
**Identification Of Land Tenure Options
and Issues Respecting Inuvialuit Owned Lands:
Inuvik to Tuktoyaktuk Road**

**Transportation Planning Division
Department of Transportation
Government of the NWT**

PROJECT REPORT

Submitted By:

Terriplan Consultants Ltd.
Suite 302, 4920 - 47 Street
Medical Arts Building
Yellowknife, NT X1A 2P7

October, 1999

Table of Contents

Acronyms	iii
Executive Summary	iv
1. INTRODUCTION	1
1.1 Project Purpose and Scope	1
1.2 Study Methodology	1
1.3 Report Structure and Organization	2
2. PROJECT CONTEXT	3
2.1 Inuvik - Tuktoyaktuk Road	3
2.1.1 Background	3
2.1.2 Project Description and Alignment	5
2.1.3 Design Parameters	5
2.1.4 Land Ownership	5
2.1.5 Government and Third Party Interests and Constraints	7
2.2 Legislative and Regulatory Regime: Regional Framework	10
2.2.1 Inuvialuit Final Agreement	10
2.2.2 Inuvialuit and Federal Crown Land	11
2.2.3 Jurisdictional Categories	12
2.2.4 Inuvialuit Lands: Land Ownership	12
2.2.5 Conveyance of Lands	13
2.2.6 Expropriation	15
2.2.7 Municipal Requirements for Land	16
2.2.8 Public Road Right-Of-Way	17
2.3 Inuvialuit Land Administration	18
2.3.1 Inuvialuit Land Administration: Rules and Procedures	18
2.3.2 Inuvialuit - GNWT Land Access and Land Usage History	18
2.4 Economic Valuation and Regional Economic Impact of the Road	20
3. PUBLIC INFRASTRUCTURE INVESTMENT ON NON-PUBLICLY OWNED LAND	26
3.1 Policy Issues and Considerations	26
3.2 Experience in Other Jurisdictions	29

Table of Contents

4.	LAND TENURE OPTIONS AND ISSUES RESPECTING INUVIALUIT OWNED LANDS.....	31
4.1	Option One: Land Purchase	31
4.2	Option Two: Land Expropriation	32
4.3	Option Three: Land Exchange.....	34
4.4	Option Four: Land Lease	36
5.	CONCLUDING OBSERVATIONS	43
5.1	Data and Information Limitations	43

List of Figures

Figure 1	Inuvik-Tuktoyaktuk Road: Proposed Road.....	4
----------	---	---

List of Tables

Table 1	Inuvik-Tuktoyaktuk Road: Land Tenure and Design Parameters	6
Table 2	Inuvialuit Lands Road Sections	6
Table 3	Consideration of Government and Third Party Interests and Constraints	9
Table 4	Option Summary and Comparison	42

Appendix

Appendix 1	References and Bibliography
------------	-----------------------------

Acronyms

AB	Arbitration Board
7.(1(a))	Inuvialuit Fee Simple Lands (Surface and Sub-Surface)
7.(1(b))	Inuvialuit Fee Simple Lands (Surface Only)
CANADA	Government of Canada
COPE	Committee for Original Peoples' Entitlement
DIAND	Department of Indian Affairs and Northern Development
DOT	Department of Transportation, GNWT
GNP	Gross National Product
GNWT	Government of the Northwest Territories
GOVERNMENT	Government of Canada
IDC	Inuvialuit Development Corporation
IFA	Inuvialuit Final Agreement
IFAICC	Inuvialuit Final Agreement Implementation Coordinating Committee
IGC	Inuvialuit Game Council
ILA	Inuvialuit Land Administration
ILAC	Inuvialuit Land Administration Commission
IRC	Inuvialuit Regional Corporation
ISR	Inuvialuit Settlement Region
MAA	Ministry of Aboriginal Affairs, GNWT
MACA	Municipal and Community Affairs, GNWT
PWC	Public Works Canada
ROW	Right-of-Way
YTG	Yukon Territorial Government

EXECUTIVE SUMMARY

Terriplan Consultants Ltd. was retained by the GNWT Department of Transportation, Transportation Planning Division, to research and document potential options to secure land tenure for the construction and operation of an all-weather road between Inuvik and Tuktoyaktuk. The scope of the project was limited to land use and administration issues, respecting Inuvialuit owned lands and does not purport to provide any legal advice related to land tenure - as a condition, or form of right or title, under which property is held.

The methodology included extensive literature searches and review, consultations with appropriate Inuvialuit organizations, federal and territorial government departments, and interviews with transportation agencies in other jurisdictions to bring additional perspective to the assessment of land tenure options.

The original road alignment proposed by Public Works Canada in 1977 passes through federal Crown land, Commissioners's land, Gwich'in Settlement lands (privately held) and Inuvialuit owned lands (privately held). The research focused only on Inuvialuit owned lands, while the other land owners will be addressed within other clearly established legal procedures at the appropriate time. The total distance of the proposed road is 140 km and is designed with a 60 m right-of-way covering some 840 ha of land. 91.6 km of the road, representing 65 percent of the total length, are on Inuvialuit owned lands. The total amount of Inuvialuit land affected by the road is 550 ha.

The proposed road construction cost is estimated at \$100 million, with annual maintenance costing some \$1.4 million. Independent analysis conducted by Nichols Applied Management concluded that the benefit-cost ratio of the road is 0.26, assuming a 7.5% discount rate, and the present value of the net benefits is minus (-) \$66 million. This indicates that the project is not viable from a strict economic perspective. Recognizing that many public investments in infrastructure and programs are made on the basis of social as well as economic considerations, the proposed road project will have a significant regional development impact, including: \$77 million in business and labour income and 600 person years of employment during the construction stage.

The Inuvialuit Final Agreement (IFA) and the Inuvialuit Lands Administration (ILA) *Rules and Procedures* provided a key part of the framework for examining conveyance, expropriation and acquisition of rights through a lease, rental or other instruments. The IFA does not formally recognize the GNWT, and therefore does not afford the same opportunities and rights with respect to land access and usage that are provided to the federal government. This is a key factor in the consideration of potential land tenure options.

The GNWT has a number of interests with respect to local roads and highways. This includes an interest to guarantee unrestricted and equal public access, benefit and enjoyment of publicly financed highways that establish transportation links between communities, settlement areas and adjacent provincial and territorial highway networks. Central to these interests are questions respecting title, benefits and use of highways.

The experience of transportation agencies in other jurisdictions indicates that road projects affecting, crossing or located on Aboriginal lands are now emerging as part of the new operating environment and that jurisdictions are gradually making the necessary internal policy and organizational adjustments. There is emerging interest and commitment to fully recognize and treat First Nations as private land owners, with the requisite rights, privileges and obligations, in land access and tenure negotiations.

The land access and acquisition process respecting Aboriginal lands in other jurisdictions is dominated by complex legal considerations, while transportation planning and design factors have generally played a secondary role. Negotiation periods of up to a decade are not unusual. The general absence of a cohesive policy framework to guide land access and tenure issues respecting Aboriginal lands is clearly a critical factor.

The Department of Transportation initially identified four possible land tenure options for consideration: land purchase; land expropriation; land exchange; and land lease. The key findings for each option include:

Land Purchase: The IFA currently allows Inuvialuit lands to be conveyed only to Inuvialuit persons or corporations, or to the federal Crown. It may be possible to consider requesting that the subject lands be purchased by the federal government from the Inuvialuit and in turn transfer the lands to the Commissioner of the NWT, or to consider an amendment to the IFA to allow this option to be pursued.

Land Expropriation: For purposes of a comparative analysis the option of outright expropriation was deemed to be distinct from a land exchange agreement, fully recognizing that the result would be similar in that there is a transfer of title and rights. The IFA states that only the federal government has the right to expropriate Inuvialuit lands. The GNWT does not have direct expropriation rights but rather would have to request the federal government to do so on its behalf. There has never been an expropriation of any lands within the NWT, including the Inuvialuit Settlement Region, by either the federal government or the GNWT.

Land Exchange: While the existing provisions of the IFA preclude the GNWT from engaging in a direct land exchange with the Inuvialuit, it is possible to seek an amendment to the IFA that would facilitate this direct type of land exchange. The preliminary evidence compiled during this project does not permit a conclusion to be drawn respecting the willingness of either the Inuvialuit or the federal government to undertake such an amendment. However, the option clearly does exist for the GNWT to request that the federal government undertake a land exchange on its behalf.

Land Lease: The IFA allows for the GNWT to enter into a long term lease (up to 50 years with options for renewal) for a *Public Right-of-Way* with the Inuvialuit. There are a number of existing specific terms and conditions associated with a *Public Right-of-Way* as defined in the Inuvialuit Lands Administration Rules and Procedures, including but not limited to: maximum term for a lease, maximum right-of-way allowed for a public road, required security deposits, lease costs and "variable terms and conditions". The legal status of the ILA Rules and Procedures require clarification.

Depending on the decision taken by the GNWT or other developer as to whether to proceed with construction of the road and when, government and third party interests and constraints will have to be fully considered and documented at that time in the context of any particular option which is pursued. This should include a comprehensive review of rights, interests, commitments and activities on the subject lands, including consideration of government and Inuvialuit rights granted to third parties.

1. INTRODUCTION

1.1 Project Purpose and Scope

Terriplan Consultants Ltd. was retained by the Department of Transportation, Transportation Planning Division, Government of the NWT (GNWT) to undertake the following tasks:

- consult with the appropriate Inuvialuit organizations, federal and territorial government departments, regulators, and any other appropriate groups or individuals to identify options for land tenure respecting Inuvialuit owned lands for the construction of an all-weather road between Inuvik and Tuktoyaktuk;
- research and document potential options for the GNWT to secure land for construction and operation of an all-weather road between Inuvik and Tuktoyaktuk.

The Department of Transportation (DOT) instructed Terriplan Consultants Ltd. to focus only on Inuvialuit owned lands, recognizing that other land owners will be consulted within clearly established legal procedures - various legislation and/or Gwich'in Settlement Agreement, at the appropriate times.

The scope of the project was limited to land use and administration issues respecting Inuvialuit owned lands and does not purport to provide any legal opinion or advice related to land tenure - as a condition, or form of right or title, under which real property is held.

1.2 Study Methodology

The project methodology consisted of the following:

- Extensive literature search, both data base/key word searches and manual cross-referencing, and review. Particular emphasis was given to consideration of the history of land use and "access" arrangements and negotiations between the GNWT and the Inuvialuit Regional Corporation (IRC). Detailed review of relevant files from Department of Transportation, Department of Justice, and Ministry of Aboriginal Affairs was completed.
- Conduct of interviews with key informants and stakeholder.
- Analysis of the findings from the literature review and interviews to define potential land tenure options.

1.3 Report Structure and Organization

The report is organized as follows: Section 2 - Project Context, provides an overview of the: Inuvik to Tuktoyaktuk Road in terms of background, alignment and design; Inuvialuit Final Agreement; Land Ownership in the Inuvialuit Settlement Region; Inuvialuit land administration structures and procedures; and, the road's economic valuation and regional economic impact. Section 3 - Public Infrastructure Investment on Non-Publicly Owned Land, identifies some policy issues and briefly touches on relevant experiences in other jurisdictions respecting highway projects affecting Aboriginal lands.

Land tenure options and issues respecting Inuvialuit owned lands are discussed in Section 4, including purchase, expropriation, exchange, and lease. Section 5 - Concluding Observations, provides a discussion respecting data and information limitations. References and Bibliography are provided in Appendix 1.

2. PROJECT CONTEXT

2.1 Inuvik-Tuktoyaktuk Road

2.1.1 Background

Currently the community of Tuktoyaktuk is accessible by road only during the winter months via a 187 km ice road constructed annually by the GNWT (see Figure 1). The operating period is weather dependent and the road typically opens from mid to late December and closes from mid to late April.

Discussions about the merits of an all-weather road between Inuvik and Tuktoyaktuk have been ongoing since the late 1960s. The first route survey began in 1974 when oil and gas exploration activities were in progress in the Parsons Lake area, south of Tuktoyaktuk. Based on this early work a 140 km land route was identified by Public Works Canada (PWC) (see Figure 1).

Preliminary engineering and environmental studies were undertaken on this route in 1975-1976 and it became known as the *1977 PWC Surveyed Route*. The incentive to build the road was diminished with the downturn in petroleum exploration activities which followed the release of the recommendations of the Berger Commission on the Mackenzie Valley Gas Pipeline.

During the 1980s interest in the proposed road continued to rise and fall in relation to economic and political factors and two other possible road alignments were considered. Following some reference in 1985 that an alternate route was desired by the Inuvialuit, early in 1986 the Department of Indian Affairs and Northern Development (DIAND) received a suggested road alignment that would be located almost entirely within Inuvialuit owned lands. This proposed alignment traversed through the Caribou Hills along the east bank of the Mackenzie River and was approximately 33 kilometres longer (total of 173 km) than the 1977 PWC Surveyed Route. Public Works Canada did not support this proposed alignment because of economic and geometric reasons but put forward an alternate route that was 27 kilometres longer than the original 1977 PWC Surveyed Route. However, this route was located without field data, would have required completely new preliminary engineering studies and because of its longer length, would have been considerably more costly to construct.

No reference to the 1977 PWC Surveyed Route is made in Annex "R" - Existing Government Reservations on Inuvialuit Lands, in the Inuvialuit Final Agreement (IFA) (1984). Section 7(4) of the IFA states that: "Title to Inuvialuit lands shall be subject to easements, servitudes, and rights-of-ways listed in Annex "R".



Proposed Inuvik to Tuktoyaktuk Road

Figure2.1-1

No further work was done on the proposed road for a number of years but recently new interest has risen amongst the communities of Tuktoyaktuk and Inuvik to make the road a reality. The Inuvik Tuktoyaktuk Highway Steering Committee was established in 1997 comprised of Council members from both communities. In 1998, the Department of Transportation struck a Stakeholder Advisory Committee, whose purpose was to provide the GNWT Minister of Transportation with advice with respect to the studies being undertaken for the Inuvik-Tuktoyaktuk road proposal. The Stakeholder Advisory Committee incorporates the membership of the Steering Committee, as well as business, youth and elders from each community. Based on consultation with the Stakeholder Advisory Committee, the 1977 PWC Surveyed route has been reconfirmed as the best route to investigate and develop.

2.1.2 Project Description and Alignment

The 1977 PWC Surveyed Route passes through rolling tundra with an elevation approaching 200 meters above sea level just north of Inuvik and then gradually decreasing in elevation as it proceeds northward towards the lowlands of the Tuktoyaktuk Peninsula. The route passes west of Noell Lake, follows the western shore of Husky Lakes and generally meanders northward around small peninsula lakes en route to Tuktoyaktuk. The area around Husky and Parsons Lakes harbours important fish and wildlife resources which must be protected and sustained.

To further optimize the route, an alternate point of departure from Inuvik, at the end of Navy Road, is also currently under consideration (Figure 1). This alternate, if adopted, would shorten the total length of road to be constructed by about 5 kilometres with resultant cost savings. For purposes of this report the original 1977 PWC Surveyed Route is used in considering land tenure options.

2.1.3 Design Parameters

Two standards of proposed road service are currently under consideration and both are referred to as all-weather road options. The first option is based on a design speed of 80 km/hr while the second option would be designed for a speed of 60 km/hr.

Both design options would have a road top width of 8.4 meters built on a minimum of 1.5 meters of embankment fill with 3:1 sideslopes. The 80 km/hr design option would have a lower maximum gradient (8%), compared with an 8-10% gradient for the 60 km/hr option. The lower maximum gradient for the 80 km/hr option would result in an increased stopping sight distance of 140 m, compared with 85 m for the 60 km/hr option and would also require more general fill and crushed granular base material than the 60 km/hr option. Both design options are assumed to require a 60 meter Right-of-Way (R.O.W.) for the full 140 km route and are used as the basis for considering land tenure options.

2.1.4 Land Ownership

The original 1977 PWC Surveyed Route passes through federal crown land, Commissioner's land, Gwich'in Settlement lands (privately held) and Inuvialuit owned land (privately held). Table 1 provides a summary of the land ownership and design parameters respecting the Inuvik-Tuktoyaktuk road. The total road length (provisional distances) is 140 km and covers some 840 hectares (84 sq. km).

Table 1

Inuvik-Tuktoyaktuk Road Land Ownership Breakdown and Design Parameters
Road Length and Area by Category

Category	Unit of Measure	Percent
Total road length	140.0 km	100.0
	840.0 ha (84.0 sq. km)	100.0
Total federal/crown land	39.9 km	28.5
	239.4 ha (23.94 sq. km)	
Total Commissioner's land	42.2 km	3.0
	25.2 ha	
Total Inuvialuit land	91.6 km	65.4
	549.6 ha (54.96 sq. km)	
Total Other Private land: Gwich'in	4.3 km	3.1
	25.8 ha (2.58 sq. km)	

Note: Provisional distances based on base mapping by the Engineering Division, DOT

Approximately 91.6 km of the total 140 km (65.4%) are on Inuvialuit owned lands (7(1)(a) and (b) lands). This covers some 549.6 hectares (54.96 sq. km). The 91.6 km are made up of three sections of road and is summarized in Table 2.

Table 2

Inuvialuit Lands Road Sections

Road Alignment Section	Section Start: km	Section End: km	Total km
Inuvik	6.4	13.0	6.6
Husky Lake	52.9	106.8	53.9
Tuktoyaktuk	106.8	137.9	31.1
Total			91.6

2.1.5 Government and Third Party Interests and Constraints

Based on interviews and examination of various administrative records the following observations can be made with respect to government and third party interests in the 1977 PWC Surveyed Route R.O.W. The accuracy of the data respecting government and third party interests is subject to the limitations expressed by various government agencies and the Inuvialuit Land Administration as of June 1999.

Crown Land Interests and Constraints

Based on DIAND administrative records, including confirmation through correspondence dated June 2, 1999 from Janis Peddle, Land Operations, DIAND - Inuvik District Office, the following interest/constraints were identified on federal crown land:

- There are numerous government and third party interests in the vicinity of the alignment but no evidence that any existing known interest is directly within the alignment R.O.W.
- The government and third party interests in the vicinity include: Well Sites; Land Use Permits; and Leases/Reserves.
- Confirmation of known cabins and a well site in the vicinity but not on federal crown land.

The Northern Oil and Gas Directorate, DIAND - Ottawa, is responsible for maintaining oil and gas dispositions information. The Oil and Gas Rights Digital Files were reviewed and the Rights Administrator was contacted for information regarding third party interests in the proposed road alignment. No evidence was found to indicate an oil and gas interest within the actual proposed road alignment. There is an existing Oil and Gas Concession Agreement between Imperial Oil and ILA for part of the Tuktoyaktuk 7(1)(a) lands. This is discussed in more detail in the following section on Inuvialuit land interests and constraints.

Inuvialuit Land Interests and Constraints

Based on Inuvialuit Land Administration records, the following interests/constraints were identified:

- There are no known ILA lands within the municipal boundaries in Inuvik and Tuktoyaktuk.
- ILA has some 30 residential leases (primarily cabins) along the Husky Lakes shoreline in proximity to the proposed road alignment. There is no evidence that any residential lease is directly within the alignment right-of-way.
- There exists an Oil and Gas Concession Agreement with Imperial Oil for part of the Tuktoyaktuk 7(1)(a) lands. Correspondence dated June 3, 1999 from Mr.

Hans Arends, Lands Administrator, ILA, confirmed that this Concession area “is generally located south and west of Tuktoyaktuk and may overlap a short section of the R.O.W. immediately south of Tuktoyaktuk. Since the Concession deals with subsurface rights, it is my understanding that the effect on the road would be negligible and would only require notification of Imperial Oil that a surface alienation would take place. We would also have to confirm to them that none of these works would reduce or prevent their right of access.”

Should the proposed road project proceed, a comprehensive review and update of government and third party interests and constraints on both federal crown land and Inuvialuit private lands will be required. Table 3 presents a summary of the type of government and third party interests that will need to be taken into account. Table 3 also provides information on the data sources and their respective location.

Table 3

Consideration of Government and Third Party Interests and Constraints

Ref. No.	Type of Interest	Data Source	Location
1	reservations to the Crown	Quad Maps	DIAND, Land Admin., Yellowknife
2	land grants and titled lands	Quad Maps	DIAND, Land Admin., Yellowknife
3	surface leases	Quad Maps	DIAND, Land Admin., Yellowknife
4	withdrawals from disposal	Quad Maps	DIAND, Land Admin., Yellowknife
5	rights-of-way	Quad Maps	DIAND, Land Admin., Yellowknife
6	lands set aside or transferred to administration and control of other departments	Quad Maps	DIAND, Land Admin., Yellowknife
7	agreements for sale	Quad Maps	DIAND, Land Admin., Yellowknife
8	land use permits	Land Use Map	DIAND, District Office, Inuvik
9	quarrying permits; District (attached to LU Permit)	Land Use Map	DIAND, District Office, Inuvik
10	water use authorizations and licences	Water Records	DIAND, Water Resources, Yellowknife
11	commercial fishing licenses	Commercial Licenses	RWED, Yellowknife
12	prospecting permits	Mining Records/Maps	DIAND, Mining Recorders Office, Yellowknife
13	mineral claims and leases	Mining Records/Maps	DIAND, Mining Recorders Office, Yellowknife
14	coal leases	Mining Records/Maps	DIAND, Mining Recorders Office, Yellowknife
15	oil and gas exploration licenses and agreements	Oil & Gas Dispositions Maps	DIAND, Oil & Gas Directorate, Ottawa
16	significant discovery licenses	Admin. Records/Maps	DIAND, Oil & Gas Directorate, Ottawa
17	parks & protected areas	Base Maps/GIS Base Maps/GIS	RWED, Parks & Visitor Services, Yellowknife DIAND, Environment & Conservation, Yellowknife
18	hazardous waste sites	Administrative Records Base Mapping	DIAND, Arctic Environmental Strategy, Yellowknife
19	Inuvialuit Private Land Interests	ILA Administrative Records	ILA, Tuktoyaktuk

Source: 1. Derived from DIAND Land Administration records and interviews, June 1999.
 2. Derived from ILA records and interviews, June 1999.

Heritage Resources

Based on the conclusions in the Rescan Environmental Services Report - Proposed Inuvik-Tuktoyaktuk Road: Environmental/Socio Economic Baseline Report (May 1999), it is likely that some detailed ground reconnaissance will be required since archaeological resources have been found on interior lakes near the proposed road alignment in the vicinity of the community of Tuktoyaktuk.

The general provisions of the IFA (as amended) and specifically Section 19 - Conduct of Operations of the ILA Rules and Procedures will need to be recognized. Section 19(a) states that:

- 19(9) *Where in the course of an operation, a suspected archaeological site or burial ground is unearthed or otherwise discovered, the Holder shall immediately:*
- (a) *suspend the operation on the site;*
and
 - (b) *notify the Administrator or an Inspector of the location of the site and the nature of any unearthed materials, structure or artifacts.*

2.2 Legislative and Regulatory Regime: Regional Framework

2.2.1 Inuvialuit Final Agreement

The Inuvialuit Final Agreement (IFA) is the agreement between the Committee for Original Peoples' Entitlement (COPE), representing the Inuvialuit of the Inuvialuit Settlement Region, and Canada, dated June 5, 1984. It includes the amending agreement made between the Inuvialuit Regional Corporation (IRC) representing the Inuvialuit and Canada in 1987.

The IFA came into force pursuant to the federal statute - the *Western Arctic (Inuvialuit) Claims Settlement Act*, Bill C-49. The IFA is a land claims agreement under subsection 35(3) of the *Constitution Act*. The Inuvialuit released Aboriginal claims to land in the Northwest Territories, the Yukon Territory and offshore, subject to the settlement legislation.

The IFA can be amended by consent of the Governor in Council and the Inuvialuit, as represented by the Inuvialuit Regional Corporation.

Section 2 - Definitions of the IFA contains a number of terms and definitions significant to the examination of land tenure options, specifically:

<i>Developer:</i>	<i>This means a person, government or other legal entity owning, operating or causing to be operated, a development wholly or partially in the Inuvialuit Settlement Region. This definition includes any Inuvialuit developer.</i>
<i>Development:</i>	<p><i>This refers to:</i></p> <ul style="list-style-type: none"> • <i>any commercial or industrial undertaking or venture (other than commercial wildlife harvesting). It includes support and transportation facilities relating to the extraction of non-renewable resources from the Beaufort Sea; or</i> • <i>any government project, undertaking or construction (whether federal, territorial, provincial, municipal, local, Crown agency or corporation), except:</i>
<i>Government:</i>	<i>This means the Government of Canada (the IFA does not include the Government of the NWT (GNWT) as "Government" but rather identifies the GNWT in a generic way as "government").</i>

2.2.2 Inuvialuit and Federal Crown Land

Section 7 - Inuvialuit and federal crown Land of the Inuvialuit Final Agreement (ILA) provides a key element of the framework for assessing and undertaking land related initiatives. Some relevant observation from Section 7 include:

- Laws of general application applying to private lands (including territorial laws and ordinances) apply to Inuvialuit lands and are subject to the IFA. The Inuvialuit enjoy all rights of property owners under laws of general application. The Inuvialuit and the Crown can agree to apply federal crown land laws and regulations to Inuvialuit lands.
- An Arbitration Board (established pursuant to Section 18) has authority to resolve: disputes relating to land matters including (a) certain municipal needs, and (b) certain road requirements; expropriation of Inuvialuit lands; and, terms and conditions of Participating Agreements.
- Under Chapter 27 of the Gwich'in Settlement Agreement the Gwich'in Tribal Council can exchange lands with the Inuvialuit. Any lands received in exchange shall be deemed to be Gwich'in lands under the Gwich'in Settlement Agreement.
- The Inuvialuit shall, by virtue of the Settlement Legislation, be granted 35,000 sq. miles of land, plus or minus a margin of error of 1 percent (Section 7(5)). The requirement to maintain the negotiated land quantum is significant in terms

of land tenure undertakings. Land surveys completed in early 1999 by the federal government pursuant to Section 7(7) indicate “excess” lands that were transferred to the Inuvialuit and which will have to be transferred back to the federal government.

- Title to Inuvialuit lands may only be conveyed to Inuvialuit persons or corporations, or to the Crown, subject to any agreements with adjoining First Nations.

2.2.3 Jurisdictional Categories

Two jurisdictional categories of land exist in the Inuvialuit Settlement Region in the Northwest Territories. Reserves under the *Indian Act*, if any, and Commissioner's lands are not discussed:

1. *Inuvialuit lands under the IFA*. The Inuvialuit hold these in three ways:
 - a. Category 7(1)(a) Inuvialuit Lands. Here the Inuvialuit have a fee simple title in the lands, and subsurface title to all mines and minerals. For these lands, the Inuvialuit act in general as private landowners. The lands are not federal lands, and any federal jurisdiction over the lands comes from the IFA.
 - b. Category 7(1)(b) Inuvialuit Lands. Here the Inuvialuit have a fee simple title in the lands excluding mines and minerals (other than specified substances such as sand and gravel). The lands are not federal lands, and any federal jurisdiction over the lands or the specified substances comes from the IFA. The federal government has the subsurface title to mines and minerals (other than specified substances), and retains jurisdiction over them, subject to the IFA.
 - c. Fee simple absolute title to the beds of all lakes, rivers and other water bodies found in Inuvialuit lands.
2. *Federal lands*. The federal government has jurisdiction over them subject to the IFA.

2.2.4 Inuvialuit Lands: Land Ownership

The Inuvialuit received title to the following lands under the Settlement legislation:

- approximately 4,200 sq. miles of land in fee simple absolute (including all minerals whether solid, liquid or gaseous and all granular materials) selected in the Western Arctic Region, in blocks of 700 sq. miles (more or less) near each of the six communities. This is subject to subsurface alienations, and existing surface rights for limited terms, both listed in the IFA. These lands are referred to as “section 7(1)(a)(i) lands.”
- a single block of approximately 800 sq. miles of land in fee simple absolute (including all minerals whether solid, liquid or gaseous and all granular

materials) in Cape Bathurst. Subject to the IFA, any alienations shall be terminated by Canada and the present moratorium on exploration and development shall continue until the time of conveyance. These lands are referred to as "section 7(1)(a)(ii) lands."

- approximately 30,000 sq. miles of lands in fee simple absolute (excluding oil, gas, related hydrocarbons, coal, native sulfur and minerals), subject to alienations for limited terms listed in the IFA. This does not affect holders of valid subsisting rights, granted pursuant to the *Territorial Lands Act* or its regulations and other appropriate legislation, and renewals of those rights. These lands are referred to as "section 7(1)(b) lands."
- fee simple absolute title to the beds of all lakes, rivers and other water bodies found in Inuvialuit lands.

Title to Inuvialuit lands is subject to easements, servitudes and rights-of-way listed in the IFA (Annex "R" of the IFA). The Crown retains ownership of waters in the settlement region.

All selected lands were transferred to the Inuvialuit Land Corporation (ILC) (or the Inuvialuit Regional Corporation (IRC)), for the Inuvialuit Land Corporation. Initially, the Inuvialuit Regional Corporation received the Inuvialuit lands for transfer to the Inuvialuit Land Corporation.

Title to Inuvialuit lands may only be conveyed to Inuvialuit persons or corporations, or to the Crown, subject to any agreements with adjoining First Nations. Leases and resource dispositions may be made to persons or corporations in accordance with the IFA and laws of general application. The Inuvialuit Land Corporation may exchange lands with Canada and the Gwich'in Tribal Council (pursuant to Section 7(44) of the IFA Chapter 27 of the Gwich'in Settlement Agreement).

Inuvialuit lands may be expropriated only by order of the Governor in Council. Compensation should be in the form of replacement lands, if possible. Replacement lands are deemed to be Inuvialuit lands.

2.2.5 Conveyance of Lands

Section 7(43) to (49) of the IFA specify the framework for the conveyance of lands:

- 7.(43) *The Inuvialuit Land Corporation and other corporations controlled by the Inuvialuit may, from time to time, exchange lands with Canada.*
- 7.(44) *Subject to any agreements that the Inuvialuit have entered into or may enter into with other native groups in adjoining land claims areas respecting the acquisition or disposition of their respective interests in land, title to Inuvialuit lands may not be conveyed except to Inuvialuit individuals or corporations controlled by the Inuvialuit or Her Majesty in right of Canada. For greater certainty, leases and other rights to use and occupy Inuvialuit lands for any purpose and*

dispositions of rights to explore, develop and produce resources owned by the Inuvialuit may be made by the Inuvialuit to persons or corporations in accordance with this Agreement and laws of general application.

- 7.(45) *The transfer or grant of Inuvialuit lands pursuant to subsection (44) and subsections (50) to (81) shall be exempt from tax. For greater certainty, the transfer to and the receipt by the Inuvialuit of the proceeds of such transfers or grants and any distributions thereof by Inuvialuit corporations shall be exempt from tax, including income tax, by federal, provincial, territorial or municipal governments. The Inuvialuit corporations shall separately account for such proceeds and any transfer or distribution thereof.*
- 7.(46) *For the purposes of the Income Tax Act, there shall be deemed to be no cost with respect to any acquisition or deemed acquisition of Canadian resource properties, as defined in paragraph 66(15)(c) of the Income Tax Act, by the Inuvialuit under this Agreement. However, net proceeds up to a total of \$10 million received by the Inuvialuit from the disposition of Canadian resource properties relating to lands described in subsections 9(3) and 9(4) shall be deemed, for the purposes of the Income Tax Act, not to be proceeds of the disposition of Canadian resource properties, and those proceeds, their transfer to and receipt by the Inuvialuit and any distribution thereof by Inuvialuit corporations shall be exempt from tax, including income tax, by federal, territorial, provincial or municipal governments. The Inuvialuit corporations shall separately account for such proceeds and any transfer or distribution thereof.*
- 7.(47) *No federal, territorial, provincial or municipal charge, levy or tax of any kind whatsoever shall be payable on Inuvialuit lands or based on the value or assessed value of Inuvialuit lands and, without limiting the generality of the foregoing, no capital, wealth, realty, school, water or business tax shall be payable on Inuvialuit lands or based on the value or assessed value of Inuvialuit lands.*
- 7.(48) *For the purposes of subsection (47), "land" does not include buildings on land, and all royalties, rents, profits and other revenues or gain derived from Inuvialuit lands shall be taxable under laws of general application except as otherwise provided by this Agreement.*
- 7.(49) *No federal, territorial, provincial or municipal charge, levy or tax shall be payable in respect of the transfer to or receipt by the Inuvialuit Regional Corporation of the Inuvialuit Land Corporation of Inuvialuit lands under the Settlement.*

2.2.6 Expropriation

Section 7(50) to (60) of the IFA contain the provisions respecting expropriation:

- 7.(50) *No Inuvialuit lands may be expropriated except by order of the Governor in Council.*
- 7.(51) *Canada recognizes the desire of the Inuvialuit to retain their*

- lands and therefore agrees that any expropriation shall provide suitable alternative lands in the Western Arctic Region, considered to be satisfactory by the Inuvialuit, in place of the expropriate (sic) lands if it is reasonably possible to so provide.*
- 7.(52) *If suitable alternative lands considered to be satisfactory by the Inuvialuit cannot reasonably be provided pursuant to subsection (51), monetary compensation shall be payable, together with interest, as contemplated by the Expropriation Act of Canada.*
- 7.(53) *The monetary compensation payable on an expropriation shall reflect the fair market value of the lands expropriated but shall take into account that such value is low relative to other areas in Canada and that this Agreement is intended to constitute a fair exchange between the Inuvialuit and Canada. Where a cost base is agreed on, the compensation payable on an expropriation shall be an amount equal to the greater of the fair market value and that cost base.*
- 7.(54) *On an expropriation of Inuvialuit lands, compensation shall be payable for the loss of the use of the land. Part of the land value, in addition to other land values, shall consist of its intrinsic value for wildlife.*
- 7.(55) *Compensation for actual harvesting loss shall be provided for Inuvialuit harvesters under section 13 and shall not be considered in determining the value of the land under expropriation.*
- 7.(56) *Where Inuvialuit lands are expropriated, the exclusive harvesting rights set out in paragraph 14(6)(d) shall continue to apply. For greater certainty, the exercise of such rights by the Inuvialuit is subject to the laws of general application respecting public safety and conservation.*
- 7.(57) *On an expropriation, any disagreement between Canada and the Inuvialuit concerning the following matters shall be referred to the Arbitration Board pursuant to section 18:*
- (a) *whether it is reasonably possible for the Government to provide suitable alternative lands satisfactory to the Inuvialuit;*
 - (b) *the compensation and interest payable in the event that suitable alternative lands are not available; and*
 - (c) *any other matters arising on expropriation, including payment of the costs of any arbitration.*
- 7.(58) *Compensation for expropriation, whether in the form of suitable alternative lands or money, shall be tax free to the Inuvialuit.*
- 7.(59) *Where lands are required to be conveyed pursuant to subsections (61) to (81), the provisions of subsections (50) to (58) do not apply.*
- 7.(60) *For the purposes of subsections (61) to (81), the following provisions apply:*

- (a) *where Inuvialuit lands are appropriated, if possible, equivalent alternative lands in the Western Arctic Region suitable to the Inuvialuit shall be provided.*
- (b) *if the parties cannot agree on appropriate equivalent lands, the matter shall be referred to the Arbitration Board pursuant to section 18 and the arbitrator shall decide the issue of equivalence and whether payment shall be made in land or money;*
- (c) *the value of the lands shall be based on their worth before being required for government purposes, and shall include, in addition to other land values, their intrinsic value for wildlife;*
- (d) *compensation for actual harvesting loss shall be provided to Inuvialuit harvesters under section 13 and shall not be considered in determining the value of the land under subsections (61) to (81);*
- (e) *lands acquired by the Inuvialuit Land Administration through exchange by virtue of subsections (61) to (81) shall be deemed to be Inuvialuit lands and receipt of compensation for appropriation in whatever form shall be tax free to the Inuvialuit; and*
- (f) *on appropriated lands, the exclusive harvesting rights set out in paragraph 14(6)(d) shall continue to apply. For greater certainty, the exercise of such rights by the Inuvialuit is subject to the laws of general application respecting public safety and conservation.*

2.2.7 Municipal Requirements for Land

Section 7(61) to (63) of the IFA set out the municipal requirements for land. A central concept in dealing with municipal requirements is that of “nominal rent” - an area of ongoing disagreement between the IRC and the GNWT.

- 7.(61) *Where any government or municipality, including any settlement, hamlet, or town, demonstrates a need, arising out of the provision of government services, for Inuvialuit lands within the area of or adjacent to the municipal jurisdiction to meet public convenience and necessity, and such lands cannot reasonably be obtained from other sources, the Inuvialuit Land Administration, on receipt of notice of the extent and location of the lands so required, undertakes to negotiate in good faith the terms and conditions, including nominal rent, on which the government might obtain the lands by sale, lease or other disposition or arrangement.*
- 7.(62) *Failing successful conclusion of negotiations under subsection (61) within a period of ninety (90) days following receipt of the notice referred to in that subsection, either party may refer the matter to the Arbitration Board pursuant to section 18 and subsection (60).*
- 7.(63) *Each party shall submit its final offer to the arbitrator who may select the one considered more reasonable or, after mediation, make a compromise ruling bearing in mind, on the one hand, the governmental use for which the land is required and, on the other, the desire of the Inuvialuit to retain their lands.*

2.2.8 Public Road Right-Of-Way

Section 7(64) - Public Road Right-Of-Way, stipulates a procedure respecting appropriation of lands for a public road right-of-way.

- 7.(64) *For the purposes of appropriating lands for a public road right-of-way, the following procedures apply:*
- (a) *the Government shall consult with the Inuvialuit Land Administration on all matters of interest or concern to the Inuvialuit concerning road development before approval is given by the Government to any road project;*
 - (b) *where approval is given to commence the development of a particular road project, the Government shall negotiate with the Inuvialuit Land Administration for the acquisition of the necessary public road right of way on the basis of compensating the Inuvialuit by providing, if possible, alternative land of equivalent value in the Western Arctic Region that is suitable to the Inuvialuit;*
 - (c) *the Government shall give notice to the Inuvialuit Land Administration of the amounts and location of land it requires and shall at the same time make an offer to the Inuvialuit Land Administration of suitable alternative and in the Western Arctic Region and having equivalent value to that of the land being acquired; and*
 - (d) *where the Government and the Inuvialuit Land Administration are not able to conclude an agreement as to the location or amounts of suitable alternative land within Forty-two (42) days from the date of the notice referred to in paragraph (c), the matter shall be referred to the Arbitration Board pursuant to section 18 and subsection (60).*

2.3 Inuvialuit Land Administration

The Inuvialuit Regional Corporation (IRC) administers Inuvialuit lands through its division, the Inuvialuit Land Administration (ILA). Section 6(1) (a) of the Inuvialuit Final Agreement (IFA) provides that the administration of Inuvialuit lands and responsibility for matters related to the supervision, management and administration of such lands will be through the Inuvialuit Land Administration.

2.3.1 Inuvialuit Land Administration: Rules and Procedures

The Inuvialuit Land Administration (ILA) discharges its responsibility for supervision, management and general administration of Inuvialuit lands through *Rules and Procedures* adopted by the Inuvialuit Regional Corporation on April 1, 1986. These *Rules and Procedures* have been amended from time to time in accordance with the By-Laws of the IRC. The *Rules and Procedures* “govern the manner in which the ILA shall administer the Inuvialuit lands”. It is significant to note that the *Rules and Procedures* were developed and adopted outside the IFA and have not been formally recognized by either the GNWT or Canada. For purposes of assessing land tenure option it has been assumed that the Rules and Procedures would apply.

2.3.2 Inuvialuit - GNWT Land Access and Land Usage History

Since the IFA was concluded in 1984, general access to and across Inuvialuit lands has been one of the most significant, and at times controversial, areas of ongoing relations between the Inuvialuit and the GNWT. The absence of a formal “implementation plan” for the IFA is viewed as a significant deficiency and a contributing factor to land access and usage disputes.

Summarized below are selected references to illustrate the history of Inuvialuit - GNWT land access and usage:

- Articles 7(16) of the Inuvialuit Final Agreement (IFA) provides that “agents or employees of governments shall have the right to enter on and cross Inuvialuit lands for legitimate government purposes relating to the management of their programs or enforcement of their laws, and such access, where applicable, shall be in accordance with appropriate laws or approved procedures”.
- The Inuvialuit have interpreted Article 7(16) to mean that they have the authority to impose access procedures and fees on government, through the *Inuvialuit Land Administration’s Rules and Procedures*. The *Rules and Procedures* would also obligate government to abide by economic measures provisions.
- Under Article 7(61), where any government or municipality demonstrates a need, arising out of the provision of government services, for Inuvialuit lands within the area or adjacent to the municipality, the ILA will negotiate the terms and conditions, including nominal rent, on which government might obtain the lands by sale, lease or other disposition or arrangement.
- During the IFA land selection process, without the benefit of legal surveys, the Inuvialuit selected lands that included government infrastructure such as

garbage dumps, sewage lagoons, airports and related access roads. When the problem was identified, the GNWT requested that Canada initiate land exchanges to resolve the issue. Canada would not initiate land exchanges in the absence of legal surveys. The GNWT began negotiating short-term rental arrangements with the Inuvialuit in order to access government infrastructure sites.

- The federal government has taken the position, consistent with its position in other jurisdictions (as identified during interviews), that land usage and access are bilateral issues between the GNWT and the Inuvialuit. Canada has stated that it has no responsibility regarding the payment of incremental land rental costs, or for initiating land exchanges. The one notable exception to this position by the federal government relates to the 1991 devolution of airports to the GNWT. The Department of Transportation, GNWT, insisted on and received confirmation that Canada would negotiate land exchanges with the Inuvialuit for all disputed airport lands. Until such time as a land exchange has taken place, Transport Canada is responsible for all costs associated with the use of the airport lands in question.
- The GNWT has continued to address the issue of “nominal rent” as it relates to public infrastructure. Should no resolution be achieved, the GNWT has the option of referring the matter to the Arbitration Board pursuant to Section 18 of the IFA.
- In December 1998, the IRC, IGC, DIAND, YTG and the GNWT agreed to establish an Inuvialuit Final Agreement Implementation Coordinating Committee (IFAICC) with a mandate to:
 - *monitor the fulfillment of the ongoing obligations of the parties pursuant to the Inuvialuit Final Agreement and may, from time to time, make recommendations for the ongoing implementation of the Inuvialuit Final Agreement and the continued role of the IFAICC.*
 - *consider the development of a written agreement (implementation plan) with respect to the obligations of the parties under the IFA.*
 - *The IFAICC is intended to resolve issues arising with respect to the implementation of the Inuvialuit Final Agreement prior to seeking resolution through arbitration as provided for in Section 18.*

2.4 Economic Valuation and Regional Economic Impact of the Road

The Department of Transportation commissioned an independent study to conduct an economic evaluation and regional economic impact analysis of the construction and operation of the full Inuvik to Tuktoyaktuk road, some 140 km.

The study was completed by Nichols Applied Management in March 1999 and provided an important element in the consideration of land tenure options and strategic considerations respecting Inuvialuit owned lands. The conclusions of the study - *Benefit-Cost and Regional Economic Analysis: Inuvik to Tuktoyaktuk Road*, are summarized below.

Project Benefits

- Prices in Tuktoyaktuk are expected to decrease as transportation and storage costs are reduced and more movement of persons between Inuvik and Tuktoyaktuk increases price competition.
- Tourism is expected to increase as the ability to drive to the Beaufort Sea furthers the appeal of the Inuvik region. This will lead to increased tourism spending.
- People, businesses, and public sector organizations including the health system in Tuktoyaktuk will have increased access to Inuvik, the regional centre. This will likely mean an increase in operating efficiencies. Individuals are expected to travel more frequently between the communities, reducing their isolation.
- The Department of Transportation will not have to maintain an ice road between Inuvik and Tuktoyaktuk.
- Tuktoyaktuk and Inuvik will have increased access to gravel and sand resources.

The road is not expected to increase the likelihood of oil and gas or fisheries development in the region. If these resource developments were to take place, the road may increase access and the efficiency benefits will increase. However, there are no indications that further oil and gas will take place in the foreseeable future.

Some identified benefits were not further quantified because no ready market value estimates were available. These include the anticipated increase in the quality and variety of goods available in Tuktoyaktuk and the increased access for hunters and trappers.

Project Costs

The Department of Transportation developed a preliminary construction cost estimate. Other costs will be incurred as well because public money will have to be spent to realize some of the benefits. The cost are listed below:

- The total construction cost of the road is estimated at \$100 million. This assumes a 60 km/hour design standard. The Department also developed a \$135 million cost estimate for a road with an 80 km/hour design standard. The \$100 million cost was used in the analysis.

- Maintenance of the all-weather road is estimated at \$10,000 per kilometer or \$1.4 million per year.
- The tourism industry will need to spend money to supply the products desired by visitors. This includes the cost of restaurant meals, tour operator supplies, wholesale grocery, and bulk fuel.
- Increased mobility implies costs, including additional ground transportation costs and increased accidents.

Some costs were not quantified because no market values are available. These include the cost of increased hunting and trapping pressure and possible impacts of the road on wildlife migration patterns.

Benefit-Cost Analysis

The benefit-cost analysis compared the discounted benefits and costs of the Inuvik to Tuktoyaktuk road project. The discounted benefits need to be greater than the discounted costs for the project to be economically viable. A benefit-cost ratio of one or larger and a positive value of the net present value of the difference between the costs and benefits indicates economic viability.

The benefit-cost ratio of the project is estimated at 0.26, assuming a 7.5% discount rate, and the present value of the net benefits is estimated at minus (-) \$66 million. This means that the project is not viable from a strict economic perspective.

This result is in line with other earlier assessments of the economics of the Inuvik to Tuktoyaktuk and similar roads, which yield benefit cost ratios ranging from 0.11 to 0.27.

The Nichols Applied Management report notes however, that many public investments in infrastructure and programs are made on the basis of social rather than economic considerations. The regional economic impact analysis looks at the project from a regional development perspective, focusing on redistributing economic activity and benefits among regions.

Regional Economic Impact Analysis

The project is expected to generate employment and income benefits to the region in the following ways:

- local hiring of construction workers and project spending on wages, materials, and equipment during construction;
- increased local hiring of maintenance workers and spending on wages, materials, and equipment for the maintenance of the all-weather road as compared to annual spending on the ice road; and
- increased tourism spending accruing to local operators and their suppliers.

These regional construction impacts are estimated at:

- \$77 million in business and labour income; and
- 600 person-years of on-site employment.

Much of the business income will leave the regional economy as payment to suppliers, including equipment lease payments. These economic impacts accrue to the region over the seven year construction period assumed in the analysis. Considering the limited annual construction period, the project's construction may require some 170 workers per year, or 8% of the total workforce. The project could also provide additional training positions for persons interested in equipment operations and the heavy duty mechanics trade.

The ongoing road maintenance will also provide economic benefits. These are estimated at:

- additional business and labour income of \$1.1 million per year; and
- additional employment of five person-years per year.

The anticipated increase in tourism will increase the employment opportunities in the region. This may eventually reach an additional 50 person-years of employment by 2025.

Seen from a regional perspective, the project strengthens the local economy by providing additional business and labour income and by creating additional jobs. This is significant for the Inuvik Region, which has unemployment levels well above those in, for example, Yellowknife.

Assuming that the project is financed from outside the study area, the employment and income benefits will be without cost to the region. This means that the project will lead to a redistribution of income within the Northwest Territories. The redistributive effect of the project is reduced if it is financed in part by regionally-based organizations. In that case, the project would likely pre-empt other investment in the region.

Community Construction Approach

The Nichols Applied Management report also examined an alternative construction scenario for consideration given the estimated capital cost of the road project. It is possible to construct the road not as a short-term construction project, but as a long-term regional development initiative. The community construction approach, which would mean the construction of about one kilometer of road per year, has the following annual economic impacts:

- additional business and labour income estimated at \$75,000; and
- additional employment estimated at 6 on-site person-years.

The community construction approach would contribute to the economic development of the region, but on a much reduced scale as compared to the seven year construction scenario.

It would:

- provide a modest stimulus to the regional economy, a policy goal that may be of interest to the GNWT; and
- provide some training opportunities for local people, especially if a way can be found to deliver the appropriate trades training in the region.

The community construction approach would not place any undue stress on the labour market of the region and provide one or maybe two training positions for equipment operators and heavy duty mechanics.

Conclusion

Construction of the Inuvik to Tuktoyaktuk road can be a tool for regional economic development. It provides significant income and employment benefits to the Inuvik region during both the construction and maintenance of the road. This region has not seen a lot of economic development since the oil and gas industry withdrew from the area.

The project would increase the appeal of the area as a tourism destination by providing road access to the Beaufort Sea and completing a "coast-to-coast-to-coast road system". This would help in the further development of the tourism industry.

The project is not attractive from a strict economic point of view because the total economic costs exceed the anticipated benefits by a wide margin. The project, if built, will not generate new wealth for the Northwest Territories. It will, however, contribute to the regional economy and make local businesses and people better off.

The road project would be subject to the provisions of Section 10 - Participation Agreements and Section 16 - Economic Measures of the IFA, as well as Section 16 of the *ILA Rules and Procedures*. Based on the available information, it appears that Section 10 and 16 would also apply in any land tenure option chosen. Key provisions of Section 10 and 16 of the IFA include:

Section 10: Participation Agreements

Section 10 of the IFA sets out a number of requirements respecting "development" on Inuvialuit lands, including:

- 10.(2) *Except as otherwise agreed by the Inuvialuit Land Administration, before exercising his guaranteed right of access, a developer must have concluded a valid Participation Agreement with the Inuvialuit Land Administration setting out the rights and obligations of the parties respecting the activity for which the access is being granted.*
- 10.(3) *The Inuvialuit Land Administration shall have the right to negotiate with the developer/applicant an appropriate land rent (not to include royalty revenues) and a Participation Agreement that may include specific terms and conditions respecting the nature and magnitude of the land use for which the access is being sought. Without limiting their generality, the terms and conditions may also include:*
- (a) costs associated with any Inuvialuit Land Administration inspection of the development work sites and the nature and scope of such inspection;*
 - (b) wildlife compensation, restoration and mitigation;*
 - (c) employment, service and supply contracts;*
 - (d) education and training; and*
 - (e) equity participation or other similar types of participatory benefits. As amended January 15, 1987*
- 10.(4) *The term of a Participation Agreement may continue until the termination date of the right issued or the interests accorded by Canada to which the Participation Agreement relates.*
- 10.(8) *Where the parties have not been able to agree on a Participation Agreement, the matter shall be referred to the Arbitration Board pursuant to section 18. The Arbitration Board shall have before it as the basis of its arbitration the last comprehensive proposal put forward by each of the parties. The parties shall promptly submit to the Arbitration Board the reasons for their positions. As amended January 15, 1987*

Section 16: Economic Measures

The IFA sets out a number of objectives, including:

- 16.(2) *Canada and the Inuvialuit agree that the economic measures set out in this section should relate to and support achievement of the following objectives:*
- (a) full Inuvialuit participation in the northern Canadian economy; and*
 - (b) Inuvialuit integration into Canadian society through development of an adequate level of economic self-reliance and a solid economic base.*

Section 16(6) indicates that government (which includes the GNWT in the definition) agrees:

- (a) to use its best efforts to overcome any institutional prejudices that may exist against the Inuvialuit;*
- (b) to facilitate Inuvialuit access to governmental economic assistance programs of general application; and*
- (c) to take the measures it considers reasonable to afford economic*

opportunities to Inuvialuit with respect to employment and projects within the Inuvialuit Settlement Region.

- 16.(7) *With respect to any business activity contemplated by the Inuvialuit, the government agrees to use its best efforts to:*
- (a) provide the Inuvialuit, on request, with access to any available and releasable information or data;*
 - (b) direct the Inuvialuit to the appropriate contacts or sources of information; and*
 - (c) facilitate expeditious consideration by the government of Inuvialuit applications.*

The Participation Agreement requirements set out in Section 16 of the ILA *Rules and Procedures* are discussed in more detail in Section 4.4 of this Report.

3. PUBLIC INFRASTRUCTURE INVESTMENT ON NON-PUBLICLY OWNED LAND

3.1 Policy Issues and Considerations

There are two policy questions central to the consideration of land tenure options respecting public infrastructure investment on non-publicly owned land:

1. What is a public good?
2. Should roads be considered fully as a public good?

From a broad legal and policy perspective, the *Law of Real Property* (Oosterhoff and Rayner, 1985) provides the necessary context to consider the two policy questions:

“For the most part the expression “highway” in this section is used as a generic term to denote public highways, roads, streets, lanes, walkways, squares and other public thoroughfares over land.

A highway is a way open to the public at large for travel or transportation without distinction, discrimination or restriction except such as is incidental to regulations calculated to secure to the general public the largest practical benefit therefrom and enjoyment thereof.

A highway is a way over which all members of the public are entitled to pass and repass and conversely every piece of land which is subject to such public right of passage is a highway or part of a highway. A highway includes the public streets of an urban district equally with the connecting roads between urban districts. To constitute a highway, there must be some notion of a passage which begins somewhere, and along which the public have a right to drive or walk from its beginning to its end. A highway need not be a thoroughfare nor only for vehicular traffic. A footpath if open to the public generally is a highway. A public highway may exist over land or along a navigable watercourse.

Title to Highways

At common law a person who dedicated or was presumed to have dedicated land as a public highway was deemed to have retained the property in the soil. In England, there is a general presumption that the owner of land abutting a highway is the owner also of the soil to the centre line of the highway or usque ad medium filum viae.

In the United States in the absence of an express statutory provision for the fee to the soil beneath a highway to vest in the municipality or other public authority the creation of a public highway vests in the public a mere right of passage in the nature of a public easement with the fee in the soil remaining in the abutting owners.

In Canada, as contrasted to both England and the United States, the general rule is that there is vested in a municipality a “qualified property (in a highway) for the benefit of the whole body of a corporation.

Municipalities “are in truth but trustees of the highways within their municipality, the ways being vested in them mainly so that they may the better perform their duties towards all of the [Queen’s] subjects in respect of them”. While the fee of a highway may be in a municipality, the municipal ownership in a highway is not an absolute beneficial ownership identical with the rights.

Use of a Highway

The highest right in highways is the right of the public to travel over them. Every subject has the right to use all public highways whether within or without corporate limits of a municipality and without any invitation from anyone. It is an absolute right. The right of passage is not confined to that part which is used as the via trita but to the whole width of the road not in the actual use of another traveler.” (Oosterhoff and Rayner, 1985)

GNWT Interests

The GNWT has an interest to guarantee unrestricted and equal public access, benefit and enjoyment of publicly financed highways that establish transportation links between communities, settlement areas and adjacent provincial and territorial highway networks. It also has an interest to uphold equal and unrestricted public access to streets and roads on settlement lands to the extent they are financed by territorial public monies.

The territorial authority over highways, streets and roads is found in Section 16(o) of the *Northwest Territories Act*:

16. The Commissioner in Council may, subject to this Act and any other Act of Parliament, make ordinances for the government of the Territories in relation to the following classes of subjects:

(o) the closing up, varying, opening, establishing, building, management or control of any roads, streets, lanes, or trails on public lands;

The GNWT is viewed as having a number of interests with respect to local roads and highways.

- Ensuring local transportation needs are met: The quality, extent and alignment of municipal/community streets and roads are a local interest exclusively. The territorial interest is minimal except that all citizens should equally enjoy their use insofar as they are financed by territorial monies.
- Local transportation: Local transportation, i.e., municipal streets and roads, are a municipal jurisdiction under the *Cities, Towns and Villages Act*. Local authorities may build, maintain, realign and/or close municipal streets and roads.

The *Motor Vehicle Act* delegates to municipalities the regulation of local traffic on municipal streets and roads through specific by-law making authorities, eg., parking, crosswalks, speed limits, erection and placement of traffic control devices (signage, etc.).

Local transportation is generally limited to streets and roads within municipal corporate limits or block land transfers.

- Public highways: Under the authority of the *Public Highways Act*, the Commissioner of the Northwest Territories may designate public highways. All public highways in the Northwest Territories are listed in the Highway Designation and Classification Regulations pursuant to the *Public Highways Act*, Public highways (and winter road alignments) are territorially financed, owned, managed and controlled right-of-ways. In addition to inter-community transportation, public highways often transit one or more

land claim settlement areas and link to highways in adjoining provincial or territorial jurisdictions. Public highways involve a broad and general public interest that transcends specific locales and jurisdictional boundaries.

Within the Northwest Territories, access and use of public highways and right-of-ways is regulated by the *Public Highways Act* and the *Motor Vehicles Act*. National and international inter-jurisdictional agreements and conventions govern the reciprocal recognition between provinces, territories and states of driver's licenses, vehicle registrations, rules of the road and traffic signage.

- Private highways: Private individuals or corporations may own or lease their own right-of-ways and operate private highways for their own purposes. By virtue of ownership, the owner may restrict access and use of a private highway to designated persons or vehicles.

To the extent that the owner/operator restricts public access to a private highway, the territorial *Motor Vehicle Act*, Chapter M-16, may not apply; although as a law of general application, the Act has a very broad and inclusive definition of "highway". Section 1:

"Highway means a road, place, bridge or structure, whether publicly or privately owned, that the public is ordinarily entitled or permitted to use for the passage of vehicles and includes:

- (a) a privately or publicly owned area that is designed and primarily used for the parking of vehicles, other than the driveway of a private dwelling;*
 - (b) where a plan of survey or other instrument establishes a highway, the area between the boundary lines of the highway as shown on the plan of survey or instrument;*
 - (c) a sidewalk, pathway, ditch or shoulder adjacent to and on either side of the travelled portion of the road or place and the area between the sidewalk, pathway, ditch or shoulder and the travelled portion of the road or place; and*
 - (d) a road on a frozen body of water or water course or a road that can be used for only a portion of a year.*
- Protecting national standards: There is a large public safety interest in preserving common and standard rules of the road as well as traffic signage across the territorial jurisdiction and in conformity with national and international conventions.

Aboriginal governments may restrict or prohibit public areas to private highways on settlement lands that are financed independently of territorial public funds.

3.2 Experience in Other Jurisdictions

The policy issues and considerations respecting public infrastructure investment on non-publicly owned land identified in the previous section are also evident in the experience of other jurisdictions. Based on literature reviews and/or interviews with various officials in ministries of transportation in Ontario, New Brunswick, Saskatchewan, Alberta and British Columbia a number of observations can be made.

- Many comparable highway projects affecting First Nations lands in provincial jurisdictions are within the purview of the *Indian Act* given that reserve lands are often involved. Recognizing that while the IFA is a separate and unique undertaking, the general principles between the IFA and *Indian Act* are comparable with respect to the issue of access.
- There has generally been a long period of time required for transportation officials to fully recognize and treat First Nations as “private land owners” in land access/tenure negotiations.
- Road projects affecting, crossing, or located on Aboriginal lands is now emerging as part of the new operating environment of many provincial ministries of transportation. Many jurisdictions are gradually making the necessary internal organizational adjustments.
- There is a general absence of a cohesive policy framework to guide the land access/tenure issues respecting Aboriginal lands. The one identified exception is the Ministry of Transportation and Highways, Government of British Columbia, which has adopted a government wide policy respecting “Procedures For Avoiding Infringement Of Aboriginal Rights” (1997). The policy approach is in part based on a risk management model to identify, avoid where possible, and negotiate as required to ensure that public interest is maintained while respecting Aboriginal rights.
- The federal government has generally taken a “hands-off” position across most provincial and territorial jurisdictions respecting land access issues and negotiations between transportation agencies and First Nations. The history of Inuvialuit-GNWT land access and land usage (as discussed in Section 2.3.2 of this Report) reflects this federal position.
- Expropriation of Aboriginal lands (even in cases of legitimate and compelling public safety concerns) is generally not undertaken.
- Land “exchanges” (while following a similar process to an expropriation undertaking) and rental/lease arrangements for roads affecting Aboriginal lands are more common options followed. There does however remain a preference by transportation agencies for ‘ownership’, depending in part on whether the proposed project is a new road or changes (i.e., extension, realignment) to an existing road.

- The complexity, legal costs, allocation of staff time and lead time required for negotiation/mediation between transportation agencies and First Nations is significant. Several examples were identified that required up to a decade or more to conclude.
- A number of land access agreements that have been reached in other jurisdictions, while of a generally long term nature, have “reversionary clauses” - where in cases the land is no longer required for highway purposes it reverts back to the First Nation.
- The issue of “access” versus “tenure” is clearly a key consideration. The very notion of access implies a “temporary or transient right”. This is in contrast to the concept of tenure which implies a more permanent right to occupy or develop land.

From a broader policy perspective one of the two central questions: “Should roads be considered fully as a public good?”, there is an emerging interest to “*explore*” other models based on a public-private partnership approach of meeting public need for access to roads through ensuring “tenure” without necessarily having public ownership. Highway 407 in Ontario and the Fredericton-Moncton Highway in New Brunswick are recent examples.

There does however remain a cautious legal and administrative perspective that favours a stronger degree of “certainty” of tenure that direct ownership has historically afforded public agencies.

4. LAND TENURE OPTIONS AND ISSUES RESPECTING INUVIALUIT OWNED LANDS

The Department of Transportation initially identified four possible options for consideration, with no priority being assigned: Land purchase; Land expropriation; Land exchange; and Land lease.

The baseline from which the options were assessed included: legislative and regulatory regime; Inuvialuit-GNWT land access and usage history; the parameters discussed in detail in Sections 2.1.4 - Land Ownership and 2.1.5 - Government and Third Party Interests and Constraints; and, policy considerations (see Table 4). The quantum of Inuvialuit land involved and considered in each option is:

- Road length of 91.6 km (with a 60 m R.O.W.); and
- Total area of 549.6 ha (54.96 sq. km).

Presented below are the results of the assessment of the four options initially identified. The results are presented in a format which includes a description of the option, identification of the key issues and considerations. It is assumed at the outset that all the associated environmental and regulatory approvals will have been obtained by the road developer and that the four land tenure options are distinct undertakings. Each option concludes with a statement of key findings and opinion as to the feasibility of the option. Table 4 provides an options summary and comparison using some standard evaluation factors and criteria.

4.1 Option One: Land Purchase

While it may be desirable from a certainty of tenure perspective for the GNWT to obtain fee simple title to the lands required for the road right-of-way, the IFA precludes this as an option. Section 7(44) of the IFA stipulates that title to Inuvialuit lands may only be conveyed to Inuvialuit persons or corporations, or to the Crown, subject to any agreements with adjoining First Nation:

- 7.(44) *Subject to any agreements that the Inuvialuit have entered into or may enter into with other native groups in adjoining land claims areas respecting the acquisition or disposition of their respective interests in land, title to Inuvialuit lands may not be conveyed except to Inuvialuit individuals or corporations controlled by the Inuvialuit or Her Majesty in right of Canada. For greater certainty, leases and other rights to use and occupy Inuvialuit lands for any purpose and dispositions of rights to explore, develop and produce resources owned by the Inuvialuit may be made by the Inuvialuit to persons or corporations in accordance with this Agreement and laws of general application.*

In addition, the requirement to maintain the negotiated land quantum (plus or minus a margin of error of 1 percent) set out in Section 7(5) of the IFA presents a further limitation:

- 7.(5) *The Inuvialuit shall, by virtue of the Settlement Legislation, be granted a total of 35,000 square miles of land, plus or minus a margin of error of 1%. If the final ground survey shows a square mileage in excess of 35,350, the Inuvialuit Regional Corporation or Inuvialuit Land Corporation shall promptly reconvey to Canada an area of paragraph (1)(b) land equal to the*

excess. If the final ground survey shows a square mileage less than 34,650, Canada shall promptly convey to the Inuvialuit Regional Corporation or Inuvialuit Land Corporation an area of paragraph (1)(b) land equal to the deficiency. These adjustments shall be made utilizing land located in the Wynniatt Region adjustment area shown in Annex K-6. As amended January 15, 1987

- DIAND Lands Administration (Claims Implementation Section) has now completed all the required surveys of Inuvialuit lands (Section 7(7) of the IFA) and the calculations are indicating that there are some “excess” lands (Section 7(5) of the IFA) beyond the 1% margin of error and that those “excess” lands are to be returned to the federal government. While the issue of “equivalent valued lands” remains, this may provide an opportunity to consider a land exchange for the proposed Inuvik to Tuktoyaktuk road.

Based on the available information respecting government and third party interests and constraints in the land directly within the proposed alignment for the road (see Section 2.1.5 of this Report), there does not appear to be a concern at this time respecting existing rights, interests, commitments and activities. Depending on the decision as to whether to proceed with construction of the road and when, government and third party interests and constraints will have to be again fully considered at that time in the context a land purchase option should it be possible through an amendment to the IFA or a transfer from the federal government.

Findings:

It may be possible to consider requesting that the subject lands be purchased by the federal government from the Inuvialuit and in turn transfer the lands to the Commissioner of the NWT pursuant to Section 44 of the *Northwest Territories Act*, Chapter N-27. There is little evidence to support the possible interest by the federal government to consider such a request.

Based on the available information through a literature review and interviews, it is reasonable to conclude that land purchase by the GNWT is not an option at this time.

4.2 Option Two: Land Expropriation

The concept of expropriation as referred to in various sections of the IFA can be interpreted in several ways. For purposes of this Report, the term “expropriation” will be interpreted from a legal definition:

“A voluntary surrender of rights or claims; the act of divesting oneself of that which was previously claimed as ones’ own, or renouncing it” (Black’s Law Dictionary, 1979)

For purposes of examining the range of potential land tenure options, the option of outright expropriation is deemed to be distinct from a land exchange arrangement - recognizing that the end result would be similar in that there has been a transfer of title and rights. Only the federal government has the right to expropriate Inuvialuit lands. The GNWT does not have direct expropriation rights but rather would have to request the federal government to do so on its behalf.

Section 7(50) to 7(60) of the IFA provides the framework within which expropriation of Inuvialuit lands would take place. The key points respecting Section 7(50) to 7(60) include:

- No Inuvialuit lands may be expropriated except by order of the Governor in Council.
- Any expropriation shall provide suitable alternative lands, considered to be satisfactory by the Inuvialuit, in place of the expropriated land if it is reasonably possible to so provide. This provision is consistent with the need to maintain the negotiated land quantum stipulated in Section 7(5) of the IFA (as discussed in Option One).
- Where suitable alternative lands are not able to be provided, monetary compensation shall be payable as contemplated by the *Expropriation Act* of Canada. The actual expropriation (and land exchange) process would be undertaken under the authority of the Minister of Public Works Canada.
- The procedure for expropriation is specified in the Canadian *Real Property Act* and detailed in the Treasury Board of Canada "Manual on Real Property Management." This includes the key areas of: acquisition; evaluation; and environmental assessment.
- The authority to expropriate stems from Section 4(1) of the *Expropriation Act*: - any interest in land that in the opinion of the Minister of Public Works Canada, is required by the Crown for a public work or other public purpose may be expropriated. While the *Expropriation Act* does identify some exemptions, including a number of recent comprehensive claims (Cree-Naskapi lands; Sechelt lands; and Tetlit Gwich'in Yukon land) there is no reference to the Inuvialuit lands.
- The literature review and interview results indicate there is no record of any expropriation of any lands in the Northwest Territories by either the federal government or the GNWT (pursuant to the *Expropriation Act*, R.S.N.W.T., 1988, c E-11).
- The results of the Benefit-Cost Analysis (see Section 2.4 of the Report) does not provide compelling rationale to support a "public interest" argument necessary in an expropriation undertaking.

Based on the available information respecting government and third party interests in the land directly within the proposed alignment for the road (see Section 2.1.5 of the Report), there does not appear to be a concern at this time respecting existing rights, interests, commitments and activities. Depending on the decision as to whether to proceed with construction of the road and when, government and third party interests and constraints will have to be fully considered at that time in the context of a land expropriation option.

Findings:

Based on the available information obtained through a literature review and interviews it is reasonable to conclude that expropriation outright (that is outside of any mutually agreeable compensation arrangement, either in terms of a land exchange or monetary compensation), does not appear to be a viable option at this time.

4.3 Option Three: Land Exchange

For purposes of examining the range of potential land tenure alternatives, the land exchange option is treated as distinct from an outright expropriation (Option Two) - recognizing that the process and end result would be similar in that there is a transfer of title and rights.

There are a number of specific sections of the IFA relating to land exchanges. The provisions of Sections 7(50) to 7(60) were presented in detail in the discussion of Option Two - Land Expropriation and as such will not be discussed here. In conjunction with Section 7(64) this provides the framework and procedure respecting appropriation of lands for a public road right-of-way through a land exchange agreement (i.e., that is through a formal process of voluntary and mutually agreeable appropriation):

- 7.(64) *For the purposes of appropriating lands for a public road right-of-way, the following procedures apply:*
- (a) *the Government shall consult with the Inuvialuit Land Administration on all matters of interest or concern to the Inuvialuit concerning road development before approval is given by the Government to any road project;*
 - (b) *where approval is given to commence the development of a particular road project, the Government shall negotiate with the Inuvialuit Land Administration for the acquisition of the necessary public road right of way on the basis of compensating the Inuvialuit by providing, if possible, alternative land of equivalent value in the Western Arctic Region that is suitable to the Inuvialuit;*
 - (c) *the Government shall give notice to the Inuvialuit Land Administration of the amounts and location of land it requires and shall at the same time make an offer to the Inuvialuit Land Administration of suitable alternative and in the Western Arctic Region and having equivalent value to that of the land being acquired; and.*
 - (d) *where the Government and the Inuvialuit Land Administration are not able to conclude an agreement as to the location or amounts of suitable alternative land within Forty-two (42) days from the date of the notice referred to in paragraph (c), the matter shall be referred to the Arbitration Board pursuant to section 18 and subsection (60).*

Importantly, land exchanges in the Inuvialuit Settlement Region (ISR) can only take place between the Inuvialuit, federal government and with the Gwich'in Tribal Council (pursuant to Chapter 27 of the Gwich'in Settlement Agreement).

The GNWT cannot undertake a land exchange directly with the Inuvialuit. The GNWT would have to request the federal government, as represented by the Minister of Public Works Canada, to undertake and conclude a land exchange with the Inuvialuit. The lands would then be transferred to the Commissioner of the NWT pursuant to Section 44 of the

Northwest Territories Act. Section 44 does not apply to Inuvialuit lands without a formal land exchange. Based on the individual and joint interviews with Lands Administration representatives, DIAND, and Real Estate Services, Public Works Canada, the following observations can be made:

- There exist a number of procedural questions within the federal government (DIAND and PWC) regarding the potential of concluding the land exchange directly on behalf of the GNWT rather than the two step process whereby the subject lands are first transferred back to Canada and then transferred to the Commissioner of the NWT through an Order In Council. This has some implications for the protocol and timing of any potential land exchange. This is in part linked to the formal registration process at Land Titles and the requirements for a legal survey. It is useful to consider the reality that in point of fact and law “Commissioner’s Lands” are still considered federal crown lands.
- Under a potential land exchange option it is likely that the federal government will stipulate that should the subject lands not be required at some point in the future (i.e., the road is not built or abandoned), the lands revert back to federal crown land. This type of ‘reversionary clause’ is common in other jurisdictions in Canada (see Section 3.2 of this Report).
- The exchange would likely only involve surface rights only. As such, it is not certain whether 7(1)(a) and 7(1)(b) lands would be treated differently by either the Inuvialuit or the federal government.
- The absence of historic precedent in the ISR respecting land exchanges may result in a complex and drawn out land valuation process. The criteria of “suitable” and “equivalent” lands required by the IFA may not be easy to achieve.
- There has not been a formal land exchange for a Public right-of-way under the IFA. There are examples related to the Pingo Canadian Landmark and certain airports. These examples illustrate different circumstances; the Pingo Landmark (6.34 sq. miles) being identified as Annex H-2 of the IFA and ultimately facilitated the transfer of surface management authority to Parks Canada Agency; and, the airport lands being part of the airports devolution from the federal government to the GNWT.
- Based on the available information respecting government and third party interests and constraints in the land directly within the proposed alignment for the road (see Section 2.1.5 of this Report), there does not appear to be a concern at this time respecting existing rights, interests, commitments and activities. Depending on the decision as to whether to proceed with construction of the road and when, government and third party interests and constraints will have to be fully considered at that time in the context of a land exchange option.
- DIAND Lands Administration (Claims Implementation Section) has now completed all the required surveys of Inuvialuit lands (Section 7(7) of the IFA) and the calculations are indicating that there are some “excess” lands (Section 7(5) of the IFA) beyond the 1% margin of error and that those “excess” lands are to be returned to the federal government. While the issue of “equivalent valued lands” remains, this may provide an

opportunity to consider a land exchange for the proposed Inuvik to Tuktoyaktuk road.

Findings:

While the existing provisions of the IFA preclude the GNWT from engaging in a direct land exchange with the Inuvialuit, it is possible to seek an amendment to the IFA that would facilitate this direct type of land exchange. The preliminary evidence does not permit a conclusion to be drawn respecting the willingness of either the Inuvialuit or the federal government to undertake such an amendment. It should however be recognized that amendments to claim agreements are generally a slow and complicated process. There clearly is no logical reason, and indeed precedent exists in the Sahtu and Gwich'in Settlement Agreements, why the GNWT should be precluded from this type of transaction.

Based on the available information it is reasonable to conclude that a land exchange, as facilitated by the federal government, is an option at this time.

4.4 Option Four: Land Lease

Review of the background documentation and interviews conducted with Mr. Hans Arends, Land Administrator, ILA, indicates that the GNWT, as represented by the Department of Transportation, could enter into a long term lease (up to 50 years) for a Public Right-Of-Way with the IRC, as represented by the Inuvialuit Land Administration. Pursuant to Section 7(64); Public Road Right-Of-Way, of the ILA, the following procedures are stipulated, with the exception to 7(64)(b) which speaks to provision of alternative land of equivalent value "if possible", and provide an annual rent payment where necessary.

- 7.(64) *For the purposes of appropriating lands for a public road right-of-way, the following procedures apply:*
- (a) *the Government shall consult with the Inuvialuit Land Administration on all matters of interest or concern to the Inuvialuit concerning road development before approval is given by the Government to any road project;*
 - (b) *where approval is given to commence the development of a particular road project, the Government shall negotiate with the Inuvialuit Land Administration for the acquisition of the necessary public road right of way on the basis of compensating the Inuvialuit by providing, if possible, alternative land of equivalent value in the Western Arctic Region that is suitable to the Inuvialuit;*
 - (c) *the Government shall give notice to the Inuvialuit Land Administration of the amounts and location of land it requires and shall at the same time make an offer to the Inuvialuit Land Administration of suitable alternative and in the Western Arctic Region and having equivalent value to that of the land being acquired; and.*
 - (d) *where the Government and the Inuvialuit Land Administration are not able to conclude an agreement as to the location or amounts of suitable alternative land within Forty-two (42) days from the date of the notice referred to in paragraph (c), the matter shall be referred to the Arbitration Board pursuant to section 18 and subsection (60).*

Section 6 - Rights and Authorities, of the *ILA Rules and Procedures* provides the framework for entering into a lease agreement for a Public Right-Of-Way. For purposes of this Report it has been assumed that the GNWT will recognize the *ILA Rules and Procedures* - notwithstanding the issues related to the *Rules and Procedures* discussed earlier in this Report. Section 6(2) of the *Rules and Procedures* defines the types of "Rights" which may be granted on Inuvialuit Lands, including:

6(2)(1) Public Right-of-Way; the right granted to a government, municipality, settlement, hamlet, or town for public convenience and necessity for the non-exclusive use of a strip of Inuvialuit Lands for construction, maintenance and use of a road, railway, pipeline for water transport or electricity transmission system;

There are a number of existing specific terms and conditions that are associated with a Public Right-Of-Way, including:

- The maximum term of a Public Right-Of-Way is 50 years (Section 6(4)(l)). Clearly this is a key policy consideration in public infrastructure investment on non-publicly owned land. There are provisions for renewal pursuant to Section 6(6) which states that:

6(6) The term of a Right may be renewed under such terms and conditions as are stipulated in the Right. The term of a Right cannot be renewed unless the Holder has complied with all the obligations related to the Right sought to be renewed. Where any Default has occurred, the applicant must provide evidence to the satisfaction of the Administrator and Commissioner that the Default has been corrected and will not occur again during renewal.

- The maximum width of a right-of-way is 50 meters (Section 6(9)). Based on the information provided by the ILA, it may be possible to relax this requirement and negotiate the 60 m Right-Of-Way required for the proposed road. There is no stated maximum area of occupancy for a Right-Of-Way in the *Rules and Procedures*.
- A Right cannot be granted unless applicable provisions set out in Section 6 and 7 are met, including:

6(13)(a) The applicant has made, where applicable, pursuant to subsection 7(94) hereof, the deposits required to guarantee the fulfillment of the obligations contained in the Right or for such other purpose as prescribed by these Rules;

(b) the Right follows a Prescribed Form approved by the Board;

(c) such person has deposited all applicable fees in the case of a Land Use Licence, or all applicable fees for the first year of operation for a Permit, Lease, Concession or Right-of-Way;

7(94) In order to ensure that a Holder complies with the terms and conditions of a Right and with these Rules, the Administrator shall not issue a Right, other than a Land Use Licence or Residential Lease unless the applicant has made the deposit pursuant to paragraph 6(13)(a) hereof. Such deposit must be made to the Treasurer of the IRC. The amount of the deposit shall be as determined in Schedule IX. Provided, however, that where the Administrator is of the opinion or where he is so ordered by the Environmental Review Board pursuant to Section Twenty Two hereof, that serious environmental or property damage could occur from an operation

he may require a higher Security Deposit. Where a company or operator intends to carry out various Operations on Inuvialuit Lands over a certain time period, he has the Right to establish and maintain a General Security Deposit covering all operations under the Rights. The General Security Deposit shall be of an amount as stipulated in Schedule IX.

Calculation of the amount of the deposit is as set out in Schedule IX of the *Rules and Procedures*, which indicates that the amount is to be stipulated in the Right-Of-Way. The ILA have set the General Security Deposit at \$200,000. The amounts listed in Schedule IX were set in 1986 and have not been updated.

- Section 6(14) sets out a number of specific “Obligations Of A Right” that DOT will need to consider in determining the viability of this land tenure option. The key obligations include:

6(14) *Any Right shall contain the following obligations:*

- (a) *the obligations to provide the Administrator on a regular basis with such information as the Administrator may prescribe from time to time in accordance with these Rules;*
- (b) *the obligation to pay such applicable fees as the Chief Regional Councillor may prescribe from time to time in accordance with these Rules;*
- (c) *the obligation to adhere to the Agreement and these Rules as they may be amended from time to time;*
- (d) *the obligation to pay a fair compensation for the access to Inuvialuit Lands;*
- (e) *the obligation to compensate the Inuvialuit for any damage to Inuvialuit Lands or for any diminution of the value of Inuvialuit interest in such lands;*
- (f) *the obligation to compensate Inuvialuit or any directly affected third persons for any damage or accidents as a result of the occupancy or operations carried out during term of the Right;*
- (g) *the obligation to provide Inuvialuit employment;*
- (h) *the obligation to provide opportunities for Inuvialuit businesses; and*
- (i) *that the Holder shall be responsible for all surveying costs related to the establishment of the Right.*

The Administrator may waive the obligations under (g) and (h) for a Land Use Licence. The matters stipulated under paragraphs (g) and (h) hereof, shall be matters of negotiation, where a Right is granted pursuant to a Participation Agreement or an Access Agreement in accordance with Section sixteen hereof.

- It should be noted that from a legal and land administration perspective the 1977 PWC “Surveyed Route” is not considered a “legal survey” from a Land Titles Registry perspective, but rather prepared for preliminary alignment and design purposes. The survey costs are unknown at this time but should be taken into consideration by

Department of Transportation.

- While the 1977 PWC road alignment crosses both land categories, there is no indication that the ILA treats granting of Rights differently between 7(1)(a) and 7(1)(b) lands.
- There are a number of “Variable Terms and Conditions” set out in Section 6(2) that DOT should take into consideration. This is not to say any or all of these variable terms and conditions will actually be required by the ILA. This will be subject to negotiations between the GNWT and the Inuvialuit:

6(20) *While it remains the obligation of the Holder to comply with all provisions of the Agreement and these Rules, the Administrator may include in any Right additional terms and conditions, related to Land Use Operations, that can be changed pursuant to subsection 7(100) hereof, respecting:*

- (a) *the part of the Right-Of-Way, the location and area of Inuvialuit Lands that may be used for certain operations;*
- (b) *the times at which operations may be carried on;*
- (c) *the type, size and weight of equipment that may be used in the operations;*
- (d) *the methods and techniques to be employed by the Holder in carrying out the operations;*
- (e) *the type, location, capacity and operation of all facilities to be used by the holder in the operations;*
- (f) *the methods of controlling or preventing ponding of water, flooding, erosion, slides and subsidences of land;*
- (g) *the production, use, storage, handling and ultimate disposal of any sewage, chemical or toxic material to be used in the operations;*
- (h) *the protection of wildlife, reindeer, flora and harvesting activities;*
- (i) *the protection of objects and places of recreational, scenic and ecological value;*
- (j) *the establishment of petroleum fuel storage facilities;*
- (k) *the methods and techniques for debris and brush disposal;*
- (l) *the obligation to prepare and submit a plan, acceptable to the Administrator, for the removal of assets and for land reclamation prior to the date stipulated in the Right;*
- (m) *wildlife compensation measures and/or mitigative and remedial obligations to prevent actual wildlife harvest loss and future harvest loss;*
- (n) *where the Right is totally or partially located on 7(1)(a) lands, the terms and conditions necessary to ensure control of the activity by the respective Community Corporation in accordance with subsection 6(4)(a) of the Agreement; and,*

- (o) *such other matters, not inconsistent with the Agreement and these Rules as the Administrator deems necessary.*

Any Variable terms and conditions related to paragraphs (c) and (e) hereof, shall be for the sole purpose of the optimal protection of Inuvialuit Lands, wildlife and the population who depend on same.

Variable terms and conditions included under this Subsection shall not limit restrict or qualify any general terms and conditions set out in subsections 6(12) through 6(19) hereof and following. Where any discrepancy, inconsistency or contradiction occurs between the general and the variable terms and conditions, the former shall govern.

- Section 6(42) - Participation & Access Agreements requires that such agreements must be entered into prior to a Right being assigned:

6(42) *A Land Use Permit, Commercial Lease, Well-Site Lease, Public Lease or Right-Of-Way cannot be granted unless the Holder has previously entered into a Participation Agreement or Access Agreement.*

The ILA indicated during interviews that a Participation Agreement would be required as part of the lease arrangement. Participation Agreements are negotiated separately and normally prescribe an additional set of terms and conditions, some with potentially significant cost implications. Section 16 of the *Rules and Procedures* outlines the requirements respecting Participation Agreements, including the negotiation process.

- The actual lease application and Inuvialuit review process is set out in Section 7 of the *Rules and Procedures*. The application and review process is comprehensive and generally involves a number of steps, including:

⇒ initial screening of application for compliance (section 7(14) to (48)).

⇒ a general consultation procedure for (Section 7(49)).

⇒ public ILAC Meeting (Five Phases) (Section 7(51) to (60)). Consultation would be required in both Inuvik and Tuktoyaktuk.

⇒ the lease application may also be subject to the Environmental Impact Screening and Review Process set out in Section 7(63).

⇒ appeal procedure.

⇒ assignment of the Right.

- Based on the available information respecting government and third party interests and constraints in the land directly within the proposed alignment for the road (see Section 2.1.5 of this Report), there does not appear to be a concern at this time respecting existing rights, interests, commitments and activities. Depending on the decision as to whether to proceed with construction of the road and when, government and third party interests and constraints will have to be fully considered at that time in the context of a lease option.

Findings:

Based on the available information through a literature review and interviews, it is reasonable to conclude that a long term lease by the GNWT is an option at this time.

Table 4
Options Summary and Comparison

<i>Evaluation and Comparison Criteria</i>	<i>Option One Land Purchase</i>	<i>Option Two Land Expropriation</i>	<i>Option Three Land Exchange</i>	<i>Option Four Land Lease</i>
Allowable under the Inuvialuit Final Agreement	No	Yes	Yes	Yes
Can be undertaken directly by the GNWT	No	No	No	Yes
Provides direct fee simple ownership to the GNWT	No	No	Yes	No
Degree of certainty of tenure "rights"	High	High	High	Low/Moderate
Previously completed in the NWT	No	No	Yes	Yes
Previously completed in the Inuvialuit Settlement Region	No	No	Yes	Yes
Time required to complete (excluding negotiation of Participation Agreement)	3-5 years	3-5 years	2-3 years	< 1 year
Conflict with existing government and third party rights/interests	No	No	No	No
General level of complexity	Moderate/High	High	High	Moderate
Likely level of support from the Inuvialuit Regional Corporation	Low	Low	Low/Moderate	High
Likely level of support from the federal government	Low	Low	Low/Moderate	Moderate/High
Likely level of legal advisability/support	Low	Low	High	Low/Moderate
Associated Steps and Costs:				
Negotiation of Participation Agreement	No - \$0	Yes - \$ unknown	Yes - \$ unknown	Yes - \$ unknown
Other negotiation/arbitration	Yes	Yes	Yes	Yes
Legal survey (Inuvialuit lands portion only)	Yes	Yes	Yes	Yes
Appraisal/valuation	Yes	Yes	Yes	Yes
Acquisition	Yes	Yes	Maybe	No
Land Rent/Lease	No	No	No	Yes

5. CONCLUDING OBSERVATIONS

5.1 Data and Information Limitations

There are a number of data and information limitations which need to be taken into consideration by the Department of Transportation respecting further consideration of the land tenure options:

- The current available information respecting government and third party interests and in the land directly within the proposed alignment for the road (see Section 2.1.5 of this Report), indicates that there does not appear to be a concern at this time respecting existing rights, interests, commitments and activities. Depending on the decision taken by the GNWT or other developer as to whether to proceed with construction of the road and when, government and third party interests and constraints will have to be fully considered and documented at that time in the context of any particular option which is pursued. This should include a comprehensive review of rights, interests, commitments and activities on the subject lands, including consideration of government and Inuvialuit rights granted to third parties.
- Some of the views and positions expressed by representatives from various organizations interviewed should be formally sanctioned and documented by the competent individuals, committees or Boards.

Appendix 1
References and Bibliography

Association of Transportation Law, Logistics and Policy	Journal of Transportation Law, Logistics and Policy, Montgomery, MD, U.S.A. Various Years.
Black, Henry	Black's Law Dictionary, Fifth Edition, West Publishing Company, St. Paul, 1979.
Blanchard, Ghislain	Highway Benefit-Cost Analysis: A Review of Evidence. Transport Canada Policy - Economics Analysis, June 1996.
Conference Board of Canada	Slave Province Transportation Corridor: Benefit-Cost Analysis Custom Economic Services, August 1995.
Conference Board of Canada	The Role of Transportation in Economic Development Custom Economic Services, August 1991.
Department of Transportation	Northwest Territories Transportation Strategy, Department of Transportation, GNWT, Yellowknife, 1990.
Department of Transportation	Northwest Territories Transportation Agenda, Department of Transportation, GNWT, Yellowknife, December 1993.
Department of Transportation	Northwest Territories Transportation Strategy Update, 1994, Department of Transportation, GNWT, Yellowknife, May 1995.
Dome Petroleum Ltd.	Esso Resources Ltd., and Gulf Canada Resources, Hydrocarbon Development in the Beaufort Sea-Mackenzie Delta Region, Environmental Impact Statement, Volume 5, Socio-Economic Effects, 1982.
Ferguson Simek Clark	Tuk/Inuvik All-Weather Highway: Alternatives for Funding and Construction (October 1997).
Government of the Northwest Territories	Bureau of Statistics. Statistics Quarterly (various issues).
Government of the Northwest Territories	Resources, Wildlife and Economic Development. Northwest Territories Economic Framework Sector Profile: Fisheries (May 1997).

Government of the Northwest Territories	Resources, Wildlife and Economic Development. Northwest Territories Economic Framework Sector Profile: Travel & Tourism (May 1997).
Huston, Sheilagh	Recent Approaches to Discounting In Cost Benefit Analysis, Economic Analysis, Project Working Paper, Ministry of Transportation and Highways, Victoria, January 1996.
Indian Affairs and Northern Development	Jurisdictional responsibilities for Land Resources, Land Use and Development in the Yukon Territory and Northwest Territories: Northwest Territories Inuvialuit Settlement Region Lands. Book Two. Land Management Division, Northern Affairs Program, Ottawa, 1998.
Indian Affairs and Northern Development	Transportation and Communications Section, Economic Analysis Division (Edouard Préfontaine). Economic Evaluation of a Proposed Road Project Between Inuvik and Tuktoyaktuk, N.W.T. (September 1978).
Indian Affairs and Northern Development	The Western Arctic Claim: A Guide to the Inuvialuit Final Agreement, DIAND, Ottawa, 1984.
Inuvialuit Regional Corporation - GNWT	Inuvialuit Land Usage and Access Agreement, Yellowknife, 1993 (*The Agreement was terminated effective June 5, 1997).
Inuvialuit Land Administration	Land Administration Rules and Procedures, Inuvik, 1986 (as amended periodically).
Inuvialuit Land Administration	Various land administration files respecting examples of "access or participation agreement".
JAI Press	Research in Transportation Economics, Stanford, CT, U.S.A. Various Years.
Ministry of Transportation	Property Acquisition Procedures, Ministry of Transportation, Ontario, Toronto (unpublished), January 1980.
Ministry of Transportation	Order In Council 1239/97 and P.C. 1997-639 and P.C. 1977-640, Respecting Garden River Indian Reserve No. 14, (lands for public highway purposes), Ministry of Transportation, Ontario, Toronto, May 1997.

Ministry of Transportation	Order In Council 76/95, Respecting Garden River First Nation and Band of Indians (land transfer for public highway purposes), Ministry of Transportation, Ontario, Toronto, January 1995.
Ministry of Transportation and Highways	A Guide to Applying the Highway Environmental Assessment Process. Ministry of Transportation and Highways, Government of British Columbia, Victoria, September 1997.
Ministry of Transportation and Highways	Manual of Environmental Procedures, Ministry of Transportation and Highways, Government of British Columbia, Victoria, February 1992.
Ministry of Transportation and Highways	Procedures for Avoiding Infringement of Aboriginal Rights (Revised), Aboriginal Relations Branch, Ministry of Transportation and Highways, Victoria, July 1997.
National Post	"Natives Consider Toll Road", TSUU T'ina First Nation, Calgary, AB, June 28, 1999.
Nichols Applied Management	Benefit-Cost and Regional Economic Impact Analysis: Inuvik to Tuktoyaktuk Road (Final Report), Department of Transportation, GNWT, Yellowknife, March 1999.
Oosterhoff, A. and W. Rayner	Anger and Honsberger Law of Real Property, Second Edition, Vol. 1, Canada Law Book Inc., Aurora, 1985.
Planning and Transport News	London Research Centre, London, England. Various Years.
Public Works Canada	Inuvik to Tuktoyaktuk Highway Mile 971 to Mile 1059: Alignment Update Report, Public Works Canada, Western Region, Edmonton, March 1977.
Rescan Environment Services	Proposed Inuvik-Tuktoyaktuk Road: Environmental/Socio-Economic Baseline Report, Department of Transportation, GNWT, Yellowknife, May 1999.
Transport Canada	Transport Canada Programs & Divestiture Negotiators' Consultation Model: Aboriginal Interests In Federal Real Property Divestiture (unpublished), Transport Canada, Ottawa, c. 1997.