle signed.
21 November, 1974	Québec Court of Appeal reverses the Malouf Judgment.
November, 1974	Negotiations continue. GCCQ fixes deadline of 1 November, 1975, for Final Agreement.

DATE	EVENT
13 February, 1975	Supreme Court gives Crees and Inuit leave to appeal the Court of Appeal judgment.
August, 1975	GCCQ General Assembly decides to present draft Final Agreement to Bands by mid September.
September, 1975	Draft Final Agreement translated and explained to Bands. Crees approve draft, and individual Crees sign power of attorney authorizing GCCQ to sign it.
15-30 October, 1975	All Cree Band Councils travel to Montréal to monitor final negotiations and to review final texts.
early November, 1975	Crees appear before Québec Parliamentary Commission on Natural Resources and confirm eagerness to sign Final Agreement.
10 November, 1975	Crees approve final draft of Final Agreement and travel to Québec for signing.
11 November, 1975	Final revision of provisions concerning ratification. Signing of the JBNQA.
22 December, 1975	Crees ratify JBNQA by 922 votes in favour and 1 vote against.

Sources: Diamond, no date; La Rusic et al., 1979; Deschênes and Vincent, 1988; Salisbury, 1986.

APPENDIX 5: YEAR OF FIRST LEGISLATION OR REGULATION PROVIDING FOR ENVIRONMENTAL IMPACT ASSESSMENTS OF GENERAL APPLICATION

Jurisdiction	Year	Legislation
Newfoundland	1980	*Environmental Assessment Act*
New Brunswick	1987	*Regulation 87-83*
Nova Scotia	1988	*Environmental Assessment Act*
Québec (Southern)	1978	*Environment Quality Act* (Revised from 1972 Act to include provision for environmental assessment)
Ontario	1980	*Environmental Assessment Act*
Manitoba	1988	*Environment Act*
Saskatchewan	1980	*Environment Assessment Act*
Alberta	1973 1993	*Land Surface Conservation and Reclamation Act* *Environmental Protection and Enhancement Act*
British Columbia	1980	*Utilities Commission Act* establishes *Energy Project Review Process*[1]
Canada	1973 1977 1984 1995	Cabinet Directive of 20 December, 1973 Cabinet Directive *Federal Environmental Assessment and Review Process Guidelines Order* *Canadian Environmental Assessment Act*

[1] There is no piece of legislation enacting an environmental assessment regime of general application. Development is currently regulated by 45 statutes that apply in varying circumstances.

APPENDIX 6: SIGNIFICANT ENVIRONMENTAL AND ABORIGINAL DEVELOPMENTS SINCE THE SIGNING OF THE JBNQA

DATE	SIGNIFICANT DEVELOPMENTS
1974	Start of the Mackenzie Valley Pipeline Inquiry Mandate much broader than the technical evaluation of the proposed project. The Berger Inquiry was notable in that it held public hearings in affected communities, considered social impacts, and provided intervenor funding.
1975	CARC initiates Northern Resource and Land Use Policy Study, which will last until 1978. *Convention on International Trade in Endangered Species Wild Fauna and Flora.*
1976	Federal Government publishes *Guidelines for Scientific Activities in Northern Canada*, which encourages consultation with and participation by Natives, as well as feedback to Native communities. Hart Inquiry on the Northern Environment. EARP assessment of Eldorado Nuclear Uranium Refineries.
1977	Report of Mackenzie Valley Pipeline Inquiry. Illustrates scope, complexity and reliability of TEK and value of conducting a hearing in a manner adapted to aboriginal cultures, as well as legitimizing aboriginal claims, values and priorities by recommending settlement of Native claims as a precondition for pipeline construction. Amendments to the federal *Fisheries Act* strengthen its environment protection provisions. *Canada Oil and Gas Bill* permits, at least in theory, consideration of environmental factors in the licensing process.
1978	Canada Man and the Biosphere Programme publishes *Ethical Principles for the Conduct of Research in the North*. EARP review of proposed improvements to the Trans-Canada Highway in Banff National Park. EARP report on offshore drilling in South Davis Strait published in English and Inuktitut. Environmental Assessment of Brinex Uranium Mine begins under draft Newfoundland environmental assessment legislation. Public hearings are held in Postville and Makkovik, and technical hearings in St. John's.
1979	*Report of the Environmental Assessment Panel: Lancaster Sound Drilling* concludes that any recommendation for or against drilling would be arbitrary because the panel lacked adequate information on policy options and alternative uses of the area. Advocates a "best use(s)" approach to planning. Environment Canada publishes first state-of-the-environment report for the Atlantic Province. DIAND adopts the 1978 *Ethical Principles* as official policy.

DATE	SIGNIFICANT DEVELOPMENTS
1980	Start of Beaufort Sea EARP. First Canadian review of a concept rather than a specific development project. Unusually broad mandate (land claims, regional autonomy, regional development policy, land-use planning, government policies and programmes) to counteract possible finding similar to Lancaster Sound. Terms of reference contemplate more specific review and assessment of individual developments. Public hearings subsequently (1983) held in 19 Native and 6 non-Native communities. First significant use by an EARP Panel of Technical Advisors. Panel requires EIS to present impacts by zones and to prepare a concise summary (English, Inuktitut, and Dene), to facilitate both Native and popular understanding. First provision of intervenor funding. Panel opens field office in the region. EARP assessment of potential oil production on the Northeast Grand Banks and of Arctic Pilot Project. EARP assessment of the Lower Churchill Project refers to the importance of Innu land claims but notes that consideration of them is not part of its mandate. Cree heads aboriginal delegation to World Health Organization in Geneva. DIAND abandons multiple-use concept of land-use in favour of land categorization defining degrees of constraint on development. No Natives involved in 1981 workshop to elaborate Cabinet paper. New approach endorsed by Cabinet in June 1981. Policy rejected by most northern and aboriginal groups.
1981	Canada ratifies *World Conservation Strategy*, thereby endorsing concept of conserving natural environment to permit sustainable economic development. DIAND publishes *In All Fairness, A Native Claims Policy*. Report of Mackenzie River Basin Committee.
1982	Existing aboriginal/treaty rights entrenched in the *Constitution Act 1982*. Canada publishes a policy on specific claims in *Outstanding Business*. *United Nations Convention on the Law of the Sea.* Creation of Beverly and Qamanirjuaq Caribou Management Board.
1983	DIAND 1981 policy on land-use planning replaced by DIAND/GNWT/Native-negotiated policy, which has not, however, ever been seriously implemented. Supreme Court rules, in *Nowegijick v. The Queen* that *...treaties and statutes relating to Indians should be liberally construed and doubtful expression resolved in favour of the Indians.* Publication of Gordon Beanlands and Peter Duinker, *An Ecological Framework for Environmental Impact Assessment in Canada.*

DATE	SIGNIFICANT DEVELOPMENTS
1984	Beaufort Sea EARP report submitted. Review cost 20$ million. Report concluded oil- and gas- production can proceed under certain conditions. Report generally perceived as disappointing expectations for guidance on policy development and procedural aspects of assessment, although it highlights lack of baseline data, the need for monitoring, weaknesses in regionally based management, and inadequacies in regulations. Creation of the Science Institute of the Northwest Territories. Its objectives include enhanced Native involvement in research and decision-making. Hydro-Québec adopts Environment Policy: 1% of capital cost of transmission lines and 2% of capital cost of generating stations, in addition to the cost of mitigative measures, must be invested in environmental improvement. Proclamation of *Cree-Naskapi (of Québec) Act*, Canada's first aboriginal self-government legislation. Supreme Court rules, in *Guérin v. The Queen*, that aboriginal title is a legal right predating the Crown's acquisition of sovereignty. KRG holds a conference in Kuujjuaq on environment and Inuit life in N. Québec.
1985	Supreme Court of Canada rules, in *Simon v. The Queen*, that the treaty right to hunt was *an effective source of hunting rights* and includes the right to engage in *reasonably incidental* activities. Publication of the report of the federal Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements*. Addresses aboriginal role in land-use planning, but not environmental assessment as such. *Report of the Inquiry on Federal Water Policy.*
1986	Canada publishes its first state-of-the-environment report. Goose Bay Panel formed. First EARP panel to have aboriginal representation.
1987	Goose Bay Panel publishes Guidelines stressing: attention to TEK and aboriginal values; use of a VEC-based approach; consideration of ethical and human-rights issues; consideration of project impacts on aboriginal and treaty rights. Clearly establishes responsibility of proponent to address all relevant issues, even if some of them are not addressed in the guidelines. Publication of *Our Common Future* (Bruntland Report). Publication of revised *Comprehensive Land Claims Policy.* *Report of the National Task Force on Environment and Economy.* Publication of *Federal Water Policy,* which sets two goals: to protect and enhance water quality; to promote the wise and efficient management and use of water. Guidelines and criteria for assessing interbasin transfers are promised but have not been drafted. Federal Green Paper on reform of the *EARP Guidelines Order.*

DATE	SIGNIFICANT DEVELOPMENTS
1988	Passage of the *Canadian Environmental Protection Act*, which requires the Federal Government to "provide information to the people of Canada on the state of the Canadian environment." Québec is the first province to issue a state-of-the-environment report. Publication of the *Lacoste Report* recommending major changes to the environmental assessment procedures in S. Québec.
1989	Environmental assessment of Ontario Hydro's *Demand/Supply Plan*, a "concept review". Federal Court Trial Division, in *Canadian Wildlife Federation Inc v. Minister of the Environment*, rules that the *EARP Guidelines Order* of 21 June, 1984 is legally binding on Canada.
1990	Supreme Court of Canada, in *Sparrow v. The Queen*, rules that governments have only a limited right to restrict the aboriginal right to harvest. Supreme Court of Canada, in *R. v. Horseman*, rules that the treaty right to hunt includes the right to expect that the activity will continue to be successful, measured against past practice. First reading of the *Canadian Environmental Assessment Act*, which provides for mediation as an alternative to a panel hearing. Broadly, the *Act* achieves the following: it removes ambiguity as to legal status of *EARP Guidelines Order*; it defines more clearly the federal representatives and agencies to which it applies; it defines "environment" and "environmental effect"; it defines the scope of screening reports and panel reviews; it makes the process enforceable by injunction; and it prevents proceeding with a project in the absence of an approval. Federal Court Trial Division, in *Naskapi-Montagnais Innu Association v. Canada (Minister of National Defense)*, rules that the *EARP Guidelines Order* applies to Minister implementing Cabinet decision. Northwest Territories Government passes *Environmental Rights Act*. Canada's *Green Plan for a Healthy Environment* commits the Federal Government to a policy of sustainable development.
1991	Department of Forestry releases its first annual report on the condition of Canada's forest resources. Report of the Commission de l'aménagement et des équipements on EIA in S. Québec. Hydro-Québec initiates its first public consultation on its development plan. The JBACE participates, but the CRA/GCCQ do not. Inuit participation is minimal. The Supreme Court of British Columbia, in *Delgamuukw v. British Columbia*, rules that aboriginal rights have been unilaterally extinguished, but that the Province has a fiduciary duty to permit Indians to use vacant Crown lands on a non-exclusive basis.

DATE	SIGNIFICANT DEVELOPMENTS
1991 Cont'd.	The Federal Court rules that the Eastmain 1 project is part of the Complexe La Grande and is therefore exempt from assessment by COFEX-South, but that it is subject to assessment under EARP. Federal Court Trial Division rules, in *Cree Regional Authority v. Robinson:* that the EARP Guidelines Order does not apply to the Federal Administrator where a proposal is subject to a review under the JBNQA; that Phase II of the Complexe La Grande is subject to independent assessment under the Cree-Federal Section 22 Regime. Federal Court of Appeal, in *Québec (Attorney General) v. National Energy Board*, rules that the NEB cannot attach conditions, such as environmental assessments, to the issuance of permits to export electricity provided that production facilities are not part of export operations. Creation of federal Indian Claims Commission, mandated to deal with specific claims and to visit aboriginal communities to take evidence.
1992	Federal Court of Appeal, in the so-called Eastmain Judgement, finds: (1) that the JBNQA need not be interpreted liberally (see 1983, *Nowegijick v. The Queen*) because of detailed nature of negotiations, because Crees were able to understand it, and because they had counsel and expert advisors; (2) that projects under provincial jurisdiction are not subject to assessment under the Cree-Federal regime of Section 22 even if they have impacts on areas of federal jurisdiction; (3) that the JBNQA is not a law in the sense of the *Interpretation Act*, although it has *a legislative effect*; (4) that the EARP does not apply; (5) that the EARP is triggered only when the Federal Government is required to issue or refuse a permit in virtue of a law or other obligation. Federal Court of Appeal rules, in *Saskatchewan Water Corp. v. Canadian Wildlife Federation*, that the *EARP Guidelines Order* applies to a federal Minister granting a license. Supreme Court, in *Friends of Oldman River Society v. Canada (Minister of the Environment)* rules that the *EARP Guidelines Order* applies to a federal Minister granting a license. Ontario Minister of Environment releases an *Environmental Bill of Rights* The High Court of Australia, in *Mabo v. Queensland*, holds that aboriginal title survived the acquisition of sovereignty by the British Crown. Rio Conference and signing of *Convention on Biological Diversity*, non-binding *Declaration of Forest Principles*, and *Framework Convention on Climate Change*. Saskatchewan tables a *Charter of Environmental Rights and Responsibilities*. Bill C-13, An Act to establish a federal environmental assessment process is assented to 23 June, 1992.
1993	BAPE recommends against HQ's Sainte-Marguerite-3 Project, partly on the grounds that it may not be needed, but also because of its probable negative effects on salmon.

DATE	SIGNIFICANT DEVELOPMENTS
1994	Premier Daniel Johnson announces that the Ste-Marguerite-3 Project will be constructed without the proposed diversion. The diversion will be studied by a special committee, which will recommend to the government whether to proceed with it at a later date. The Montagnais Band of Uashat-Maliotenam and HQ sign the Uashat Mak Mani-Utenam Agreement with respect to Ste-Marguerite-3. The purposes of the Agreement are: to reconcile the interests of the two parties; to facilitate the construction of the Project; to reduce negative impacts and improve positive impacts; and to assist the community, economic, and cultural development of the Band. It also provides financial compensation for the impacts of the Project. Supreme Court of Canada affirms the power of the National Energy Board to consider the impact of Québec's hydroelectric projects prior to granting HQ licences to export electricity to the U.S. First Nations of the Moose River Basin participate on a government-to-government basis in Ontario's review of Ontario Hydro's EIS for the Mattagami G.S. Extensions. The Review Panel on low-level military flying activities permits DND to avoid addressing the questions of aboriginal rights and land claims, which had been among the key issues identified in the Guidelines. Public Hearings in the aboriginal communities are scheduled at a time when most of the members are on the land. The Innu of Québec and Labrador decide to boycott the hearings. HQ's EIS of the Great Whale Project is found deficient by the Review Panels. The newly elected Parti-Québecois government subsequently postpones the Project indefinitely.

APPENDIX 7: HISTORICAL OVERVIEW OF IMPLEMENTATION OF SECTIONS 22 AND 23

	CREE REGIME	INUIT REGIME
1. YEAR COMMITTEES WERE ESTABLISHED	JBACE[1] -1978 COMEV[2] -1979 COMEX[3] -1980 COFEX-South[4] -1979	KEAC[5] -1980 KEQC[6] -1980 FSC[7] -Activated as needed COFEX-North[8] -1980
2. FREQUENCY OF MEETINGS- **a) Number of Meetings** **b) Average per year** **c) Maximum per year** **d) Minimum per year**	JBACE a) 75 b) 5.5 c) 11 d) 0 COMEV a) 128 b) 9.14 c) 15 d) 3 COMEX a) 127 b) 9.8 c) 19 d) 3	KEAC a) 54 b) 4.5 c) 7 d) 2 KEQC a) 69 b) 6.3 c) 10 d) 2 FSC a) 1 b) n/a c) n/a d) n/a COFEX-North a) 7 b) n/a c) 3 d) 0

	CREE REGIME			INUIT REGIME	
3. PLACE OF MEETINGS	JBACE	COMEV	COMEX[9]	KEAC	KEQC
a) Montreal	a) 29	a) 41	a) 49	a) 6	a) 27
b) Quebec City/Ste Foy	b) 27.5	b) 73	b) 68	b) 19	b) 13
c) Val d'Or	c) 7	c) 8	c) --	c) --	c) --
d) Radisson	d) 2	d) --	d) 2	d) 3	d) 2
e) Cree Territory	e) 7.5	e) 5	e) 2	e) --	e) --
f) Inuit Territory	f) --	f) --	f) --	f) 21	f) 20
g) Other (Bromont, Hull, Parc Yamaska etc.)	g) --	g) --	g) --	g) 3	g) 6
h) Telephone Conference	h) --	h) --	h) 1	h) --	h) --
4. COMMUNICATIONS PROGRAMMES	Draft text of an information bulletin was approved by the members in 1983-84. The JBACE has not been able to agree on a text for a more detailed information package for proponents, and so that project has apparently been dropped.[10]			The KEAC published a comprehensive information document in Inuktitut, English and French in 1982. The KEQC reports having published "Quebec Environmental and Social Impact Assessment and Review Procedures North of the 55th Parallel: Guide for Proponents" in 1984.	
5. ABORIGINAL MEMBERSHIP	JBACE -3 of 4 representatives of the CRA were Cree from 1979 to 1989. -2 of 4 CRA representatives were Cree from 1989 to 1993. COMEV -1 of 2 CRA representatives were Cree, except from 1986 to 1988, when none of the members was Cree, and one point in 1991-92, when both CRA representatives were Cree.			KEAC -2 of 3 representatives of the KRG have been Inuit every year except 1981,1982 and 1988-89. In two of those years, 1 KRG seat was vacant. KEQC -3 of 4 KRG representatives were Inuit from 1983 to 1990. -2 of 4 KRG representatives were Inuit from 1981 to 1982.	

	CREE REGIME	INUIT REGIME
5. ABORIGINAL MEMBERSHIP, CONT'D.	COMEX -1 of 2 CRA representatives was usually Cree during the first 4 years of operation. -Both CRA representatives have been Cree since February 1993.	COFEX-North -1 of 2 KRG representatives was Inuit for all seven sittings.
6. CONTINUITY OF MEMBERSHIP **a) Average time spent on Committee** **b) Longest term** **c) Shortest term** **d) Most turnover** **e) Least turnover**	JBACE (not including *ex officio* member) a) First 8 years: 3.88 years/member (24 members over a total of 93 person-years) Since 1989: 3.20 years/member (15 members over a total of 48 person-years) b) 14 years (including the 2 years in which the JBACE did not meet) c) 1 year d) Canada e) CRA COMEV a) 2.69 years/member (29 members over a total of 96 person-years) b) 13 years c) less than 1 year d) CRA, especially Cree members e) Quebec COMEX a) 4.40 years/member (15 members over a total of 66 person-years) b) 10 years c) Some members were appointed to review a specific project, and attended only the meetings at which it was discussed. d) CRA e) Québec	KEAC a) 3.27 years/member (30 members over a total of 98 person-years) b) 12 years c) 1 year d) and e) Canada has had slightly more turnover, but all parties are quite close. KEQC a) 4.67 years/member (21 members over a total of 98 person-years) b) 11 years (4 members for 11 years, 1 for 10) c) 1 year d) KRG e) Québec COFEX-North[11]

	CREE REGIME		INUIT REGIME	
7. ATTENDANCE OF MEMBERS[12] **a) Average number of representatives per meeting, by appointing party** **b) Average percentage of meetings attended by members, by appointing party** **c) Percentage of meetings at which each party was fully represented**	JBACE a) CRA: 2.29 members/meeting[13] QUE: 2.89 members/meeting CAN: 2.95 members/meeting b) CRA: 57% QUE: 72% CAN: 74% c) CRA: 24% QUE: 27% CAN: 28% COMEX a) CRA: 1.58 members/meeting (out of 2) QUE: 2.9 members/meeting (out of 3) b) CRA: 78% QUE: 95% c) CRA: 60% QUE: 83%		KEQC a) KRG: 2.88 members/meeting QUE: 3.50 members/meeting (not including chairman) b) KRG: 72% QUE: 88% c) Unable to calculate from available data.	
8. BUDGET[14]	JBACE/COMEV[15]	COMEX	KEAC	KEQC
1992-93	126 967$	not available ("n/a")	n/a	n/a
1991-92	121 457	n/a	62 250$	n/a
1990-91	100 900	n/a	68 250	57 750
1989-90	93 929	n/a	65 000	55 000
1988-89	n/a	n/a	52 250	52 250
1987-88	n/a	n/a	50 000	50 000
1986-87	n/a	n/a	50 000	50 000
1985-86	87 988	n/a	45 000	45 000
1984-85	78 344	n/a	40 000	45 000
1983-84	40 601	n/a	45 000	54 590
1982-83	20 298	15 000	40 000	52 000
1981-82	60 920	25 000	24 992	39 727[16]
1980-81	45 910	20 000	16 804	20 727[17]
1979-80	35 420	19 000	n/a	n/a
1978-79	26 600	16 000	n/a	n/a

	CREE REGIME	INUIT REGIME
9. CONTROL OF BUDGET	The JBACE secretariat is responsible for the COMEV's budget. The JBACE submits its budget request to MENVIQ, which decides how much to allocate to the Committee. Québec claims half of the cost of administering the JBACE from Environment Canada.	The KEAC submits its budget to the MENVIQ, which decides how much to allocate to the Committee. Québec claims half of the cost of administering the KEAC from Environment Canada. The KEQC is funded by Québec.
10. REMUNERATION OF MEMBERS	Members are remunerated by the party that appoints them, except for the Québec representatives, who are not remunerated.	Members are remunerated by the party that appoints them, except for the Québec representatives, who are not remunerated.
11. LANGUAGE OF OPERATION AND DOCUMENTATION	French and English: members express themselves in the language with which they are most comfortable, with informal translation. Minutes of meetings of the JBACE are in French and English. Minutes of meetings of the COMEX are in French. Internal documents of the JBACE are usually available in English and French. Internal documents of the COMEX are usually in French. The Crees must pay for translation of COMEX material. Annual reports are in English and French, with Cree summaries.	English, French and Inuktitut are used, with informal translation when necessary. Minutes of meetings are prepared in all three languages. Correspondence with MENVIQ is translated by the KRG. Annual reports are trilingual.
12. SECRETARIAT **a) Staff** **b) Location**	JBACE/Evaluating Comm./Review Comm. a) 1 Secretary, 1 Researcher,1 Administrative assistant b) Ste-Foy	KEAC/KEQC a) 1 Secretary b) Kuujjuaq

13. DEVELOPMENTS REVIEWED UNDER PROVINCIAL JURISDICTION[18]

TYPE OF DEVELOPMENT	CREE REGIME	INUIT REGIME
1. Mining operations	1. 34 Sub-total 34(14%)	1. 5 Sub-total 5(7%)
2. Siting and operation of sand and gravel pits and of quarries	2. 14 (5 in Cree Communities) Sub-total 14(6%)	2. -- Sub-total 0(0%)
3. Energy Production **a) Hydroelectric power plants & associated works** **b) Storage and water supply reservoirs** **c) Transmission lines over 75 kV** **d) Extraction & processing of energy yielding material** **e) Fossil-fuel generating plants above 3000 kw**	3. a) 28 b) -- c) 9 d) -- e) 4 Sub-total 41(17%)	3. a) 1 b) -- c) 1 d) -- e) 3 Sub-total 5(7%)
4. Forestry and Agriculture **a) Forest access roads** **b) Mills & other forestry plants** **c) Significant changes in land-use affecting more than 25 square miles**	4. a) 23 b) 3 c) -- Sub-total 25(11%)	4. a) -- b) -- c) -- Sub-total 0(0%)
5. Community & Municipal Services **a) Sewage & wastewater collection and disposal** **b) Solid waste collection & disposal** **c) Parks, wilderness areas, ecological reserves, etc.** **d) Outfitting facilities, for more than 30 people** **e) New communities or expansions**	5. a) 5 b) 7 (2 in Cree communities) c) 8 (including restoration programs) d) 6 e) 5 Sub-total 31(13%)	5. a) 15 b) 14 c) 2 d) 1 e) 2 Sub-total 34(47%)

TYPE OF DEVELOPMENT	CREE REGIME	INUIT REGIME
6. Transportation **a) Access roads to and near Native communities** **b) Port and harbour facilities** **c) Airports** **d) Railroads** **e) Pipelines** **f) Dredging operations**	6. a) 29 (8 Cree proposals) b) 8 (5 in Cree communities) c) 8 (7 in Cree communities) d) -- e) 15 f) -- Sub-total 60(25%)	6. a) -- b) 3 c) 10 d) -- e) 2 f) -- Sub-total 15(21%)
7. Other- Projects neither automatically subject nor exempt **a) Drinking water supply** **b) Fuel tanks, petroleum reservoirs** **c) Water retention for firefighting** **d) Ecological monitoring** **e) Local economic development projects** **f) Forestry and mining camps** **g) Industrial waste treatment disposal (forestry and mining operations)** **h) Snowmobile trails**	7. a) 4 b) -- c) -- d) -- e) 3 f) 7 g) 9 h) 6 Sub-total 29(12%)	7. a) 3 b) 7 c) 2 d) 1 e) 1 f) -- g) -- h) -- Sub-total 14(19%)
TOTAL PROJECTS SUBMITTED	COMEV[19] 237	KEQC 73

14. DEVELOPMEN_S REV_EWED UNDER FEDERAL JURISDICTION[20]

TYPE OF DEVELOPMENT	CREE REGIME	INUIT REGIME
1. Community Infrastructure	1. 8	1. --
2. Transportation Infrastructure	2. 1	2. 4
3. Hydroelectric Development and related projects	3. 3	3. 1
4. Mining Projects	4. --	4. 1
TOTAL PROJECTS REVIEWED	12	6

Notes

1. Data from Annual Reports from 1979 to 1993, Minutes of Meetings from 1979 to 1993.

2. Data from Annual Reports from 1979 to 1992.

3. Data from Biennial Reports from 1980 to 1988, Minutes of Meetings from 1988 to 1992.

4. No reports or minutes were accessible.

5. Data from Annual Reports from 1980 to 1992.

6. Data from Annual Reports from 1980 to 1991.

7. No data were available.

8. Data from minutes of meetings, 1980 to March, 1991.

9. Locations of the first five meetings are not given in the Minutes.

10. H. Chatagnier, personal communication, August, 1993.

11. The seven meetings were spread out between 1980 and 1991, the majority of which were in 1989. The membership changed completely between the second sitting in 1981 and the third sitting in 1989. The KRG membership was the same from the 3rd to the 7th sittings, and one of the federal members was replaced at the 6th sitting. COFEX-North operates like an EARP Panel, in that members are appointed for specific reviews.

12. Complete data were obtained only for the JBACE. For the COMEX, data were obtained for the last 49 meetings only. Data for the first three years of operation of the KEQC are presented. No data were obtained for the COMEV, the KEAC, or either of the COFEX Panels.

13. 97% of the absences were Cree members.

14. Budgetary data were available only for those Review Bodies for which there are annual or biennial reports.

15. These figures represent expenditures rather that actual budgetary allocations.

16. This figure represents the actual expenditures.

17. This figure represents the actual expenditures.

18. List of types of projects is adapted from Schedules 1 to sections 22 and 23 of the JBNQA.

19. Of those 237 projects, at least 61 were exempted from the assessment process. Information regarding the status of decisions by the COMEV and the subsequent recommendations of the COMEX is incomplete due to inconsistencies in the way that projects are listed in the Annual Reports.

20. These data are probably incomplete, because the federal Review Bodies have no permanent secretariats, and project files appear to be spread out over several offices.

APPENDIX 8: SELECTED PROJECTS REVIEWED BY COMEX AND PRINCIPLES TO WHICH DECISIONS CONFORM[1]

Guiding Principles:

1. Protection of Native people, their societies, communities, economies;
2. Protection of hunting, fishing and trapping rights of Native people;
3. Protection of wildlife resources, physical and biotic environment, and ecological systems in the territory;
4. Involvement of Cree and Inuit people in applying the process;
5. Rights and interests of non-Native people;
6. Right to develop the territory;
7. Minimizing negative environmental and social impacts on Native people and their communities
8. Rights and guarantees of the Native people within Category II established by and in accordance with Section 24 until such land is developed.

KEY: X = Decision/conditions uphold the guiding principle; a blank space indicates that principle is not considered in decision; and N/A = Not Applicable

NAME OF PROJECT	PROPONENT	DECISION OF COMEX	CONDITIONS	DECISION RESPECTS THE FOLLOWING GUIDING PRINCIPLES							
				1	2	3	4	5	6	7	8
Forest road N-836	Normick Perron Inc.	Authorized	1) protection zone around lakes and 140 ha moose habitat zone; 2) only borrow from authorized pit; 3) restoration of borrow pit; 4) impact study of future work camp; 5) liaison committee to work with Waskaganish Cree to solve problems; 6) consult Waskaganish Band re proposed access to Samson river by bridge; 7) take precautions to preserve spawning grounds by bridge; 8) construction should occur after the spawning season (15 April to 15 July). -Cree representatives abstained from vote		X	X	X		X	X	N/A
Route Chibougamau-Nemiscau	Cree Construction Co.	Authorized	1) proponents respect regulations concerning forests and public lands and water crossings; 2) only borrow from authorized pits, proponent not to use some of the pits described in impact statement; 3) proponent must give specific plans concerning details of work camp; 4) archaeological inventory conducted by qualified person; 5) proponent to appoint person to be responsible for environmental monitoring throughout duration of construction and submit report to MENVIQ at end of construction; 6) proponent must rehabilitate areas disturbed by construction activities; 7) follow-up program to study ecological, economic and social repercussions of road construction; 8) take certain precautions for safety and road maintenance. -Cree representatives abstained from vote.	X		X		X	X	X	N/A

NAME OF PROJECT	PROPONENT	DECISION OF COMEX	CONDITIONS	DECISION RESPECTS THE FOLLOWING GUIDING PRINCIPLES							
				1	2	3	4	5	6	7	8
Dry waste elimination site at LG3	Hydro-Québec	Authorized	This project was evaluated after an aeration pond had been used as a repository for dry waste to the point that it was almost full. COMEX deplored that action. 1) the materials transported to the site will conform with regulations concerning acceptable materials; 2) during operation of the site, dry materials will be treated and covered with gravel at least once monthly; 3) once the site is full, it should be covered with 60 centimetres of earth, and other measures taken to restore the site to blend with the environment; 4) those materials that can be practicably recovered should be, and quantities should be reduced in keeping with the applicable regulations.			X			X		N/A
Second 315 Kv Transmission Line, La Grande 2A-Radisson	Hydro-Québec	Authorized	1) proponent to work primarily when soil is frozen, and when that is not possible, to restore areas where access roads are built; 2) inform trapping boss, users of area and Chisasibi Band through LG-1 Liaison Committee of timing of work; 3) establish restoration program for sites affected by construction work that takes account of desires of users of land and identifies sites and restoration measures; 4) project monitoring report to be submitted to MENVIQ at end of restoration work; 5) COMEX requests to be informed of completion of restoration work. -Cree representatives did not agree with authorization, stating that the project is not the same as the one described in the JBNQA, and therefore requires the consent of the James Bay Cree.	X	X	X	X	X	X	X	N/A
Eastmain Mining Project	MSV Resources Inc.	Authorized	1) proponent to keep commitments made in impact study with respect to construction, operation, and duration of mine; 2) hazardous waste and spill management in compliance with regulations; 3) archaeological information to be gathered by qualified persons via visual inspections of fault areas and survey of chain of small lakes northwest of area; 4) establishment of Liaison Committee to facilitate communication between Mistissini Band Council and proponent, and enable discussions and negotiations with respect to various social issues;	X		X	X	X	X	X	N/A

NAME OF PROJECT	PROPONENT	DECISION OF COMEX	CONDITIONS	DECISION RESPECTS THE FOLLOWING GUIDING PRINCIPLES							
				1	2	3	4	5	6	7	8
Eastmain Mining Project, Cont'd.			5) biophysical and social monitoring program to identify foreseen and unforeseen impacts and verify implementation of mitigation measures; 6) submit restoration plan to MENVIQ 6 months before shutdown.								
Addition of an aerated pond in Waswanipi	Waswanipi Band Council	Authorized	1) establish procedure to monitor composition of waste water; 2) establish monitoring program for first 2 years of operation to validate parameters on which system is conceived and to evaluate effectiveness; 3) waste water sampling and analysis; 4) chlorination of water should be avoided; 5) provide for training of an operator for the pond and for some training for local administrator so a second person has knowledge.	X		X	X		X	X	N/A
Winter road linking Eastmain to Matagami-Radisson	SOTRAC	Authorized	1) no clearing until financing of project is authorized; 2) mitigation for archaeological sites to be employed for borrow pits; 3) restoration of borrow pits, consisting of, at a minimum, regeneration of vegetation. The authorization is valid only for five years.	X		X			X	X	N/A
Installation of additional capacity at La Grande 2	Hydro-Québec	Authorized	1) corrective measures described in chapter 4 of the 1986 Mercury Agreement must be applied; 2) ensure that work camp facilities meet the standards of MENVIQ; 3) ensure that construction work does not compromise the quality of the drinking water source at Lake Jacques; 4) mitigation for increased sedimentation from installation; 5) ensure that use of sulphur hexafluoride does not put workers at risk; 6) restoration of areas affected by construction work; 7) follow environmental code, with modifications as recommended; 8) corrective measures as they are identified through the monitoring process.	X	X	X		X	X	X	N/A

NAME OF PROJECT	PROPONENT	DECISION OF COMEX	CONDITIONS	DECISION RESPECTS THE FOLLOWING GUIDING PRINCIPLES							
				1	2	3	4	5	6	7	8
Landfill site for sludge from septic tanks in Chapais and Chibougamau	James Bay Municipal Corporation	Authorized	This project was built before the authorization was granted. There was a misunderstanding by the proponent, who believed that authorization for this project was not necessary because authorization for a sanitary landfill site had been granted on 4 December, 1981. 1) depth of trenches should be above the aquifer; 2) proponent must ensure that site does not interfere with the operation of the airport; 3) follow-up report must be prepared annually by site-manager, including the state of operational conditions, the sanitary condition of the site, and eventual saturation point; 4) a restoration program should be prepared for the eventual shutdown of the site.			X		X	X		N/A

[1]. The determination of whether or not decisions conform to the guiding principles is qualitative and subjective since no operational definitions of the principles have been devised.

APPENDIX 9: SELECTED PROJECTS REVIEWED BY THE KATIVIK ENVIRONMENTAL QUALITY COMMISSION AND PRINCIPLES TO WHICH DECISIONS CONFORM[1]

Guiding Principles:

1. Protection of Native people, their societies, communities, economies;
2. Protection of hunting, fishing and trapping rights of Native people;
3. Protection of wildlife resources, physical and biotic environment, and ecological systems in the territory;
4. Involvement of Cree and Inuit people in applying the process;
5. Rights and interests of non-Native people;
6. Right to develop the territory;
7. Minimizing negative environmental and social impacts on Native people and their communities.

KEY: X = Decision/conditions uphold the guiding principle; a blank space indicates that principle is not considered in decision.

NAME OF PROJECT	PROPONENT	DECISION OF KEQC	CONDITIONS	DECISION RESPECTS THE FOLLOWING GUIDING PRINCIPLES						
				1	2	3	4	5	6	7
Kuujjuaq thermal power plant	Hydro-Québec	Authorized	1) negotiate with municipality of Kuujjuaq for use of facilities supplying drinking water and treating waste water and solid waste; 2) use sand and gravel pits already in operation in Kuujjuaq, and only in conformity with the regulation respecting sand and gravel pits; 3) use the preparation of the access road as an opportunity to recover debris, clean the site and revegetate where necessary; 4) build the work camp, if required, on a site that has already been disturbed and where no deforestation is necessary, negotiate the use of municipal facilities, respect municipal by-laws and recommendations or guidelines respecting alcohol consumption and drugs and relations between workers and the local population; 5) obtain all permits and authorizations pursuant to Chapter I of the EQA; 6) consult with Avataq Cultural Institute and Ministry of Cultural Affairs to ensure that mitigation measures sufficiently protect adjacent land, which is known as ecologically significant; 7) favor the hiring and training of Inuit personnel during construction and operation phases; 8) initiate a soil characterization of the site as soon as possible, and eventually decontaminate it; submit a site-decontamination program to the Deputy Minister, emphasizing restoration of contaminated soils and sites and methods of decontamination and landfilling;	X		X	X		X	X

NAME OF PROJECT	PROPONENT	DECISION OF KEQC	CONDITIONS	DECISION RESPECTS THE FOLLOWING GUIDING PRINCIPLES						
				1	2	3	4	5	6	7
Kuujjuaq thermal power plant, Cont'd.			9) submit, one year after operation, a follow-up report to the Deputy Minister on construction work, air quality and noise levels.							
Aupaluk airport	Transport Québec	Authorized	1) use of the C-2 quarry for materials required for construction work; the quarry may not be accessed by or exploited on the west side; 2) use of B-1 and B-3 sand pits is allowed only if the capacity of the C-2 quarry is insufficient; 3) take measures to ensure that good communication is established with the community and social conflicts are resolved; a few weeks before construction begins, the promoter must organize a meeting with concerned parties, particularly those concerned with social problems, and submit a report on that meeting to the MENVIQ; 4) undertake negotiations with the municipality respecting the use of municipal services, location of work equipment and all other considerations related to the project, including the supply of drinking water and food, treatment of waste water, location of workers' camp, possibility of giving gravels to community for future projects, and discovery of artifacts; 5) respect municipal by-laws and recommendations or guidelines related to alcohol consumption and drugs and relations between workers and the local population.	X		X	X		X	X
Mineral exploration at Blue Lake	Platine de la Fosse Inc.	Authorized	Project removed from assessment process, since it is considered to be a pilot project. Measures taken to reduce environmental impacts are considered adequate. 1) ensure environmental monitoring; the environmental monitoring program must be defined in collaboration with the Regional Direction of Abitibi-Témiscamingue and Nouveau-Québec, and results transmitted regularly to the Commission for examination.			X			X	X

NAME OF PROJECT	PROPONENT	DECISION OF KEQC	CONDITIONS	DECISION RESPECTS THE FOLLOWING GUIDING PRINCIPLES						
				1	2	3	4	5	6	7
Municipal infrastructures for Kativik region	Makivik	Authorized	1) solid waste disposal sites must be located in a different watershed from the community's potable water point and at some distance from the municipal airstrip, removed from the view of the community, accessible throughout the year; located near liquid waste disposal sites and respectful of the Solid Wastes Regulation; 2) the treatment system of liquid wastes must be of simple design and operation; the outflow location of treated waste water must ensure good diffusion, avoid contamination of drinking water points and fish spawning sites, use natural sites where possible but avoid sites used by the population; 3) water quality of the potable water point must respect the Drinking Water Regulation and the water point must be fenced and accessible throughout the year; 4) archaeological potential of sites must be evaluated for all infrastructures.	X		X			X	X
Establishment of Umiujaq	Umiujaq Steering Committee (CDRU)	Authorized	1) a water/sewage system must serve the entire village, the permanent fuel station must be relocated and soil studies must be undertaken in the summer to determine another solid waste disposal site; 2) the roads built between the housing units and the beach must only be made accessible to three-wheelers, snowmobiles and pedestrians in order to protect banks and minimize erosion; the promoter must eliminate two duplexes situated between the playground and the bay; the promoter must review plans for potable water reservoirs in housing units and submit a report to MENVIQ describing modifications; 3) submit a detailed report to MENVIQ describing measures to protect vegetation and promote revegetation.	X		X			X	X

[1]. The determination of whether or not decisions conform to the guiding principles is qualitative and subjective since no operational definitions of the principles have been devised.

APPENDIX 10: CONDITIONS LEADING UP TO AND SELECTED DEVELOPMENTS SINCE THE NEGOTIATION AND SIGNING OF THE JBNQA, AND ASPECTS OF THE EVOLUTION OF EA IN CANADA SINCE THE SIGNING OF THE JBNQA

Some conditions leading up to the negotiation of the James Bay Northern Québec Agreement

Québec, in 1971, was burdened with high unemployment and the social and political aftermath of the October Crisis. In the same year, the report of the Dorion Commission recognized the right of Native peoples to hunt, fish and engage in other subsistence activities and recommended that Québec discharge its debts to Indians and Inuit, including those arising from the Acts transferring its northern territories to the Province. It did not, however, recognize the idea of native self-government.

At about the same time, growing control of the oil industry by OPEC set a global context in which there was a fear that the western world would run out of or be deprived of affordable energy. The development of the hydroelectric potential of the James Bay territory was promoted as the solution to the economic, social and political crisis faced by Québec.

Appendix 4 summarizes the evolution of the negotiation of the JBNQA, although the nature of the documentary evidence to which we had access biases it somewhat in favour of the participation therein of the Crees. Little is known about the evolution of Sections 22 and 23, but it does appear that it was Québec, in Premier Bourassa's 11-point proposal of November, 1973, that identified the need for the JBNQA to contain regimes of environmental and social protection. Richardson (1975:304), however, cites Philip Awashish, a Cree negotiator at the time, as saying that one of the reasons that the Crees rejected Premier Bourassa's 11-point proposal was *...because the major concerns that the people had expressed were land, hunting, fishing and trapping rights, and environmental protection to guarantee the continuation of the tradition*. Whilst it is true that one of the first five negotiating sub-committees created in early 1975 dealt with environmental protection, it is nevertheless difficult to avoid concluding that the Section 22 and 23 regimes were not of major importance to the Crees at the time that they were negotiated, although they may have been perceived as being of vital importance to some of the Crees' non-Native negotiators. For example, Billy Diamond's (n.d.) summary of the JBNQA, written from a personal perspective shortly after its signing, assigns only one line to the Cree Regime.

It is also true, however, that the litigation undertaken by the Crees, especially their application for an interlocutory injunction to halt construction of the James Bay Project in November, 1972, virtually constituted an environmental assessment. Moreover, the experts retained by the Crees included several persons who can best be described as environmental scientists. It seems possible, therefore, that the first exposure of the Crees to environmental assessment as a confrontational, judicial process influenced not only the structure of the Regimes but also their implementation.

At the time that the JBNQA was negotiated the Crees were in a difficult position. They stood to lose the most in the way of their livelihoods. According to Billy Diamond, the senior negotiator:

> *[their] feeling was that no one can buy a way of life and culture with money. We were ready to proceed in court, but we saw the need to limit the damages, seek remedial works and have certain fundamental rights recognized. We decided to attempt to negotiate a settlement. We really had no other choice.* (Diamond, 1990).

On the other hand, Diamond (n.d.:51) has also noted that *The Crees negotiated, drafted, and accepted the Agreement*, and he has described it (n.d.:48) as *...an achievement by the Crees and the Inuit...* and as an accomplishment of which *Our people are proud....* Clearly, there are political overtones to the evaluations of all those with dynamic political and personal stakes in the JBNQA.

The Crees and the Inuit appear to have hoped that by signing the JBNQA, they would ensure the continued existence of their culture, economy, and way of life, while taking advantage of the social and economic benefits that would accompany the controlled development of Northern Québec (Indian and Northern Affairs Canada, 1982). They also believed that the JBNQA would increase their control over the speed and nature of the development of their respective territories.

The JBNQA was negotiated quickly, during a two-year period between 1973 and 1975. Québec's position was that it was urgent that the La Grande Complex proceed. The Cree position was that they would resume court action if a satisfactory final agreement was not reached within one year of the signing of the Agreement-in-Principle. During the final two weeks, the negotiations continued almost non-stop (Indian and Northern Affairs Canada, 1982). Relative to the time that other land claims agreements have taken, two years is remarkably fast. For example, the initial Yukon Indian claim was made in 1973, and the Umbrella Final Agreement was signed only in May 1993. Several other claims that were accepted in the late 1970's, including those of the Conseil Atikamekw-Montagnais, the Labrador Inuit Association, and the Naskapi-Montagnais-Innu Association (now the Innu Nation) are still far from being settled.

The haste with which the JBNQA was negotiated, and the complexity of the issues that it addressed, resulted in a document that is at times open to conflicting interpretations. Originally, it was understood that the details of various programmes would be worked out over a lengthy implementation period (Indian and Northern Affairs Canada, 1982), but that has rarely, if ever, proved to be the case.

For its time, however, the environmental regime established in the JBNQA was revolutionary. At the time that the JBNQA was signed, the only Canadian jurisdictions requiring EIA were the federal government and Alberta. Even in southern Québec, the practice of impact assessment was not legislated until 1978, the same year in which MENVIQ was created. As already noted,

the one other native claim settled around the same time, the Alaska Native Claims Settlement, did not provide for any such regime. Indeed, few well-established models for impact assessment existed anywhere at the time. Yergeau (1988:296) has called the JBNQA a pioneering document *... particularly with respect to the criteria governing environmental and social impact statements*, and we share his view.

Selected developments since the signing of the James Bay Northern Québec Agreement

Space does not permit us to place the implementation of the Regimes in their provincial, national and international contexts. A brief summary of some of the most significant environmental and aboriginal developments since the signing of the JBNQA illustrates that although the Inuit and Cree Regimes have remained unchanged, the 20 years following the JBNQA have witnessed major changes in the theory and practice of EIA, in its judicial bases, and in the recognition of aboriginal rights. Given the difficulty of amending the JBNQA, sections 22 and 23 have not been able to keep pace with these developments. Appendix 6 outlines some of the significant events relating to environmental assessment and aboriginal affairs between 1974 and 1994.

The environmental assessment process has evolved considerably since the signing of the JBNQA. Its evolution is marked by several significant events, of which the following are only a few selected for illustrative purposes. 1974 was the year in which the Mackenzie Valley Pipeline Inquiry (Berger, 1977) commenced. Also known as the Berger Inquiry, it was notable in that it held public hearings in the affected communities, considered social impacts, and provided intervenor funding. The Report of the Mackenzie Valley Pipeline Inquiry was published in 1977 and was remarkable in that it illustrated, perhaps for the first time, the scope, complexity, and reliability of TEK, and the value of conducting a hearing in a manner adapted to aboriginal cultures. It also legitimized aboriginal claims, values, and priorities by recommending the settlement of Native claims as a precondition for pipeline construction. The report of the Landcaster Sound Drilling Panel (FEARO, 1979) concluded that any recommendation for or against drilling would be arbitrary because the panel lacked adequate information on policy options and alternative uses of the area, and advocated a *best use(s)* approach to planning. The report of the Beaufort Sea Review Panel (FEARO, 1984) was the first Canadian review of a concept rather than a specific development project and the first time that an EARP Panel made significant use of technical advisors. It highlighted the lack of baseline data, the need for monitoring, weaknesses in regionally based management, and inadequacies in regulations, but nonetheless concluded that oil- and gas-production could proceed under certain conditions. The striking of the Panel to review low-level flying activities over parts of Labrador and Québec, in 1986, constituted the first EARP Panel to have aboriginal representation. It initially produced promising guidelines requiring the EIS to do, among other things, the following: incorporate TEK and aboriginal values; to use a Valued Ecosystem Component approach; and to consider ethical and human-rights issues as well as project impacts on aboriginal and treaty rights. The federal government published, in 1987, its Green Paper on reform of the EARP Guidelines Order, which led to the first reading, in 1990, of the CEAA, and its subsequent promulgation in 1995.

With respect to the development of legislation and policy respecting aboriginal claim and rights, there have also been several significant developments, including the following: the adoption by DIAND in 1979 of *Ethical Principles for the Conduct of Research in the North*, published by the Canada Man and the Biosphere Programme in 1978; the publication by DIAND, in 1981, of *In All Fairness, A Native Claims Policy*; the entrenchment of aboriginal treaty rights in the 1982 *Constitution Act*; the proclamation, in 1984, of the *Cree-Naskapi (of Québec) Act*, Canada's first aboriginal self-government legislation; and, in 1985, the publication of *Living Treaties: Lasting Agreements*, which addressed the aboriginal role in land-use planning, although not environmental assessment as such.

Several land-mark legal cases have contributed to the judicial basis of EIA in Canada over the past 20 years, as well as to the recognition of aboriginal rights. In 1989, the Federal Court Trial Division, in *Canadian Wildlife Federation Inc v. Minister of the Environment*, ruled that the *EARP Guidelines Order* is legally binding on Canada. In 1990, the Federal Court Trial Division, in *Naskapi-Montagnais Innu Association v. Canada (Minister of National Defense)*, ruled that the *EARP Guidelines Order* applies to a Minister implementing a Cabinet decision. There have also been several court rulings concerning the application of the EARP to projects subject to assessment under other jurisdictions. Most notable, at least to the Crees of Québec, was the 1991 Federal Court ruling that the Eastmain 1 project is part of the Complexe La Grande and was therefore exempt from assessment by COFEX-South, but that it is subject to assessment under EARP. That decision was subsequently overturned by the Court of Appeal in 1992, when it found that: (1) the JBNQA need not be interpreted liberally in favour of its aboriginal signatories, because of the detailed nature of the negotiations, because the Crees were able to understand it, and because they had counsel and expert advisors; (2) projects under provincial jurisdiction are not subject to assessment under the Section 22 Cree-Federal Regime even if they have impacts on areas of federal jurisdiction; (3) the JBNQA is not a law in the sense of the *Interpretation Act*, although it has legislative effect; (4) the EARP process does not apply; and (5) the EARP is triggered only when the federal government is required to issue or refuse a permit in virtue of a law or other obligation.

Legal cases that have recognized aboriginal claims or treaty rights include the following: *Nowegijick v. The Queen*, in which the Supreme Court ruled, in 1983, that *...treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians*; *Guérin v. The Queen*, in which the Supreme Court ruled, in 1984, that aboriginal title is a legal right predating the Crown's acquisition of sovereignty; *Simon v. The Queen*, in which the Supreme Court ruled, in 1985, that the treaty right to hunt is *...an effective source of hunting rights*, including the right to engage in *reasonably incidental* activities; *Sparrow v. The Queen*, in which the Supreme Court ruled, in 1990, that governments have only a limited right to restrict the aboriginal right to harvest; and finally, *R. v. Horseman*, in which it ruled, also in 1990, that the treaty right to hunt includes the right to expect that the activity will continue to be successful, measured against past practice.

Aspects of the evolution of environmental assessment in Canada since the signing of the James Bay Northern Québec Agreement

Space does not permit us to describe in detail the evolution of EIA since the signing of the JBNQA in 1975. Appendix 6 presents some of the most significant events.

At the risk of oversimplification, we suggest that EIA in the period since 1975 has been marked by the following: (a) a trend away from reacting to proposed developments by evaluating them on an individual basis to a proactive approach based on land- and resource-use planning, involving the application of the principle of sustainable development, the explicit consideration of cumulative impacts, and explicit attempts to identify and quantify the value of externalities. Concomitant with this has been a shift away from the traditional view of EIA merely or predominantly as a tool for identifying mitigative measures and compensation to a view of EIA as a means of avoiding impacts by improved project design; (b) increased public participation at every stage of EIA, including the preparation of guidelines, and an increase in the use of the courts to achieve environmental objectives by aboriginal and special-interest groups; (c) increased pressure on proponents to justify the need for their projects, including greater consideration in EIA of alternatives to projects and of alternative ways of attaining the goals of development projects; (d) a longer-term perspective on the impacts of development, deriving largely from concerns about global climate change and the principle of sustainability; (e) the assessment of governments' and crown corporations' policies and plans, as in the case of Ontario Hydro's *Demand/Supply Plan*; (g) more frequent recourse to mediation as part of or as an alternative to EIA, illustrated by, among other things, the CEAA; (h) growing aboriginal self-government, such as the *Cree-Naskapi (of Québec) Act*; (i) the growing recognition of the liability of developers for the adverse effects of their actions, as illustrated by several judgments in Ontario, such as *R. v. Bata Industries Ltd*, *R. v. Erie Battery Inc.*, and *R. v. Nitrochem Inc. (No. 1)*; (j) greater generosity in the provision of intervenor funding, best typified by the awarding of 29$ million to intervenors of the EIA of Ontario Hydro's *Demand/Supply Plan* and of 3$ million to the Crees and the Inuit to participate in the EIA of the Great Whale Project; (k) greater awareness of interjurisdictional impacts and the development of mechanisms to address them, illustrated by the CEAA; (l) growing friction between federal and provincial governments concerning jurisdiction over environmental matters; (m) increased politicisation of environmental issues, including well-financed campaigns to mobilize public opinion, such as that of the Innu Nation against military flight training and of the Québec Crees against the Great Whale Project; (n) increased recourse to concept reviews, as in the Beaufort Sea and Ontario Hydro *Demand/Supply Plan* EIAs; (o) judicial clarification (not, however, amounting to a definition) of aboriginal rights, which has important implications for development and EIA; (p) growing use of TEK in EIA, although there is reluctance to establish standards of proof; (q) increasing consideration of need in EIA, as illustrated by the EIA of Ontario Hydro's *Demand/Supply Plan* and that of the Great Whale Project; (r) growing concern about the preservation of biodiversity, as illustrated by the Guidelines for the Great Whale EIA (COMEV, KEQC, COFEX-North, Federal Assessment and Review Panel, 1992).

In the case of the Federal Government, the senior author's observations suggest that the period

from 1984 to 1993 was marked by the planned politicisation of FEARO. Prior to 1984, FEARO truly operated at arm's-length from the Department of the Environment. Since then, however, it has gradually become not a great deal more than an extension of the Minister's office, with the consequent erosion of its credibility and the loss of several senior staff members. Indeed, Geoffrey York, writing in *The Globe and Mail* on 20 December, 1993, cites The Honourable Sheila Copps, Minister of the Environment, as stating:

> *I was told by one of our people that it was the first time in nine years that anyone had really defended the environmental assessment process. Usually the discussion was how to get around it.*

Most recently, the CEAA appears designed largely to emasculate the role of the federal government in the EIA (e.g., Northey, 1993).

Clearly, the period from 1975 to 1993 has seen immense changes in the legal and social standing of aboriginal peoples and in the scope, techniques, processes and procedures of EIA. Although the JBNQA has been amended twelve times over that period, every aspect of the Cree and Inuit Regimes has remained "frozen" in the form in which it was negotiated in 1974 and 1975.