

WHY DOES FORM MATTER? THE HYBRID GOVERNANCE STRUCTURE OF MAKIVIK CORPORATION

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When we view the processes of society as a whole, then, we do not see two distinct kinds of power—formal and real—competing for dominance in men's lives. Instead we are confronted with an intertwining of many strands of control. In this intertwining, formal power reshapes and redirects itself in accordance with the intrinsic but informal demands of the tasks it undertakes. Informal power, on the other hand, finds itself hedged about by intrinsic necessities more resistant than words on *paper* can ever be.¹

INTRODUCTION

When Lon Fuller wrote those words concerning the interplay of form and substance in the exercise of power, he was reflecting on the ways that ancient societies governed access to scarce water resources. Yet he could just as well have turned his sights on the governance of the modern corporation, or for that matter on the governance of the aboriginal enterprise. Fuller insisted that “every kind of social power, whether designated as formal or real, is subject to an implicit constitution limiting its exercise.”² That is, relationships of authority, dependency, or reciprocity are always constituted according to some set of legal norms.

These background thoughts provide a clue for the approach to the question that is of concern to me here: does it matter to indigenous communities what legal form their enterprises might take? The example that I have been studying is the Makivik Corporation, a fascinating and powerful entity based in Nunavik, northern Quebec, which the *New York Times* identified as one of the success stories of Canadian aboriginal economic development.³ The very fact that it is a corporation rather than a

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1. Lon L. Fuller, *Irrigation and Tyranny*, 17 STAN. L. REV. 1021, 1029 (1965), *reprinted in* THE PRINCIPLES OF SOCIAL ORDER 188, 197 (Kenneth I. Winston ed., 1981) (emphasis added).

2. *Id.* at 195.

3. Bernard Simon, *Canada's Indians Pondering How to Invest Land Payouts*, N.Y. TIMES,

cooperative or simply a project of the Inuit community already tells us that a choice was made to create a form of enterprise broadly recognizable in the wider economy. On the other hand, its not-for-profit status, its ownership structure, and its mode of governance bespeak a significant departure from the ordinary business corporation form. Such departures include the status of shareholders as the Inuit beneficiaries of the *James Bay and Northern Québec Agreement* (JBNQA), the election of community representatives to its Board of Directors, and the appointment of elders to an advisory Board of Governors.⁴ By combining elements of community and traditional governance with the limited liability and separation of ownership and control that characterize the modern business corporation under executive management, Makivik exhibits a hybrid form.

After briefly outlining the range of activities in which Makivik is engaged, this Essay turns to assessing the ways in which the legal form of enterprise makes a difference. I have two postulates that flow from interpreting the experience of Makivik in light of Lon Fuller's insights. First, form matters because it provides collectively identifiable pathways for choices and relationships. Second, it matters because it symbolizes the shared purposes pursued within the enterprise. But form must intertwine both with the informal understandings and expectations of the actors who engage it and with the substantive projects being pursued if any particular social outcome is to be achieved by an enterprise. Whereas a form of enterprise that impedes the smooth flow of choices and relationships can create a barrier to achieving the purposes sought, form itself, however well designed, is never a guarantee that the enterprise will fulfill its mission. Although I do argue that aboriginal enterprises, like all enterprises, should pay attention to legal form so as to assure that they are aligned with what is sometimes called corporate culture, it bears emphasis that I am not seeking to identify the conditions for a successful indigenous business venture.⁵ Makivik faces a specific problem in aligning form with culture since the enterprise must serve in some measure to bridge cultures: Inuit and contemporary market cultures. As our interlocutors often put it, Makivik,

Nov. 6, 2003, at W1; see also MARYBELLE MITCHELL, FROM TALKING CHIEFS TO A NATIVE CORPORATE ÉLITE: THE BIRTH OF CLASS AND NATIONALISM AMONG CANADIAN INUIT 352–53 (1996) (providing a fascinating historical account of the emergence of Makivik Corporation).

4. An Act Respecting the Makivik Corporation, R.S.Q., ch. S-18.1, § 16, available at <http://www.canlii.org/qc/laws/index.html> (search for “An Act Respecting the Makivik Corporation”; open document with citation form L.R.Q. c. S-18.1); James Bay and Northern Québec Agreement, Nov. 11, 1975, in JAMES BAY AND NORTHERN QUÉBEC AGREEMENT AND COMPLEMENTARY AGREEMENTS I (1998), available at <http://digbig.com/4phnw> [hereinafter JBNQA].

5. See generally HENRY MINTZBERG ET AL., THE STRATEGY PROCESS 209–41 (4th ed. 2003) (discussing organizational structure).

like many contemporary Inuit, must “live in two worlds at once,” combining the roles of economic actor with social actor, combining corporate governance with Inuit governance, and combining a commitment to tradition with a process of modernization and transformation. This is symbolized by Makivik’s two head offices—one in Kuujjuaq and one in Montreal—between which its leaders are always shuttling.⁶

I argue that the challenge for Makivik is to remain a legal hybrid that gains vigor from the intersection and overlap of its roles without setting them at cross purposes. A review of Makivik’s experience in managing its subsidiaries and joint ventures reveals considerable sophistication and dexterity in accomplishing hybrid roles. This Essay summarizes the findings of a two-year research project on the governance of Makivik and is offered by way of an overview and collection of themes that have emerged through thirty-five interviews with various participants in the economic life of Nunavik.⁷

The bridging function that Makivik has performed is about to become more complicated. Nunavik is on the verge of achieving a new form of public government, with which will inevitably come a redefinition of Makivik’s role. It might be that Makivik will seek to maintain all of its existing hybrid functions and thus become a rival for the new public government, to be known as the Nunavimmiut Aquvvinga, pitting its existing Inuit ethnic legitimacy against the civic legitimacy of the new body.⁸ It might be that Makivik seeks to narrow and focus its role as an investor, ceding its social and cultural roles to the Nunavimmiut Aquvvinga. The Essay concludes with an enumeration of some possible scenarios for Makivik’s future. They are offered neither by way of prediction nor prescription. Rather, it is hoped that they will focus attention on what form Makivik and its relationship with public government will take. Whatever shape it takes, the form Makivik adopts will matter to the people of Nunavik.

6. Makivik Corp., Backgrounders: Makivik Corporation, <http://www.makivik.org> (follow “english” hyperlink; then follow “Backgrounders” hyperlink; then follow “Makivik Corporation” hyperlink) (last visited Nov. 30, 2006) [hereinafter Makivik Corp.].

7. The interviews were with past and present officials and employees of Makivik and its subsidiaries, officials, and employees of other Nunavik and Nunavut organizations that have relationships with Makivik, as well as lawyers, researchers, and journalists who have worked with and on Makivik. The interviews were conducted under the condition of confidentiality. Interviewees were provided with a copy of an earlier version of this text.

8. “Nunavimmiut Aquvvinga” means “People of Nunavik’s Steering Body.” Greg Younger-Lewis, *Negotiator Cites “Concrete” Breakthroughs in Self-Rule Talks*, NUNATSIAQ NEWS, Apr. 23, 2004, available at <http://digbig.com/4phny>.

I. A BRIEF OVERVIEW OF MAKIVIK'S ACTIVITIES

The Makivik Corporation is a not-for-profit entity governed by part III of the Quebec Companies Act but chartered in 1978 pursuant to a special Quebec statute.⁹ It was the successor to the Northern Quebec Inuit Association, which had negotiated the JBNQA on behalf of the Inuit.¹⁰ As a not-for-profit corporation, Makivik is exempt from taxation, although individual Inuit do pay taxes on their income and revenues. Over time, Makivik has invested ninety million dollars received as compensation on behalf of approximately ten thousand Inuit beneficiaries under the JBNQA and has administered other funds received in separate governmental agreements.¹¹ Makivik has made over eighty million dollars in cumulative “donations” to local projects that fulfill its mandate under section five of the Makivik Act:

- (a) to receive, administer, use and invest the part, intended for the Inuit, of the compensation provided for in subsections 25.1 and 25.2 of the Agreement and the revenues therefrom, as well as all its other funds, in accordance with this act;
- (b) to relieve poverty and to promote the welfare and the advancement of education of the Inuit;
- (c) to develop and improve the Inuit communities and to improve their means of action;
- (d) to exercise the functions vested in it by other acts or the Agreement;
- (e) to foster, promote, protect and assist in preserving the Inuit way of life, values and traditions.¹²

9. An Act to Establish the Makivik Corporation, § 4, 1978 S.Q., ch. 91 (codified as amended at R.S.Q., ch. S-18.1, § 4). See generally Pita Aatami et al., *The History and Current Activities of Makivik Corporation*, in ARCTIC ECONOMIC DEVELOPMENT AND SELF-GOVERNMENT 207 (Gérard Duhaime & Nick Bernard eds., 2003) (recounting Makivik history and its contemporary role in Nunavik); Harry Tulugak, *Governance in the James Bay and Northern Québec Agreement: An Inuit Perspective*, in REFLECTIONS ON THE JAMES BAY AND NORTHERN QUÉBEC AGREEMENT 145 (Alain-G. Gagnon & Guy Rocher eds., 2002) (detailing the context and history of the Inuit push for self-governance during the JBNQA negotiations).

10. Tulugak, *supra* note 9, at 147.

11. Raymond Lawrence, *Makivik Businesses: Building on the James Bay and Northern Quebec Agreement*, CIRCLES OF LIGHT, Jan. 2001, at 2, 2, available at <http://digbig.com/4phpb>.

12. An Act Respecting the Makivik Corporation, R.S.Q., ch. S-18.1, § 5; see Makivik Corp., Investment of Inuit Compensation Funds, <http://www.makivik.org> (follow “english” hyperlink; then follow “Backgrounders” hyperlink; then follow “Investment” hyperlink) (last visited Feb. 2, 2006) [hereinafter Makivik Investment] (detailing how Makivik has made over sixty million dollars in cash or in-kind donations).

The Kativik Regional Government was also established in 1978 under its own special statute to exercise the powers and duties of a nonethnic municipal corporation for fourteen Nunavik villages.¹³ It also has representation from a fifteenth Naskapi village.¹⁴

Makivik has an Inuit-elected five member Executive Committee including a president and sixteen Inuit-elected members of the Board of Directors.¹⁵ Elections are for a three-year term and are based on village representation.¹⁶ The Executive Committee and Board of Directors together appoint a Board of Governors that acts as a council of elders.¹⁷ Elections to Makivik are widely perceived to be the most important elections in Nunavik, and indeed Makivik is often characterized as the de facto government of Nunavik. Makivik is represented on the Inuit Tapiriit Kanatami, Canada's national Inuit organization, and on the Inuit Circumpolar Conference, which represents approximately 150,000 Inuit of Alaska, Canada, Greenland, and Russia.¹⁸ As the conclusion of this Essay will discuss, Makivik has also played a critical role as representative of the Inuit in negotiations concerning a future public government for Nunavik.¹⁹

The JBNQA placed a ceiling of twenty-five percent on Makivik investment of compensation monies in entrepreneurial ventures—a limit to which Makivik has not strictly adhered.²⁰ However, Makivik has proven to be a conservative investor, earning a favorable return over time and seeking to preserve and grow what is now over two hundred million dollars in beneficiary assets.²¹ It has eschewed being a venture capitalist directly, leaving that role to the Kativik Regional Development Council (Katutjiniq) on which Makivik is represented. Makivik owns a series of subsidiaries that are run as profit-oriented businesses from which dividends flow tax-free back to Makivik. Its wholly owned subsidiaries include two airlines

13. An Act Concerning Northern Villages and the Kativik Regional Government, §§ 239, 244, 1978 S.Q., ch. 87 (codified as amended at R.S.Q., ch. V-6.1), *available at* <http://digbig.com/4ppha> (search for “An Act Respecting Northern Villages and the Kativik Regional Government”; open document with citation form R.S.Q. c. V-6.1).

14. *Id.* § 251 (codified as amended at R.S.Q., ch. V-6.1, § 251).

15. Makivik Corp., *supra* note 6.

16. R.S.Q., ch. S-18.1, §§ 16, 20.

17. Makivik Corp., *supra* note 6.

18. Inuit Circumpolar Conference, ICC (Canada) Board of Directors, <http://digbig.com/4pxhy> (last visited Nov. 27, 2006); Inuit Circumpolar Conference, Inuit Circumpolar Conference (ICC), <http://digbig.com/4pxja> (last visited Nov. 27, 2006); Inuit Tapiriit Kanatami, Board of Directors, <http://digbig.com/4pxjb> (last visited Nov. 27, 2006).

19. Political Accord Between the Nunavik Party, the Government of Québec and the Federal Government for the Examination of a Form of Government in Nunavik Through the Establishment of a Nunavik Commission § 2, Nov. 5, 1999, *available at* <http://digbig.com/4pxjc>.

20. R.S.Q., ch. S-18.1, §§ 8–9; JBNQA, *supra* note 4, § 27.0.5(a).

21. MAKIVIK CORPORATION, ANNUAL REPORT (2005).

(First Air and Air Inuit), Inuit Arctic Foods (now being closed down), and Halutik Enterprises, Inc. (exclusive Nunavik agent for Shell Canada with a diversified business of garage operations, heavy-equipment rental, rock crushing, and construction).²² Makivik is also involved in a number of joint ventures:

- Unaaq Fisheries, Ltd. (a shrimp operation in partnership with Clearwater Fine Foods);
- Pan Arctic Inuit Logistics Corp. (PAIL) (owned in partnership with seven Canadian Inuit development corporations, PAIL manages and operates the North Warning System in a fifty-fifty partnership with ATCO Frontec Corp. on behalf of the Department of National Defence);²³
- Nunavut Eastern Arctic Shipping, Inc. (a marine shipping service in Nunvut and Nunavik co-owned with two Nunavut Inuit development corporations and a southern-based transport company); and
- Natsiq Investments Corp. (a sealing operation in partnership with two Nunavut Inuit development corporations).²⁴

This very general summary description of Makivik's operating subsidiaries is meant to indicate that Makivik has entered successfully into sophisticated market transactions. In short, the Inuit governance structure that organizes its decision-making processes has found a way to function within a corporate transactional setting.²⁵

II. WHY IT IS NOT SELF-EVIDENT THAT FORM MATTERS

It is well known among students of business associations that various forms of business enterprise are interchangeable, at least if successful contracting strategies are deployed. It is true that the formal substantive provisions of Quebec's Civil Code, various common law partnerships and limited partnerships acts, and various business corporations acts spell out tidy distinctions among the solely owned business, the limited partnership, the general partnership, and the corporation. However, each of these forms can be transmuted into very close approximations of the other. For

22. Lawrence, *supra* note 11, at 2; Makivik Investment, *supra* note 12.

23. Makivik Investment, *supra* note 11; Pan Arctic Inuit Logistics Corp., Pan Arctic Inuit Logistics (PAIL), <http://pail.ca> (last visited Nov. 27, 2006).

24. Makivik Investment, *supra* note 12.

25. See *infra* Appendix 1.

example, it is a hallmark of the corporation, as distinct from the partnership, that it protects investors behind the veil of limited liability. Yet not only can the partnership form itself be adapted to integrate limited liability (i.e., the modern limited liability partnership), but the traditional partnership can also negotiate to include limited liability clauses in all contracts it enters. Indeed, a leading contemporary understanding of the corporation is that it is simply a “nexus of contracts”—an aggregation of transactions involving owners, managers, and other stakeholders.²⁶ Whereas the corporate form prescribed by statute provides a very general template upon which those contracts can be based, most elements of corporate law are in the nature of a default regime around which bargaining can occur. Through shareholder agreements and corporate statutes, the corporate form can largely be made to measure. A putative virtue of U.S. corporate law—what Roberta Romano has proclaimed to be its “genius”—lies in eschewing perverse incentives for strategic behavior to get around the rules since the rules are largely fashioned, at least in principle, by and for shareholders themselves.²⁷ In short, if the corporation is anything you want it to be, and if one business form can be transposed into any other, how can form possibly matter?

It turns out, of course, that there are constraints upon the variable geometry of business forms. Thus, there are indeed a limited number of significant obligatory provisions in business corporation statutes around which shareholders and other stakeholders cannot bargain (e.g., rules setting minimum numbers of directors for widely held corporations or rules providing guaranteed rights of shareholding). A similar story could be told with respect to partnerships. Yet it would be hard to make the case that form matters simply on the basis of this subset of obligatory rather than default rules. First, obligatory rules might simply be understood as facilitating contracting by providing explicit guarantees for bargains to which the parties would otherwise enter. Second, clever lawyering can often find patches and diversions around obligatory rules. Third, and most importantly, informal behavior of actors within the firm can serve to upend the obligatory rules. Thus, for example, a rule obliging a minimal number of directors can be rendered nugatory if quorum is one, and only one director ever shows up, or if all directors but one director act as a rubber stamp. In short, the presence of a narrow set of obligatory rules associated with specific business forms does not make out the claim that form matters or defeat the claim that only the “real” deployment of power in the firm

26. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 12 (1991).

27. ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 1, 9 (1993).

matters.

This general skepticism about the significance of business form, characteristic of the work of Jensen and Meckling, finds an echo in the initial reaction of Nunavik communities to the question concerning what legal form would be taken by the entity charged with administering and investing the Inuit settlement monies under the JBNQA.²⁸ The interviews we conducted revealed that at the time Makivik was created, there was very little attention paid within Inuit communities themselves as to what form the new entity would take. Form was taken to be a technical matter that could be left in the hands of the lawyers—in contrast to questions concerning resource use and management, about which the Inuit took a direct and active interest. This contrast of approach would seem to suggest that for the principal stakeholders, the Inuit beneficiaries under the JBNQA, corporate form was a matter of relative indifference. Some debate was eventually spurred between those who favored bolstering and extending the role of the Fédération des Coopératives du Nouveau Québec and those who saw in Makivik the principal motor for economic development in Nunavik. This was partly a battle of business forms—the cooperative versus the corporation. But in relatively short order this debate was settled, notably, by the election of “dissidents” to the Makivik Board. As one of our interviewees put it, “the decision-making process under the co-op model and the corporate model might come down to being pretty much the same thing, given overlapping representation and vote by proxy [both at Makivik and at the co-ops].”

III. FORM MATTERS BECAUSE IT PROVIDES COLLECTIVELY IDENTIFIABLE PATHWAYS FOR CHOICES AND RELATIONSHIPS

The skepticism about form that has just been canvassed takes aim at a peculiarly lawyer-like failing, namely the sin of essentializing rules and processes. That sin is committed because of an abiding belief that the statement of a rule produces human behavior and that the identification of a process produces characteristics of exchange and relationship. Tested against this belief, legal form cannot possibly matter. It does not straightforwardly produce results in the world. However, the inability to detect the significance of legal form is based on an inappropriate causal test for significance. The old Aristotelian distinction between efficient cause

28. See generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 306–07 (1976) (exploring questions about the traditional corporate model and skepticism about how certain theories explain managerial behavior in large corporations).

and formal cause begins to disentangle causality and significance. Another piece of the puzzle is put in place when one considers transaction costs.

It is true that in the absence of barriers to contracting, any particular form of enterprise could be transposed into any other. But there are costs associated with entering into and aligning an open-ended set of bilateral contracts. The very existence of default regimes like partnership and incorporation is designed to overcome some of these costs. By transaction costs, one should not understand simply the expenditure of time in seeking out and arranging transactions. For example, a contract of adhesion can save time but raise transaction costs if it turns out that all the unstudied contractual terms create an exposure to significant, one-sided liability. In short, a transaction cost is the cost associated with ensuring that a transaction indeed reflects the actors' purposes and that an enterprise is being pursued in common. Participants can reduce transaction costs by organizing relationships through a form of enterprise inscribed with a shared understanding of the roles and responsibilities undertaken within it.

Indeed, the malleability of business forms can be understood as suggesting that when individual constitutional arrangements are made by actors, those arrangements are significant for the organization of their contractual relationships. If actors invest bargaining effort and managerial skill in designing "made to order" business forms, then they must believe that those variations matter for the subsequent transactions entered into by the legal person they have designed.

Consider, by analogy, the relationship between an enzyme and a chemical reaction. While it would be an exaggeration to say that the form taken by an enzyme causes a chemical reaction in a cell, the enzyme's form is critical to facilitating the alignment of molecules and creating what biochemists call "chemical pathways." The form that actors choose for an enterprise helps to delineate pathways for choice and relationship. Unlike in the case of the enzyme, there is always the possibility that pathways within the enterprise will be shirked or shunned. However, their distribution is the basis for at least an initial map of the terrain on which relationships are formed within the enterprise.

Thus, for example, the fact that decision making is formed around a Board of Directors entails that the relationship with and among board members takes on particular significance. Informally, patterns of conduct may develop that invest greater or lesser meaning in those relationships and consequently give rise to differing degrees of emphasis on the work-a-day role of the board. But even to neglect the board "pathway" is to give it what Guy Rocher calls "effectivity," since bypassing or overcoming this form requires an effort of organization and mobilization within the

enterprise.²⁹ One can make a parallel claim about how the form of enterprise generates at least initial pathways for relationships with those outside the firm. Let us consider how the form taken by Makivik generates pathways for relationships within and outside the enterprise.

A. Relationships Within the Enterprise

The first thing to note about Makivik's corporate form is that it casts a wide net around who is within the firm. All Inuit JBNQA beneficiaries are shareholders.³⁰ Placing community members in an ownership relationship with Makivik delineates a number of possible pathways for interaction. For example, it marks out the possibility that each community member might undertake a direct relationship with Makivik and its leadership, without recourse to intermediaries or agents. We were told by more than one interviewee that the sense of ownership and direct relationship with Makivik, coupled with a tradition of broad consultation before decision making, produced situations in which an individual Inuk might not feel bound by Makivik decisions unless consulted personally.³¹ The property relationship also can serve to delineate roles and responsibilities of directors and managers with respect to assets. If directors and managers view themselves as agents for the shareholders in maximizing the value of property (despite the not-for-profit status of the enterprise), they will seek to demonstrate returns on investment and in turn be held accountable to do so by the shareholders. Makivik has been scrupulous and understandably self-congratulatory about reporting the rate of growth of its assets. It has also tracked the returns on investment, which do not come by way of dividend, but rather by way of "gift" to particular projects or needs.³²

There are a host of other ways in which relationships within Makivik are delineated through its corporate form. Three are worth emphasizing in particular. First, like other corporations, Makivik must hold an annual general meeting open to shareholders.³³ We were told by a number of interviewees that these meetings are extremely well attended and have in

29. Guy Rocher, *L'effectivité du droit*, in THÉORIES ET ÉMERGENCE DU DROIT: PLURALISME, SURDÉTERMINATION, ET EFFECTIVITÉ 133, 135 (Andrée Lajoie et al. eds., 1998).

30. An Act Respecting the Makivik Corporation, R.S.Q., ch. S-18.1, § 3, available at <http://digbig.com/4ppha> (search for "An Act Respecting the Makivik Corporation"; open document with citation form L.R.Q. c. S-18.1).

31. "Inuk is the singular form of Inuit." Dep't of Indian Affairs and Northern Development, Federal Government of Canada, Frequently Asked Questions About the North (March 2000), <http://digbig.com/4pxjh>. "Inuit means 'people' Most Inuit live in Nunavut, the NWT [the Northwest Territories], Northern Quebec and Labrador." *Id.*

32. R.S.Q., ch. S-18.1, §§ 4–5, 7–10.

33. *Id.* § 32.

some instances lasted several weeks. They become a forum for consensus-building and have in many ways absorbed traditional circle modes of discussion. Although resolutions are put to formal vote, this part of the meeting is of short duration because the true decision making has already occurred through the consensus-building process.

Second, like other corporations, Makivik holds elections to determine the membership of the Board of Directors.³⁴ But since seats are assigned to individual communities rather than to a dispersed shareholder group, there are high rates of voter participation at the community level.³⁵ Further, although the annual general meeting is, in principal, the gathering at which executive officers are elected, ballot boxes have also been placed in individual communities for those elections so as to facilitate broad participation.³⁶ This is a significant departure from the pro forma voting that often characterizes the election of directors and the selection of officers in the ordinary business corporation.

Third, Makivik's has a somewhat novel bicameral structure, with a four-person appointed Board of Governors acting as an advisory body of elders for the Board of Directors.³⁷ While this body, in principle, is given no specific decision-making authority, it creates a role for elders, who carry considerable weight within Nunavik communities. We were told that this involvement serves to make it a meaningful institution, particularly regarding consensus-building. In like measure, when dissidents opposing the JBNQA took issue with what they perceived to be Makivik's overly entrepreneurial approach, they were ultimately brought onto the Board—indeed, one of the Makivik-appointed troika of public government negotiators, Harry Tulugak, had been a dissident. On the other hand, Board eligibility rules were changed to require fluency in Inuttitut for otherwise eligible Inuk, resulting in the exclusion of a serving member from the Board.³⁸

Note that in each of these cases, the pathway actually taken for relationships is not a function of corporate form alone. To use Fuller's term, there is an intertwining of informal, traditional Inuit patterns of relationship with the corporate legal form.³⁹ This observation can be generalized in two ways. First, new pathways of choice and relationship

34. *Id.* §§ 15–16, 18.

35. *Id.* § 16.

36. *See, e.g., Makivik Corporation Elects New Board and Executive Members*, NUNATSIAQ NEWS, Mar. 15, 2002, available at <http://digbig.com/4pxjq>.

37. *See supra* note 17 and accompanying text (regarding Makivik governing bodies).

38. Jane George, *Non-Inuttitut Can't Run in Makivik Elections*, NUNATSIAQ NEWS, May 3, 2002, available at <http://digbig.com/4qxkr>.

39. *See supra* text accompanying note 1.

are always grafted onto existing pathways. Institutional arrangements do not have life breathed into them *ex nihilo*. Second, there is a social path dependency propelled in part by the form in which relationships are constituted. The legal form arranges and defines a significant range of choices within the firm without specifying the choices themselves—indeed, that is what it means for the legal form to be constitutive. Thus, even if the legal form does not prescribe outcomes, it can be understood to channel choice once it has been imbued with meaning through the interactions of those who coordinate their plans according to it.

B. Relationships Outside the Enterprise

There is a universe of contractors, joint venture partners, distributors, purchasers, and clients that populate the world outside Makivik with whom Makivik has business relationships. These contractual relationships are usually established by Makivik's various subsidiaries. Indeed, the fact that it has wholly owned subsidiaries, such as Air Inuit, that operate entirely on the traditional business corporation model, means that Makivik is able to maintain a foothold within commercial markets. Its managerial structure provides a series of recognizable counterparts for the managers of firms with whom it enters into transactions. In short, if for internal purposes its form allows it to channel a broad, community-based consultation process, for external purposes it is able to project itself as something very close to an ordinary market actor.

The interconnection between internal and external relationships presents a problem of decision-making effectiveness and efficiency. That is, form and function may become misaligned if for internal purposes, community-based decision making involves an elaborate, slow process, while external relationships require short-term responsiveness to markets. However, if one contrasts the organizational form of Makivik with more dispersed decision making in which communities would retain individual rights of refusal, Makivik achieves a high level of decision-making effectiveness.

This latter point was brought home through an example that will be generalized for the sake of preserving the anonymity of our interviewees. Makivik decided to invest in a project that required the participation of Inuk contractors from a number of villages. This venture required the construction and operation of a limited number of processing plants for the stock collected by Inuk contractors. The question became how Makivik would go about deciding which communities would be chosen for the investment in processing plants. The costs of siting a plant in each of the

communities would have been prohibitive in proportion to the likely returns on the venture as a whole. Recall that Nunavik's villages are scattered over a vast territory and that transportation costs form a significant component of the costs of any venture. For the sake of illustration, it can be assumed that each community saw a local benefit to having a plant because of additional employment and the spillover benefits of infrastructure investment.

Had Makivik been a pure business corporation, in which managerial decision making is separate from direct control by shareholders or any obligation to share decision making with stakeholders, the formal structure of the siting-decision process would have been as follows: Makivik would study possible siting scenarios and evaluate the costs associated with each, rank its preferences, seek to negotiate an outcome with local stakeholders, and make an investment decision dependant on whether its preferences could be met on the basis of a reasonable prospect of return. Stakeholders would include any current owners and local authorities with relevant licensing authority. In the case of Nunavik, this would involve land-holding corporations that hold collective property under the terms of the JBNQA and the Kativik Regional Government, which deals with municipal management and municipal public works.

If Makivik did not exist as a legal person and if decision making had been dispersed among local communities seeking to come together in a joint venture, the formal structure of the siting decision would have been as follows: each community would develop the case as to why it should receive a plant and negotiate an agreement with its local stakeholders to back the local siting of the plant. The communities would then come together to make a collective decision, and depending on the trade-offs that had been achieved (including whether it had succeeded in making the case for siting the plant locally), the community could decide whether it wanted to pursue the venture.

These two decision trees are of course idealized, since a centralized, corporate decision-maker can be subject to community lobbying that exhibits some of the features of dispersed community decision making, and coalitions could form among communities that would allow for something approximating centralized decision making. Nonetheless, all else being equal, the collective-action problems associated with dispersed decision making, notably the opportunities for holdout behavior, suggest that the corporate decision tree is more likely to generate an outcome that includes siting than would a community decision tree.

The simple and overly economic way of putting the issue is that the transaction costs associated with dispersed decision making are higher than those associated with centralized decision making. Communities might in

fact be prepared to bear these transaction costs if a noninvestment outcome is preferable to loss of decision-making autonomy—something that may indeed be true for a significant set of economic-development issues. But to the degree that the communities, taken as a whole, would prefer to go ahead with the venture, whatever the siting decision, dispersed decision making could place them in a prisoner's dilemma situation—the outcome chosen by each community could produce a less preferred outcome for all communities.

In fact, Makivik's hybrid corporate constitution meant that the decision tree it employed combined features of centralized and dispersed community decision making in the business corporation. After all, it is on the one hand a body that acts for all of its local beneficiaries and on the other hand a legal person distinct from any of the local beneficiaries. The formal structure of its siting decision closely followed that of the business corporation; except that in ranking its preferences for siting, Makivik had to engage in a consultation and coordination process that was implicit in its community-based Board of Directors. One way of characterizing this is that holdout problems became internal to Makivik rather than external to it, while the final contracting to site the plant remained external to Makivik. There was the possibility that failure to achieve consensus could upend the venture itself. However, Makivik, through its professional managers, has an independent capacity to evaluate investment decisions. For example, in matters such as plant siting, community lobbying through the intermediary of board members must overcome the flow of credible information coming from management. Again, one could imagine completely dispersed, community-based decision making overcoming the collective-action problem. This could be achieved at least in part by agreeing collectively to hire an independent consultant who could provide the same kind of information that Makivik's professional managers generate. Yet even the decision about which consultant to hire and according to what mandate becomes subject to holdout behavior under conditions of dispersed decision making.

In the end, Makivik was able to come to a siting decision, perhaps with greater lag time than might have been experienced by a pure business corporation but not significantly so. On the other hand, it would appear that Makivik overcame the holdout problem, in part, by placing more plants at greater expense than it would have undertaken had it evaluated the decision purely on the basis of cost and benefit. In short, there was some trade-off between satisfying a broad set of individual community interests and maximizing rates of return.

A test for whether this trade-off is sustainable arises in Makivik's response to unsuccessful investments. That is, if it ultimately appears that there has been an over-investment in plants, is the operation condemned to continue because it represents a community consensus or can Makivik pull the plug, invoking its overall responsibility to Inuit beneficiaries to ensure prudent management of assets? Our interviewees suggested that the answer to this question has changed over time as Makivik has learned to assess the success of its ventures. Thus, we were given examples of ventures in Makivik's early days that had responded directly to community lobbying to make costly investments. Having experienced accumulated losses, the organization has learned to detect them and indeed to invoke past failures to insist on ending ventures that do not meet performance targets. Indeed, most recently Makivik has closed down one of its subsidiaries after concluding that further investments are unsustainable.

An interesting view on Makivik's process was illuminated by the existence of joint ventures between Makivik- and Nunavut-based entities, which operate in a more dispersed decision-making environment. Again, for the sake of preserving anonymity, these joint ventures are described only in general terms. According to our interviewees, the contrast with decision making in Nunavut entities has, in significant part, to do with its learning curve. That is, for the reasons just mentioned, an organization needs to accumulate some experience of performance failures and successes in order to streamline consultation and impose investment discipline. Makivik simply has a longer history than do its counterparts in Nunavut, and so "mistakes" of overinvestment and protracted consultations can, in some measure, be attributed to inexperience. But as one interviewee put it strikingly, a decision-making process that might have five steps within Makivik appears to have twenty-seven steps in Nunavut, as multiple authorities seek to have their say and communities battle for precedence. We did not have the opportunity to explore this question from the Nunavut side of the story, but if one simply takes the proposition as given, it can be remarked that organizational form delimits the outer boundaries of the legal persons engaged in decision making. This point has been developed at some length by Michael Heller, who emphasizes that multiple claims affecting title to property by superimposed authorities can prove to be a significant barrier to economic development—what he calls a "tragedy of the anticommons" or failure to aggregate decision-making rights.⁴⁰

40. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 623–24 (1998) (positing that resources may be wasted and economic opportunities lost where multiple owners hold rights of exclusion in a scarce resource and the owners fail to agree on a use). See generally James M. Buchanan & Yong J. Yoon, *Symmetric*

Makivik would seem largely to have overcome the problem of the anticommons through the way in which its corporate form delimits its boundaries as a legal person.

It is perhaps not surprising that two sets of actors have emerged to take leading roles in the internal and external dimensions of Makivik's relationships. Community-based modes of representation have generated a board of directors, a board of governors, and an executive that are Inuit. The professional managers tend to be non-Inuit. In some respects it would appear that the professional managers conceive of themselves as intermediaries operating between the market and Nunavik culture. Versed in the intricacies of negotiating complex joint ventures and other contractual arrangements, the professional managers are often a conduit for conveying information about how Inuit practice can be adapted to meet the exigencies of the market. Thus, for example, we were told by one interviewee that although Makivik seeks to manage its relations with Inuit contractors so as to ensure a reasonable return on investment, the market paradigm does not always work "on the ground." When a product was delivered that was not according to commercial specifications, Inuit contractors nevertheless expected payment—they had, after all, engaged in work. In the case at issue, the product required storage and maintenance according to technical standards that the Inuk contractors did not fulfill because they had broken the storage facility. As a business entity, Makivik could simply have refused payment and obliged the contractors to purchase new storage facilities if they wanted any future contracts. But as an entity that seeks to bridge cultures, its managers understood part of their role to be the creation of conditions under which Inuk contractors could learn how to perform to technical specifications. Thus, in lieu of payment, Makivik paid for a new storage facility and for training on how to perform maintenance. We heard similar stories about how contractors lacked accounting skills and how Makivik managers sought to develop these skills. One may say that any sophisticated business entity concerned about maintaining long-term relationships will invest in its supply chain—as Jean-Guy Belley has documented so clearly in the case of Alcan.⁴¹ But it is fair to say that given its corporate form, Makivik has additional opportunities and responsibilities to engage in such behavior in a manner sensitive to Inuit culture.

Tragedies: Commons and Anticommons, 43 J.L. & ECON. 1 (2000) (responding to Heller's challenge regarding the lack of a formal economic model regarding anticommons).

41. JEAN-GUY BELLEY, *LE CONTRAT ENTRE DROIT, ÉCONOMIE ET SOCIÉTÉ* (1998).

IV. FORM MATTERS BECAUSE IT SYMBOLIZES THE SHARED PURPOSES PURSUED WITHIN AN ENTERPRISE

In order to have a “legal person,” one must be able to identify, however imprecisely, the purpose of unifying in association.⁴² A political association captures the general purpose of organizing self-governing relations for a particular community. Its form will reflect an understanding of how those relations ought, in principle, to be governed (e.g., identification of offices, mechanisms of selection, separation of powers, division of powers, and delegation of authority). A corporate body that has a specific enterprise vocation, rather than an embracive political vocation, will face the same question as to how its form reflects the manner in which its purposes ought to be pursued. But perhaps more directly than the political corporate body, it will face the question as to how its purposes ought to be articulated in the first place.

Through the nineteenth century, when Anglo-American corporations were typically established through the grant of letters patent or through chartering by way of special legislation, notionally, at least, their definition of purpose issued from a delegation of sovereign power. The corporation could thus act *ultra vires*—beyond its powers—if it purported to conduct affairs outside the ambit of delegated authority. Thus, for example, incorporation for the purpose of establishing a railway enterprise could not be the vehicle to conduct an unrelated construction venture. The statement of purpose was, therefore, a critical part of the corporate form itself.

With the advent of modern general incorporation statutes, there is no longer any significant oversight of the purposes for which incorporation occurs—this oversight is left to the licensing regime that may characterize a particular domain of industry and to the controls of misrepresentation and fraud. Statements of purpose are thus typically found not in the articles of incorporation but rather in mission statements articulated by the firm so as to identify its own core competencies. Nevertheless, if one takes a broad view of what makes up the corporate constitution, one could understand it to include corporate mission statements. After all, these do not have a directly performative role but are designed instead to facilitate or enable actors to orient themselves with respect to how roles and responsibilities within the firm are to be conceived. This difference is akin to the contrast between a description which sets out job parameters and a test for employee performance. Statements of purpose can be used to engage in a process of

42. See, e.g., An Act Respecting the Makivik Corporation, R.S.Q., ch. S-18.1, §§ 1–2, available at <http://digbig.com/4phpa> (search for “An Act Respecting the Makivik Corporation”; open document with citation form L.R.Q. c. S-18.1) (identifying the Makivik corporation as a legal person).

identifying criteria for performance, assuming one believes such criteria can always be found. But rendering purposes performative is always a matter for the agents themselves to articulate and enact.

Thus, it can be said that the corporate constitution will contain an implicit or explicit identification of those purposes that have an important symbolic enabling function. They provide a signal for the actors within the corporation according to which they can articulate and enact performance criteria. The symbolic significance is clear for those within the enterprise, but it is also significant for those outside the enterprise because it allows them to identify the kind of entity with which they are dealing.

A. Symbolism for the Enterprise

The corporate objectives for Makivik have gone through successive efforts at articulation, first through the JBNQA and then through the Makivik Act, which added the goals of fostering, promoting, protecting, and assisting in preserving the Inuit way of life, values, and traditions.⁴³ Unlike organization through a general incorporation statute, such as the Quebec Corporations Act, this special purpose incorporation formalizes specific purposes that in principle delimit Makivik's powers. Failure to conform to these purposes would produce a basis for challenge to Makivik's actions. Arguably, so would failure to consider each purpose in conducting its activities. Consistent with its not-for-profit status—which is also an implicit statement of purpose—one notes a range of purposes that would be consistent with those of a charity or foundation (e.g., relief of poverty or promotion of culture). The hybridity of Makivik is captured very clearly in the coexistence of a business-development vocation based upon prudent investment and a social vocation based upon Makivik's purposes and not-for-profit status. Below, we will consider whether this hybridity of purpose (as opposed to the related hybridity of community-based versus managerial decision making) makes for a robust or vigorous intertwining of differences or, instead, a problematic degree of cognitive dissonance—what Jane Jacobs would call a “monstrous hybrid[.]”⁴⁴ For the moment, the issue is how the symbolism of articulating purposes matters to the relationships within Makivik.

43. *Id.* § 5(e); see George W. Wenzel, *Traditional Ecological Knowledge and Inuit: Reflections on TEK Research and Ethics*, 52 *ARCTIC* 113, 116 (1999) (noting the Inuit preference to use “expertise and knowledge” as opposed to “[S]outhern science” for identifying and solving problems at Makivik (quoting W. Kemp & L. Brooke, *A New Approach to Northern Science*, N. RAVEN NEWSL. (Ctr. for N. Studies, Wolcott, Vt.) Winter 1983, at 1)).

44. JANE JACOBS, *SYSTEMS OF SURVIVAL: A DIALOGUE ON THE MORAL FOUNDATIONS OF COMMERCE AND POLITICS* 93 (1992).

Virtually everyone we interviewed noted it was Makivik's purposes that set it apart as a corporate entity. There were varying degrees of praise for, or unease with, the combination of purposes Makivik had undertaken. However, one is inclined to conclude provisionally that the range of purposes articulated for Makivik served to legitimate its function within Nunavik. Indeed, the addition to Makivik's purposes of the promotion of the Inuit way of life, values, and traditions was one of the major clarifications of the JBNQA framework urged by the Inuit when the *Loi sur la Société Makivik* was being drafted.⁴⁵ Clearly they cared about how the purposes were formulated and whether they adequately symbolized the roles and responsibilities Makivik ought to take up in Nunavik's communities. All of the work Makivik performs through its "donations"—the substitute for dividends that characterizes Makivik's payout over and above asset growth—falls within the domain of public purposes and largely accounts for Makivik's high profile in Nunavik's communities.

It is worthwhile to focus specifically on the "new" purpose added by the special incorporation statute. Placed in context, it suggests that the development of businesses is consistent with the Inuit way of life, values, and traditions.⁴⁶ Transformation and tradition are to go hand in hand. In a parallel setting, a Cree lawyer whom I interviewed stated that when he was called upon to articulate the "Cree way," his conclusion was that "it is the way we are doing things now." Within Makivik, the relation between tradition and transformation is often expressed around the commodification of traditional or "country foods."⁴⁷ This has led both to what might best be described as a tension between non-Makivik efforts to bolster traditional ways (notably the Hunter's Support Programme) and Makivik's commercialization efforts. Since Makivik, in effect, reads tradition through enterprise, it is not performing the same task as an entity that would aim to promote tradition alone. This is an example of how the statement of an enterprise's purposes affects the way it will seek to perform. Once again, I am not making the strong claim that form dictates outcomes. I am making the weaker claim that form serves to symbolize how actors will conceive of their roles and responsibilities.

45. See MITCHELL, *supra* note 3, at 355 ("Like the JBNQA, the Inuvialuit Final Agreement has the twin objective of promoting economic development and preserving Inuvialuit identity.").

46. R.S.Q., ch. S-18.1, § 5(e).

47. See generally Nicole Gombay, *The Commoditization of Country Foods in Nunavik: A Comparative Assessment of Its Development, Applications, and Significance*, 58 ARCTIC 115, 116 (2005) (exploring Nunavik commoditization of country foods, defined as those foods "harvested from the water, land, and sky").

B. Symbolism for the Outside Community

A hypothesis we were unable to confirm or invalidate was that Makivik's not-for-profit status and range of purposes was an instantiation of what can be called the "Quebec, Inc." approach to corporate hybrids. That is, Makivik might at least be understood to have a family resemblance to parallel entities in the wider Quebec context and thus be "recognizable" for economic actors entering into relationships with it. It is not clear to what degree models such as the Caisse de dépôt et de placement du Québec⁴⁸ or the Société générale de financement du Québec⁴⁹ figured in the minds of those who designed Makivik's corporate form and, in particular, its statement of purpose. The closest we came to confirmation of this hypothesis was from a lawyer present at the JBNQA negotiations who told us that such models were certainly "in the air" for the jurists who were formulating the terms of the agreement. But one might instead note parallels to corporations set up in Alaska to settle Inuit claims there.⁵⁰

The point of pursuing the Quebec, Inc. hypothesis is that novel corporate forms bear a risk of being unrecognizable and thus not carrying with them any expectations as to how they might coordinate conduct. That is, part of the external symbolic function of legal personality is to provide signals as to how conduct might be coordinated within such an entity. It makes sense to speak of how things are done within a corporation or a partnership as a general matter. An entity that mixes social and entrepreneurial purposes may not be able to send strong signals in this respect, unless it can be situated within a class or family of parallel legal persons.

48. "The Caisse de dépôt et placement du Québec was created in 1965 by an Act of National Assembly of Québec to manage the funds contributed to a newly created universal pension plan, the Québec Pension Plan." Caisse de dépôt et placement du Québec, Our Mission, <http://digbig.com/4pxjt> (last visited Nov. 27, 2006).

49. Société générale de financement du Québec (SGF) is a public corporation established by the government of Quebec as "an industrial and financial holding company. Its mission is to carry out economic development projects, especially in the industrial sector, in cooperation with partners and in accordance with accepted requirements for profitability and the Government of Québec's economic development policy." Press Release, Société générale de financement du Québec, Québec Approves SGF's Development Plan (Dec. 9, 2005), <http://digbig.com/4pxjy>.

50. See, e.g., Linda O. Smiddy, *Responding to Professor Janda—The United States Experience: The Alaska Native Claims Settlement Act (ANCSA) Regional Corporation as a Form of Social Enterprise*, 30 VT. L. REV. 813, 813–15 (2006) (discussing United States's experience with settling Inuit claims in Alaska).

V. WHEN DOES A HYBRID FORM “ADD VIGOR” AND WHEN IS IT
“MONSTROUS”?

The question of mixed purposes opens up a final and more provisional inquiry for this Essay: under what conditions are hybrid corporate forms capable of enabling the successful performance of mixed or countervailing purposes? So far, I have demonstrated the narrow point that Makivik’s corporate form does indeed serve to create pathways for choices and relationships, and it also symbolizes shared purpose. Both of these functions make a difference to how internal and external actors will conduct their relationships. Now comes a more difficult evaluation: in this particular case, do the special features of the corporate form create pathological, benign, or exemplary pathways and symbols? It would be presumptuous to state categorical conclusions in this regard, but a modest set of impressions can be offered.

There are many institutions, some of them endowed with legal personality, that pursue mixed or countervailing purposes. Not all of these need be understood as “hybrids,” since they may not all seek to combine and recompose legal forms drawn from discrete fields of human endeavor. From a certain standpoint, it might be concluded that every legal form is a hybrid, since one could set one’s interpretive sights on finding the influence or overlaps of multiple legal forms. But this would prove misleading, since one could only observe influence or overlap on the basis of having found individual, discrete legal forms in the first place. Nor is there any stable conception of what a legal hybrid might be. For example, today’s well-defined, discrete legal form, the trust, might be yesterday’s hybrid. The idea of hybridity can be understood to be a subset of the idea of a *sui generis* form. The hybrid is the *sui generis* form that arises when two existing species are mixed, forming a structure that stands out as a genus unto itself. Makivik can be called a legal hybrid since it mixes the business corporation form with community-based decision making, and it also mixes the private-purpose enterprise with public-purpose charity or foundation.

The critical question concerning hybrid legal forms is whether they are robust and sustainable on their own terms or whether they artificially encompass conflicting pathways and symbols. In the latter case, they might be called monstrous hybrids.⁵¹ Jane Jacobs has more recently termed public-private partnerships “monstrous moral hybrids.”⁵² She finds that the conflicting purposes to which the actors within them are oriented are

51. JACOBS, *supra* note 44, at 93.

52. JANE JACOBS, DARK AGE AHEAD 189 (2004) (discussing privately run prisons as “monstrous moral hybrids”).

mutually defeating and can in fact corrupt the particular virtues that are to be exemplified in the roles and responsibilities undertaken within the separate legal forms (e.g., university and enterprise).⁵³

The “monstrous” pathological character of a hybrid appears at the point of stress between conflicting purposes.⁵⁴ We are likely to be in the presence of a monstrous hybrid: (1) if there must systematically be not only a trade-off or balance between purposes but also a sacrifice of one purpose to another; and (2) if actors operating within the hybrid form find themselves constantly conflicted and working through paradoxical roles and responsibilities by deceit or self-deception. On the other hand, if the overlay of forms produces an enhanced capacity to engage the field of social endeavor in which the hybrid operates, it should usually be welcomed with open arms.

VI. MAKIVIK AND PUBLIC GOVERNMENT

The impression I have formed is that Makivik has in fact enhanced the capacity of Nunavik’s Inuit to engage the transformations of economic development that are under way. From interviews with those participating in Makivik’s projects, one derives the sense that they find coherence and balance of objectives within reach. The story may be in flux, however. Particularly as Nunavik itself gains greater governmental capacity, both the need for and the sustainability of Makivik’s hybrid function could diminish. On the one hand, what in shorthand can be called the public purposes that Makivik aims to accomplish would themselves become part of the jurisdiction of a public government. A case might be made for Makivik retaining residual public purposes because its focus will always be on Inuit beneficiaries of the JBNQA, whereas the public government model being debated for Nunavik is open to all residents, Inuit and non-Inuit alike. But it is inconsistent with the spirit of public government to leave the protection of Inuit culture and tradition to an Inuit institution alone. And there is no reason why a more discretely market-oriented Makivik would not exercise its corporate social responsibility through a continuing program of donations back to the community. While public government will produce an amalgamation and streamlining of key Nunavik institutions, it will

53. See JACOBS, *supra* note 44, at 98–101 (summarizing how allowing the government to also control commerce in the former Soviet Union led to its downfall); see, e.g., Richard Janda et al., *Flirting with the Devil While Doing God’s Work: The Regulation of Charitable Fund-Raising*, in BETWEEN STATE AND MARKET: ESSAYS ON CHARITIES LAW AND POLICY IN CANADA 511, 511–12 (Jim Phillips et al. eds., 2001) (observing that when government becomes involved in the operation of a charity, the government’s interference may impair charitable purpose).

54. Richard Janda, *Pathologies of Pluralism* (unpublished manuscript, on file with the author).

preserve a separation between and co-existence of Makivik and the Nunavik government. The overall governance of Nunavik will require the co-existence of ethnic legitimacy reposing in Makivik and civic legitimacy reposing in a public government. One form of legitimacy cannot and will not simply subsume the other. The remainder of this Essay seeks to identify some lines of inquiry into Makivik's future contribution to the co-existence of these sources of legitimacy. This issue has not received as much attention as the proposals for the structure of the Nunavik government itself.

A. Makivik's Role in Public Government Negotiations

Makivik has brought itself to a crossroads through its most recent—and most ambitious—foray into politics. Since 1995, it has been playing the role of representing the Nunavik Party in the negotiations establishing and flowing from the work of the Nunavik Commission, the eight-member body charged with formulating recommendations for a new Nunavik public government.⁵⁵ When the Commission's final report, entitled *Amiqqaaluta* (meaning "Let us Share"), was left unsigned by two members, including the Commission co-chair and Quebec government representative, André Binette, and Kativik School Board (KSB) representative, Annie Popert,⁵⁶ Makivik pressed ahead and signed a Negotiation Framework Agreement with the federal and Quebec governments in 2003.⁵⁷ Thereafter, Makivik found itself embroiled in controversy when KSB brought two lawsuits against it and other Nunavik Party members, because the nonconsensus recommendations of the *Let Us Share* report should not be used as the basis for self-government negotiations with Quebec and Canada.⁵⁸ The second

55. Political Accord Between the Nunavik Party, the Government of Québec and the Federal Government for the Examination of a Form of Government [sic] in Nunavik Through the Establishment of a Nunavik Commission § 2, Nov. 5, 1999, available at <http://digbig.com/4pxjc> ("Makivik Corporation, the Kativik Regional Government (KRG), the Kativik School Board (KSB), the Nunavik Regional Board of Health and Social Services (NRBHSS) and the Kativik Regional Development Council (KRDC) are designated as the 'Nunavik Party.'").

56. NUNAVIK COMM'N, AMIQQAALUTA: LET US SHARE (2001), <http://digbig.com/4pxka>; see also Jane George, *Aatami Says "The People Will Decide" on Nunavik Report*, NUNATSIAQ NEWS, May 18, 2001, available at <http://digbig.com/4pxkb> (explaining that the report "was intended to be a consensus document, but two of the eight commissioners refused to support its final conclusions").

57. Entente cadre de négociation sur la fusion de certaines institutions et la création d'une nouvelle forme de gouvernement au Nunavik [Negotiation Framework Agreement on the Amalgamation of Certain Institutions and the Creation of a New Form of Government in Nunavik] 9, June 26, 2003, available at <http://digbig.com/4pxkc> [hereinafter Negotiation Framework Agreement].

58. Kativik Sch. Bd. v. Makivik Corp., [2004] CanLII 12449, paras. 27–28, available at <http://www.canlii.org> (search for "Kativik School Board v. Makivik Corp."; then open 2004 version); Kativik Sch. Bd v. Makivik Corp., 2003 Jurisprudence Express 1582, [2003] CanLII 3609, para. 29,

action sought an interlocutory injunction to freeze Makivik's negotiations with the governments of Quebec and Canada on the basis that Makivik was improperly excluding the KSB from participating in the negotiations.⁵⁹

Although neither action was successful, they provided a taste of the kind of rivalry that can arise as existing institutional roles change with public government.⁶⁰ KSB reacted as strongly as it did largely because it would lose its autonomy as a Nunavik institution through the proposed arrangement. The three appointed negotiators for the Nunavik party were eventually able to secure KSB's continued participation in the negotiation process by insuring the latter's participation on a new Technical Advisory Committee made up of all of Nunavik's major public bodies.⁶¹ This board is now working closely with Nunavik's negotiators as they seek to complete self-government negotiations with Quebec and Canada.⁶²

As a number of our interviewees made clear, the current and future coordination of Nunavik's public institutions depends upon leaders "pulling in the same direction." Although there have been times when dissent has divided the Inuit of Nunavik, for example, in the immediate aftermath of the JBNQA, the pattern has been that Makivik has succeeded in using its authority and influence to bring dissenters within the fold. Yet as power and influence gather within the public government—and if the demographics of Nunavik change to include more non-Inuit—Makivik may find itself pressured to shed some of its responsibilities, focus on its investment portfolio, and diminish its hybridity.

There may indeed be advantages to diminishing the hybridity of Makivik's purposes as governance evolves in Nunavik. First, this would tend to remove the ambiguity about whether Makivik should pursue some projects if they have no solid economic basis. Such projects would be passed over to the public government. Whereas today, some ventures are indeed understood as best pursued by the Katavik Regional Government, Makivik's financial wherewithal seems to place it, if not at the hub, at least on the rim of most development projects. The implementation of public government would mean greater governmental fiscal resources and therefore, presumably, some recalibration of which projects Makivik should

available at <http://www.canlii.org> (search for "Katavik School Board v. Makivik Corp."; then open 2003 version); Press Release, Katavik Sch. Bd., Signing of Framework Agreement Premature, and May Be for Nothing (Feb. 3, 2003), available at <http://digbig.com/4qqya>; see also Gary N. Wilson, The Nunavik Commission and the Path to Self-Government in Arctic Quebec (unpublished manuscript, on file with the Vermont Law Review) (discussing these cases and their fallout).

59. *Katavik Sch. Bd.*, [2004] CanLII paras. 28, 42.

60. *Id.* para. 84.

61. Wilson, *supra* note 58, at 10.

62. *Id.* at 11.

undertake.

Second, Makivik may actually gain, rather than diminish, in ambition if the scope of its purposes is narrowed. At the risk of dramatically oversimplifying the matter, Makivik, or a spin-off from Makivik, might be able to move from being a holding company and investor to becoming an investment vehicle of its own, seeking therefore to tap greater pools of capital than its current asset base allows. A significant contributor to GDP in Nunavut today is Falconbridge's Raglan mine.⁶³ Makivik has succeeded in negotiating a valuable profit-sharing agreement with Falconbridge, part of which involves a guarantee of Inuit employment that unfortunately has proved hard to fulfill. Although there has been a Falconbridge joint venture with an Inuit construction company that involves the provision of services to the open pit mine, the Raglan agreement does not quite place Makivik in joint venture with Falconbridge. The profit-sharing arrangement is understood to be in the nature of "compensation payments" for the use of Inuit land. Consistent with the general point about legal form in this Essay, it matters whether Makivik is receiving compensation payments to a trust fund; is a joint venturer with Falconbridge; is an investor in a mining company; or is an issuer of shares seeking to raise capital for a mining company it forms. There are overlaps and functional equivalencies to these forms, but they tend to channel investment relationships differently.

B. A Note on Nunavut Tunngavik, Incorporated

Although Nunavut Tunngavik, Inc. (NTI) is not precisely parallel to Makivik in form, management, or experience, the sometimes difficult relationship NTI has had with the Nunavut government is worth bearing in mind as one explores the coexistence of Makivik and the Nunavut government.⁶⁴

NTI was established as a private corporation in 1993 as part of the same legislation that outlined the creation of the Territory of Nunavut six years later in 1999.⁶⁵ The new corporation replaced the Tungavik Federation of Nunavut (TFN), the organization officially recognized from

63. See Press Release, Canadian Royalties, Inc., Canadian Royalties Inc.: \$8.4 Million Private Placement Financing Closes, Mequillon Technical Report Filed (Oct. 25, 2004), available at <http://digbig.com/4pxnd> (reporting that the owners of Falconbridge recently invested some of \$8.4 million in the mine).

64. Nunavut is an Inuit homeland located north and west of Hudson's Bay. Government of Nunavut, Our Land, <http://digbig.com/4pxnw> (last visited Nov. 27, 2006). "Nunavut (the Inuktitut word for 'our land') was created April 1, 1999 as a result of the Nunavut Land Claims Agreement." *Id.*

65. Nunavut Act, S.C., ch. 28, § 2 (1993), available at <http://www.canlii.org/ca/sta/> (search for "Nunavut Act"; then open document with citation "1993, c. 28").

1982 to 1993 as representing the Inuit of Nunavut (known as Nunavummiut) for the purpose of negotiating treaties and land claims settlements. Like its predecessor, NTI continues to represent the Inuit of Nunavut in its relations with the Government of Nunavut and Government of Canada by insuring that the terms of the Nunavut Land Claims Agreement (NCLA) are respected.⁶⁶ NTI's various departments also manage several programs that are focused on Inuit social and economic development.⁶⁷

An overly formalized summary of the similarities and differences between NTI and Makivik can be gleaned from a comparison between NTI's bylaws and the governing statute establishing Makvik. NTI's bylaws are bathed in rights-focused language that reveals the organization's overarching objective to provide policy development and advocacy.⁶⁸ Meanwhile, the legislative language regarding Makivik's objectives shows that Makivik's main function is the administration and investment of funds that will be available for the social development of Nunavik's Inuit.⁶⁹ A simplified formula would be that for NTI, political rights lead to socioeconomic development; whereas for Makivik, economic development through investment leads to sociopolitical development.

66. See Nunavut Tunngavik, Inc., About Nunavut Tunngavik Incorporated, <http://digbig.com/4pxst> (last visited Nov. 27, 2006) (describing the establishment and goals of NTI); see also Nunavut Land Claims Agreement Act, S.C., ch. 29 (1993) (Can.), available at <http://digbig.com/4pxtg> (establishing certain rights and privileges for the Inuit).

67. Nunavut Tunngavik, Inc., *supra* note 66 (specifying that NTI's mission is "to foster Inuit economic, social and cultural well-being").

68. See *infra* Table 1 (comparing NTI and Makivik corporate objectives).

69. An Act Respecting the Makivik Corporation, R.S.Q., ch. S-18.1, § 5, available at <http://digbig.com/4phpa> (search for "An Act Respecting the Makivik Corporation"; open document with citation form L.R.Q. c. S-18.1).

Table 1 Corporate Objectives for Nunavut Tunngavik, Incorporated and Makivik Corporation

Nunavut Tunngavik Incorporated ⁷⁰	Makivik Corporation ⁷¹
<p>The object of Nunavut Tunngavik Incorporated is to constitute an open and accountable forum, organized to represent Inuit of all the regions and communities of Nunavut in a fair and democratic way, that will <i>safeguard, administer and advance the rights and benefits that belong to the Inuit of Nunavut</i> as an aboriginal people, so as to <i>promote their economic, social, and cultural well[-]being</i> through succeeding generations. <i>Without limiting that object, Nunavut Tunngavik Incorporated shall:</i></p> <p>....</p> <p>(e) seek, on its own initiative, or in concert with other like-minded organizations</p> <p>(i) to <i>promote the enhancement of the rights, benefits and opportunities</i> of the Inuit of Nunavut as an aboriginal people <i>through whatever avenues and mechanisms are available at the international, national and regional levels,</i></p> <p>(ii) to <i>encourage and support the development of policies</i> for Nunavut that will contribute to <i>Inuit economic self-sufficiency</i> while nurturing environmental values,</p> <p>(iii) to facilitate the preservation and strengthening of Inuit language, traditions and beliefs, and</p> <p>(iv) to build on the rich regional and community diversities among the Inuit of Nunavut, while fostering the unity of all Inuit.</p>	<p>The objects of the Corporation are:</p> <p>(a) to <i>receive, administer, use and invest the part, intended for the Inuit, of the compensation</i> provided for in subsections 25.1 and 25.2 of the <i>Agreement and the revenues therefrom, as well as all its other funds, in accordance with this act;</i></p> <p>(b) to relieve poverty and to promote the welfare and the advancement of education of the Inuit;</p> <p>(c) to develop and improve the Inuit communities and to improve their means of action;</p> <p>(d) to exercise the functions vested in it by other acts or the Agreement;</p> <p>(e) to foster, promote, protect and assist in preserving the Inuit way of life, values and traditions.</p>

70. Nunavut Tunngavik, Inc., Bylaws art. 2.1, http://www.tunngavik.com/site-eng/nti_bylaws.htm (last visited Feb. 26, 2006) (emphasis added).

71. R.S.Q., ch. S-18.1, § 5 (emphasis added).

With the establishment of the Government of Nunavut, NTI took up the mantle of ethnic legitimacy and decided to maintain its predecessor's focus on political representation and advocacy for Nunavut's Inuit. It became clear that some framework was needed to coordinate the work of NTI and the Government of Nunavut—particularly pressing since NTI, unlike Makivik, has a direct role in the administration of social development and aid programs such as Hunter's Support and Elders Benefits.⁷² Through the Clyde River Protocol (CRP), signed by NTI and the Government of Nunavut in October 1999, the government undertook to share information and to keep both the Inuit's and the territory's needs in balance when negotiating with other governments.⁷³ Its successor agreement, Iqqanaijaqatigiit (which means "working together"), signed in 2004, goes further by identifying shared priority areas.⁷⁴ These agreements have in some ways served to crystallize the challenge of managing overlapping sources of authority.

The CRP and Iqqanaijaqatigiit have a simple dispute resolution mechanism involving negotiation between the representatives of each party at different levels and an ultimate "agreement to disagree."⁷⁵ To legal formalists, this fails to identify a binding and final determination of a dispute. However, for better or for worse, the courts are available. In 2002, NTI filed a suit against the Government of Nunavut.⁷⁶ At issue was article 20 of the Government of Nunavut's Nunavummi Nangminiaqtunik Ikajuuti (NNI) policy on Nunavut contracting preferences. Article 20 "granted corporations that have operated in Nunavut but that do not qualify as Nunavut businesses under NNI a two-year grace period to become eligible."⁷⁷ Also at issue was the Government of Nunavut's failure to consult NTI in the initial drafting stages of the NNI policy.⁷⁸ The suit was settled in NTI's favor before court proceedings began. Despite this

72. Nunavut Tunngavik, Inc., *supra* note 66.

73. Clyde River Protocol: Governing Working Relations Between the Government of Nunavut and Nunavut Tunngavik Incorporated, pts. C, E, Oct. 27, 1999, <http://digbig.com/4pxxy> [hereinafter Clyde River Protocol].

74. Iqqanaijaqatigiit: Government of Nunavut and Nunavut Tunngavik Incorporated Working Together, May 28, 2004, <http://digbig.com/4pxyj>.

75. *Id.* (noting that "agreement may not be achievable on all issues" and that in the event of disagreement, "each Party shall respect the position of the other" after the disagreement has been forwarded to higher officials within both sides); *see* Clyde River Protocol, *supra* note 73, pt. F (providing that the "elected leaders of the Government of Nunavut and NTI" shall meet "on an as needed basis, to address issues of interest to one or both parties").

76. Press Release, Gov't of Nun., NNI Dispute Settled (July 30, 2002), <http://digbig.com/4pxyy>.

77. *Id.*

78. *Id.*

triumph, there is a concern that the combination of advocacy work and the organization's specific obligations toward Nunavut's Inuit has placed a serious strain on NTI's resources—human and otherwise.

CONCLUSION

In what follows I set out possible scenarios or trajectories for the relationship between Makivik and the Nunavik public government. I seek to emphasize, however, that there is not really a status quo scenario. It seems to have been reassuring to many in Nunavik that even with the advent of public government, Makivik will remain in place to represent the interests of the Inuit. The structure of Makivik will be untouched by public government, and thus Makivik will remain the same. However, the governmental context in which Makivik operates will change fundamentally, and this will necessarily affect the role and function of Makivik. The simplest illustration of this transition is that Makivik took the lead in concluding, with Quebec and Canada, the 2003 Negotiation Framework Agreement.⁷⁹ It acted as a governmental authority in this regard and in some respects can be viewed as the *de facto* government of Nunavik today. In the future, the Nunavimmiut Aquvvinga will take on this role. Thus, one must envisage a range of possible implications for Makivik in the new setting:

- **Gradual estrangement:** Makivik's role is narrowed and focused on economic development issues as social and community development passes to the Nunavimmiut Aquvvinga. This could entail an even greater ambition for Makivik, for example in hydroelectric development and mining.
- **Successful marriage:** Nunavimmiut Aquvvinga continues to look to Makivik to play an important partner role in social and community development as under the 2002 Sanarrutik Agreement.⁸⁰ Here a critical question will become what proportion of government funding for such purposes would be transferred to Makivik as opposed to the new government. Furthermore, issues will include what sort of internal allocation of responsibilities will be established—in addition to dispute settlement between Makivik

79. Negotiation Framework Agreement, *supra* note 57.

80. See *On the Doorstep of a New Future: 2002 in Nunavik*, NUNATSIAQ NEWS, Jan. 3, 2003, available at <http://digbig.com/4pycj> (reporting that Makivik signed the "Sanarrutik Agreement on economic development, under which Quebec will give Nunavik more than \$360 million over the next 25 years").

and Nunavimmiut Aquvvinga.

- **Divorce:** Makivik emerges as a rival to the Nunavimmiut Aquvvinga as its defense of ethnic legitimacy clashes with the public government concept.
- **Fusion:** Makivik ultimately folds into the Nunavimmiut Aquvvinga as an institutionalized second tier of government, or “upper house,” as ethnic and civic legitimacy are more directly combined.

Each of these scenarios implies the challenge of generating sufficient leadership and human resources to make overlapping institutions function successfully. The hybrid ethnic/civic governance that ultimately emerges will be monstrous or salutary depending, at least in part, upon the form adopted to manage the relationship between Makivik and the public government. To succeed, that form must channel effective decision making to symbolize the relationship between ethnic and civic governance that Nunavik seeks to maintain.