• immovable heritage such as burial sites, village sites or campsites, sacred landscapes or ritual and ceremonial sites;

• movable heritage such as archaeological artifacts, video, film, photographs, sound recordings and field notes; and

• intangible heritage such as oral history and legends, toponymy (place names), personal or spiritual relationship with the land and sites.

We are concerned mainly with the first category, which involves the physical location of Aboriginal sites on Crown land — although the third is also relevant to the protection of Aboriginal sites. Issues of archaeological, ethnological, ethnographic or cultural research — and the ownership of the resulting research materials — are sensitive matters to Aboriginal peoples and the academic community and must be dealt with appropriately. At the beginning of the Commission's mandate, we developed our own ethical guidelines for research, which we offer as a potential model for drafting future policy and legislation (see Volume 5, Appendix C).

Recommendations

The Commission recommends that

2.4.58

Federal, provincial and territorial governments enact legislation to establish a process aimed at recognizing

(a) Aboriginal peoples as the owners of cultural sites, archaeological resources, religious and spiritual objects, and sacred and burial sites located within their traditional territories;

(b) Aboriginal people as having sole jurisdiction over sacred, ceremonial, spiritual and burial sites within their traditional territories, whether these sites are located on unoccupied Crown land or on occupied Crown lands (such as on lands under forest tenure or parks);

(c) Aboriginal people as having at least shared jurisdiction over all other sites (such as historical camps or villages, fur trade posts or fishing stations); and

(d) Aboriginal people as being entitled to issue permits and levy (or share in) the fees charged for access to, or use of, such sites.

2.4.59

In the case of heritage sites located on private land, the federal government negotiate with landowners to acknowledge Aboriginal jurisdiction and rights of access or to purchase these sites if there is a willing seller, so that they can be turned over to the appropriate Aboriginal government.

2.4.60

The federal government amend the *National Parks Act* to permit traditional Aboriginal activity in national parks and, where appropriate, Aboriginal ownership of national parks, on the Australian model. Parks could then be leased back to the Crown and managed jointly by federal and Aboriginal governments.

2.4.61

Federal, provincial and territorial governments develop legislation and policies to protect and manage Aboriginal heritage resources in accordance with criteria set by negotiation with Aboriginal governments. These might include

(a) detailed heritage impact assessment and protection guidelines for operations involving such activities as forestry, mining, aggregate extraction, road building, tourism and recreation;

(b) funding and undertaking heritage resource inventories, documentation and related research, and archaeological and other scientific survey, in partnership with Aboriginal governments; and

(c) carrying out salvage excavation or mitigative measures at sites threatened by development, looting, resource extraction or natural causes such as erosion, and providing for Aboriginal monitoring of archaeological excavations.

Fish and wildlife

Treaty and Aboriginal hunting, fishing and trapping rights are constitutionally entrenched. Moreover, the courts now recognize that Aboriginal people are

entitled to priority of access to fish and wildlife on unoccupied Crown lands and waters for domestic consumption and ceremonial use. However, Aboriginal rights to commercial harvesting have not been recognized, even though Aboriginal harvesters traditionally predominated in some sectors (such as wild rice). Indeed, for much of the past century, Aboriginal people have had difficulty gaining access to the tourism sector and to the economic benefits associated with fish and wildlife harvesting.

Governments have honoured Aboriginal harvesting rights most often in the breach. It is clear from our hearings that the continued exercise of those rights remains deeply controversial in certain sectors of society, such as recreational hunters and anglers and commercial fishers. At the moment, Aboriginal people continue to end up in court because governments continue to lay charges against them for violations of provincial or federal regulations. The *Sparrow* and *Simon* decisions had their origins in such charges.

The trend continues. As of 1995, there were 12 cases involving Aboriginal people before the Supreme Court of Canada; eight of these involved issues related to the exercise of treaty and Aboriginal harvesting rights.[430] Although Aboriginal people are acquitted more often now than was once the case, there is as yet no body with the clear authority to declare the scope and incidence of their rights to harvest.

Over the past two decades, some provinces have attempted to acknowledge Aboriginal concerns. In 1979, for example, Ontario introduced a leniency policy to guide its conservation officers in enforcing fish and wildlife laws; for the first time in almost a century, the province stopped prosecuting status Indian people for hunting and fishing on unoccupied Crown lands. In 1991, as a reflection of the *Sparrow* decision, that policy was replaced by interim enforcement guidelines, which made Aboriginal priority rights explicit. The guidelines required that potential charges against Aboriginal people be prescreened by senior officials of the ministry of natural resources. Similar guidelines were put in place at the federal level and in some other provinces.[431]

While these kinds of measures are a worthwhile innovation, they are not based on negotiations with Aboriginal peoples. Provincial officials develop policy and interpret the guidelines based on their own (or legal counsel's) understanding of treaty and Aboriginal rights. If individual harvesters are considered to be in violation, they continue to be charged. Since *Sparrow*, many charges have tended to fall within what enforcement officers consider grey areas — such as hunting or fishing in a different treaty area, fishing during spawning periods, or

selling some of the catch.

In most instances, the continuing prosecution of Aboriginal harvesters is not only socially harmful but costly to the justice system. At the same time, these prosecutions are not resolving the profound differences between Aboriginal peoples on the one hand and governments and the public on the other, over the content of treaty and Aboriginal rights and over general issues of fish and wildlife management and harvesting. These issues are, in effect, another category of land claims.

We recommended that unresolved harvesting issues be matters for negotiation under the new processes of treaty making, implementation and renewal. But there is also an immediate need for better guidelines on Aboriginal harvesting, ones that are developed co-operatively rather than imposed unilaterally.

General regulatory issues

Some of the difficulties between Aboriginal people and members of the public — including officials of resource management agencies — relate to cultural misunderstanding about matters such as harvesting practices. Aboriginal fishers, for example, were using fish traps, weirs, night lights and spears long before the arrival of Europeans on this continent. If the primary goal is to obtain food with the least amount of effort, then these are all sensible practices — though they remain offensive to

recreational anglers for whom the thrill of the catch is part of the sport. There have been various attempts to reconcile these views. In Ontario, for example, Aboriginal communities and political organizations have been providing cultural awareness instruction for government officials responsible for fish and wildlife management. In other jurisdictions, including the Northwest Territories, governments are attempting to incorporate traditional ecological knowledge into their management systems.[432]

These cultural differences are coupled with another difficulty: the long-standing ethos in resource management that perpetuates distinctions between users and managers. These distinctions become particularly problematic when the users are Aboriginal and the managers predominantly non-Aboriginal. The frequent result is a system of wildlife ‘police’ who distrust the harvesters they are regulating. One solution is to increase the number of Aboriginal managers, either by incorporating Aboriginal people into general government regimes for fish and wildlife management, or by establishing co-management regimes. In

areas where Aboriginal people form a majority of the population (Manitoba and Saskatchewan north of the 55th parallel, Ontario north of 50) or are a sizeable minority (northwestern British Columbia), there is no reason that many (even most) resource managers should not be Aboriginal. Since Canada already exercises jurisdiction over migratory birds and fisheries (with inland fisheries being administered by the provinces under federal law), the federal government has a direct role in facilitating greater Aboriginal involvement in fish and wildlife management.

The *Sparrow* decision established an order of priority for harvesting allocations: once the interests of conservation are satisfied, Aboriginal subsistence needs have first priority. In 1991, the federal minister of fisheries advised his provincial and territorial counterparts that their regulations should be changed to reflect the *Sparrow* principles.[433] To date, not all jurisdictions have done so.

Until the 1920s, in Ontario and other provinces, Aboriginal people and settlers in remote districts were exempted from normal legislative provisions if they were hunting and fishing for food, an acknowledgement that wild game and fish formed an important part of their diet. Because of protests from recreational hunters and anglers, however, this privilege was subsequently removed from legislation. In their appearance before us, the Canadian Wildlife Federation recommended that the subsistence needs of non-Aboriginal people living in remote regions of Canada, such as Newfoundland outports and the northern interior of British Columbia, should be acknowledged in the *Sparrow* order of priorities.[434] Commissioners believe that this kind of acknowledgement would promote social harmony.

Recommendation

The Commission recommends that

2.4.62

The principles enunciated in the *Sparrow* decision of the Supreme Court of Canada be implemented as follows:

(a) provincial and territorial governments ensure that their regulatory and management regimes acknowledge the priority of Aboriginal subsistence harvesting;

(b) for the purposes of the *Sparrow* priorities, the definition of 'conservation' not be established by government officials, but be negotiated with Aboriginal governments and incorporate respect for traditional ecological knowledge and Aboriginal principles of resource management; and

(c) the subsistence needs of non-Aboriginal people living in remote regions of Canada (that is, long-standing residents of remote areas, not transients) be ranked next in the *Sparrow* order of priority after those of Aboriginal people and ahead of all commercial or recreational fish and wildlife harvesting.

Commercial fishing

Since 1994, there have been a number of incidents pitting angry commercial or recreational fishers against Aboriginal harvesters in such areas as the Fraser River of British Columbia and Ontario's Bruce Peninsula. Government regulators are in a difficult situation because growing public consciousness of fisheries as a declining resource is putting pressure on them to limit all harvesters in the interests of conservation. These disputes are as much about allocation as they are about conservation, with each industry sector arguing for limits on another. In the British Columbia salmon fishery, for example, the federal department of fisheries is attempting to balance the interests of the commercial salmon industry, tourist outfitters and sports anglers with the priority of access for Aboriginal harvesters enjoined by the *Sparrow* decision.

The *Sparrow* decision is silent on whether the Aboriginal priority of access applies to commercial fishing, although lower court decisions have upheld an Aboriginal commercial right.[435] Given the historical importance of fisheries to Aboriginal economies, the Commission believes that Aboriginal peoples are entitled to a reasonable share of commercial fishing allocations. This would constitute at least partial restitution for the historical inequity in such allocations. The exact size of fishing quotas should be negotiated, rather than imposed unilaterally by government, and they should be based on measurable criteria, including the current and future economic needs of Aboriginal communities. The *Sparrow* decision provides a useful model for establishing the relative order of priority in allocation. The Commission encourages other provinces to follow the example set by Ontario and British Columbia in purchasing commercial fishing quotas and turning them over to Aboriginal people.

Aboriginal people should also play an active role in fisheries jurisdiction and management. Under the 1985 Pacific Salmon Treaty between Canada and the United States, for example, the countries established a joint Pacific Salmon

Commission to monitor and enforce the treaty. But the two countries' representation on the commission is structured differently. The U.S. part of the commission has four members — one representative each for the United States, the state of Alaska, the states of Washington and Oregon, and the Indian tribes in Washington, Oregon and Idaho who have treaty fishing rights. Canada's side has four full members and four alternates (who come from the federal department of fisheries and various commercial and recreational fishing interests), including one Aboriginal member.[436] Unlike the Canadian part of the commission, the American side has to achieve consensus among its four commissioners before reaching any agreements with Canadian commissioners. The U.S. Aboriginal commissioner, like his American colleagues, therefore, has a de facto veto and thus more influence than the Canadian Aboriginal commissioner. Given that the fishing rights of the British Columbia First Nations are constitutionally guaranteed, the federal government should at least ensure guaranteed and effective Aboriginal representation on Canada's side of the commission.

One of the difficulties in determining quotas for each sector of the fishing industry is the difficulty of establishing adequate baseline data. The Commission believes that Canada and the provinces should improve their method of keeping statistics on the non-Aboriginal harvest — particularly recreational angling. Sports fishing is clearly a growing sector of the industry; moreover, it is being actively encouraged by many jurisdictions. As a consequence of their rising membership, many sports fishing organizations have been calling for major cutbacks in commercial fishing and the Aboriginal harvest. Yet there is still no clear idea of the relative impact of sports angling — including the effect of popular catch and release programs — on overall fish populations, compared with the impact of commercial and Aboriginal fishing. Some scientists have suggested that catch and release programs are stressful to fish and interfere with their reproduction.

We also encourage federal and provincial governments to carry out joint studies with Aboriginal people to determine the actual size of the Aboriginal harvest and the relative impact of Aboriginal harvesting methods (such as the use of spears or gill nets) on stocks. Joint data collection and interpretation with respect to stock assessments and harvest data are essential to the co-operative approach, which is the precursor to sound co-management.

Public education should also form a major component of any new fisheries strategy. Joint strategies to inform the public about Aboriginal perspectives on fishing might help to resolve differences and overcome fears that Aboriginal

entry into the fishery will result in overfishing, loss of control or loss of property. One useful model is that of the Shuswap Nation in the Kamloops region of British Columbia, which has sought local non-Aboriginal involvement in fisheries management issues and created much common ground in the process. In a study of the Shusway example undertaken for the Commission, the author points to these efforts as a key ingredient in success:

The band's experience with work parties in 1988 and 1989, when both local and Kamloops-based non-natives turned out to spend a day working alongside band members on habitat restoration projects, made it easier to reach out to local residents with some confidence in the response. Especially important was the positive energy generated by the delight in discovering at the work parties that people shared a strong common interest in restoring the fish, and in minimizing impacts on fish of other activities.[437]

Recommendations

The Commission recommends that

2.4.63

All provinces follow the example set by Canada and certain provinces (for example, Ontario and British Columbia) in buying up and turning over commercial fishing quotas to Aboriginal people. This would constitute partial restitution for historical inequities in commercial allocations.

2.4.64

The size of Aboriginal commercial fishing allocations be based on measurable criteria that

(a) are developed by negotiation rather than developed and imposed unilaterally by government;

(b) are not based, for example, on a community's aggregate subsistence needs alone; and

(c) recognize the fact that resources are essential for building Aboriginal economies and that Aboriginal people must be able to make a profit from their commercial fisheries.

2.4.65

Canada and the provinces apply the priorities set out in the *Sparrow* decision to Aboriginal commercial fisheries so that these fisheries in times of scarcity

(a) have greater priority than non-Aboriginal commercial interests and sport fishing; and

(b) remain ranked below conservation and Aboriginal (and, in remote areas, non-Aboriginal) domestic food fishing.

2.4.66

The federal government ensure effective Aboriginal representation on the Canadian commission set up under the 1985 Pacific Salmon Treaty with the United States.

2.4.67

To establish adequate baseline data for assessing the relative impact of the Aboriginal and non-Aboriginal harvest, and to assist in determining quotas to be allocated in accordance with the principles set out in the *Sparrow* decision, federal and provincial governments improve their data gathering on the non-Aboriginal harvest of fish and wildlife.

2.4.68

Federal and provincial governments carry out joint studies with Aboriginal people to determine the size of the Aboriginal harvest and the respective effects of Aboriginal and non-Aboriginal harvesting methods on stocks.

2.4.69

Public education form a major component of government fisheries policy. This will require joint strategies to inform the public about Aboriginal perspectives on fishing, to resolve differences and to overcome fears that Aboriginal entry into fisheries will mean overfishing, loss of control, or loss of property.

Hunting

As we have seen, many Aboriginal people continue to be prosecuted for violating provincial and territorial fish and game laws. An increasingly common practice in recent years has been to charge Aboriginal people with hunting (or fishing) outside their own treaty area — or outside their province or territory of residence. The practice varies by region. For example, Quebec, New Brunswick and Nova Scotia will prosecute non-resident Mi'kmaq or Maliseet harvesters found on the wrong side of an interprovincial boundary. Ontario will prosecute Aboriginal people from Quebec or Manitoba who cross the provincial boundary to hunt unless they have a treaty right to do so. Within the province, Ontario will charge a Treaty 3 or Robinson treaty beneficiary who hunts in Treaty 9 territory, and vice versa.

In the west, by contrast, the natural resource transfer agreements state that treaty beneficiaries resident in each of the prairie provinces can hunt anywhere in their own province regardless of their treaty.[438] Thus, a Treaty 4 beneficiary from southern Saskatchewan will not be prosecuted for hunting in Treaty 10 territory in the northern part of that province. However, this provision is not interpreted as applying across provincial or territorial boundaries.

Several interrelated issues are involved. One is the poor fit between the boundaries of treaties and provinces. Most of the numbered treaties were signed before current provincial and territorial boundaries in the west and north were set. Another important issue is the extent of the territory traditionally used and occupied by Aboriginal nations, which can easily span several provincial boundaries. As can be seen in Figure 4.4, for example, the traditional territories of Dene Th'a, who reside mostly in northwestern Alberta, cover portions of British Columbia and the Northwest Territories as well. Moreover, the boundaries of traditional territories do not always conform to those of treaties. This is because the federal government, not Aboriginal people, drew up the metes and bounds descriptions contained in the treaty texts. As a prominent example, most of the lands traditionally used and occupied by the Cold Lake Cree, whose reserves in northeastern Alberta were set apart under the terms of Treaty 6, are actually within the metes and bounds of Treaties 8 and 10 (as defined in the treaty texts). Moreover, a portion of their traditional area lies in the province of Saskatchewan.[439]

In general, provincial regulatory agencies assume that provincial boundaries prevail over treaty boundaries and that the latter prevail over the boundaries of traditional territories (if boundaries of traditional territories are acknowledged at all). For Aboriginal people, this order of priorities is the reverse of what it should

be. Treaty nations believe that the treaties established a relationship with the Crown that was to apply throughout their traditional lands, not some arbitrarily demarcated portion, and they argue that the treaties were intended to guarantee their harvesting rights, not to limit them geographically. Relations within and between Aboriginal communities are founded on kinship; these family ties are reinforced in turn by activities such as hunting, fishing and sharing. This means that Aboriginal harvesters will range throughout the traditional territories of their own nations and, depending on their family connections, across the territories of other nations as well. But because they continue to face prosecution for crossing treaty or provincial boundaries, there is no certainty about the geographic extent of treaty and Aboriginal harvesting rights.

One important consequence of identifying the nation as the proper vehicle for Aboriginal self-determination is that treaty and Aboriginal harvesting rights become collective, not individual. We believe, therefore, that individual harvesters must exercise their treaty and Aboriginal rights with the knowledge and consent of their own nation, or of the nation whose traditional territories they are on.

We expect that the processes of treaty making and treaty implementation and renewal will resolve such differences and provide the necessary level of certainty for Aboriginal people and government regulators alike. But until such processes are complete, we encourage provincial and territorial governments to make every effort to recognize Aboriginal harvesting rights throughout the full extent of traditional territories.

The increasing frequency of charges against Aboriginal people for crossing provincial and treaty boundaries appears to be linked to a general rise in recreational hunting. Many areas of the provinces, particularly those in range of major urban centres like Montreal, Toronto, Winnipeg and Edmonton, are under considerable hunting pressure — although this is truer of big game species than it is of small game or waterfowl. For example, while many jurisdictions have been increasing their quota for deer (whose populations are exploding in some rural areas), a steady rise in demand is forcing governments to limit licences for moose, caribou and elk as a conservation measure. In Ontario and Quebec, the most populous provinces, moose tags are now issued by lottery. In Ontario, for instance, hunters must buy a $31 moose licence to enter the tag lottery, and there is no refund for the losers. In 1995, a record 106,018 hunters applied for 24,322 available tags, which meant that three out of four hunters were unsuccessful.[440]

Because the Ontario and Quebec lottery systems are open to all provincial residents, someone from the heavily populated south who wants to hunt in prime moose country has as good a chance of securing a tag as any local resident. This not only increases the likelihood of illegal hunting but also fosters resentment toward local Aboriginal people, whose hunting rights are perceived as giving them an unfair advantage.[441]

In areas under significant hunting pressure, there must be more appropriate systems of allocation. As with fishing, we encourage the provinces and territories to improve their overall compilation of hunting statistics and to carry out joint studies with Aboriginal governments to determine the actual size of the Aboriginal harvest. This would provide a solid basis for negotiations to establish an appropriate Aboriginal allocation, one that is based on the *Sparrow* principle of Aboriginal priority for subsistence purposes.

In addition, we urge the provinces and territories to favour non-Aboriginal hunters living in rural and northern areas in any revised allocation systems. This might include such measures as opening the big game season a week earlier for local residents or, in the case of Ontario, establishing a special tag lottery for bona fide northern residents. We note that in district 76 in northern Saskatchewan the provincial government has already established a separate hunting season for local non-Aboriginal residents.

Recommendation

The Commission recommends that

2.4.70

Provincial and territorial governments take the following action with respect to hunting:

(a) acknowledge that treaty harvesting rights apply throughout the entire area covered by treaty, even if that area includes more than one province or territory;

(b) leave it to Aboriginal governments to work out the kinds of reciprocal arrangements necessary for Aboriginal harvesting across treaty boundaries; and

(c) introduce specific big game quotas or seasons for local non-Aboriginal residents in the mid- and far north.

Tourism

Particularly in the mid- and far north, opportunities in the tourism sector show great potential for increasing Aboriginal self-sufficiency. But, as with the other resource sectors, any improvement in Aboriginal participation in the tourist industry will also require changes in government allocation policies.

This is especially the case with the awarding of tourist outfitting licences and leases. There are a number of ways to redress the balance in favour of greater Aboriginal participation. Some of the comprehensive claims agreements (such as the James Bay and Northern Quebec Agreement) give Aboriginal people the right of first refusal on existing tourist outfitting leases or licences that are being given up, as well as priority access to new areas. Exclusive allocations are another possibility. For a number of years, the Ontario government has zoned the area north of the 7th and 11th baselines (the provincial far north) for Aboriginal operations only. We encourage other provinces to consider such arrangements.

We acknowledge that attempts over the past 25 years to involve Aboriginal people in outfitting opportunities have not always been successful. This was the case, for example, with certain fishing and goose-hunting camps on the west coast of James Bay. This reflects a need for training and management programs. We encourage provincial and territorial governments to facilitate joint management or other transitional agreements between Aboriginal entrepreneurs or Aboriginal governments and non-Aboriginal outfitters who wish to sell their facilities.

The failure of some attempts to involve Aboriginal people in the tourism sector may also reflect a clash of cultural values. There has been a tendency for governments (and industry associations) to promote a single model in the outfitting sector, namely fly-in hunting and fishing camps or lodges. While these have enjoyed great success, the rise of ecotourism and other forms of wilderness adventure are changing the nature of back-country tourism. Commissioners believe that governments should encourage Aboriginal people to develop their own kinds of tourism ventures that reflect who they are and where they live.

Recommendation

The Commission recommends that

2.4.71

Provincial and territorial governments take the following action with respect to outfitting:

(a) increase their allocation of tourist outfitters' licences or leases to Aboriginal people, for example,

(i) by including exclusive allocations in certain geographical areas, as Ontario now does north of the 50th parallel;

(ii) by giving priority of access for a defined period to all new licences; and

(iii) by giving Aboriginal people the right of first refusal on licences or leases that are being given up.

(b) not impose one particular style of outfitting business (lodge-based fly-in hunting and fishing) as the only model; and

(c) encourage Aboriginal people to develop outfitting businesses based on their own cultural values.

Trapping

Until the First World War, Aboriginal people were the principal trappers of wild fur in Canada. But a rapid influx of non-Aboriginal trappers in the immediate post-war years, coupled with increasing provincial and territorial regulation of all harvesting activities over the following decades, eventually forced many Aboriginal people out of trapping altogether, particularly in rural southern areas of the provinces and in the mid-north. By the mid-1960s, in the Chapleau district of northern Ontario, for example, the provincial government was bringing in Cree trappers from eastern James Bay to deal with an over-population of beaver and other furbearers because local Ojibwa no longer trapped.

In recent years, Aboriginal people who still trap have faced new threats from

animal rights activists. The campaign against the seal hunt had a devastating impact on the economy of many Inuit communities (as well as on rural Newfoundlanders),[442] and activists have maintained their lobbying efforts in Europe and elsewhere to ban the importation or wearing of wild fur. Nevertheless, new markets have emerged in Asia, fur prices have risen, and the trapping industry is likely to survive for the foreseeable future, continuing to provide an important part of the livelihood of Aboriginal communities.

In northern Quebec, the beaver preserves created in the 1920s and '30s — where only Aboriginal people can trap — continue to exist. During our hearings, the Quebec trappers' federation urged that the preserves in more southerly areas (such as La Vérendrye) be opened to non-Aboriginal trappers, on the grounds that many Aboriginal people in such areas no longer trap wild fur.[443] Rather than opening the preserves to others — particularly given the history of Aboriginal exclusion from traplines in so many of them — we believe that it would make more sense to work with Aboriginal governments in encouraging a return to land-based activities such as trapping. Communities such as Waswanipi in northern Quebec are already attempting to do so. In many Aboriginal communities, there is still a sufficient reservoir of people with trapping skills who can assist in culturally appropriate training for younger people.

While the Quebec preserves are zoned exclusively for Aboriginal people, the people themselves do not develop trapping regulations and policies. That remains the prerogative of provincial wildlife officials. Indeed, this is true for all parts of Canada — except those covered by co-management agreements under recent comprehensive claims settlements. The common experience for many Aboriginal trappers, even today, is that the rules governing trapping areas, seasons and quotas are developed without their input and explained to them by non-Aboriginal government employees.

Commissioners believe that provincial and territorial governments should involve Aboriginal people and Aboriginal governments in the development and implementation of trapline regulations. As well, where Aboriginal governments are able and willing to take over trapline regulation and management within their traditional territories, we urge the provinces and territories to assist them in doing so. This would include adequate levels of funding.

Recommendation

The Commission recommends that

2.4.72

By agreement, and subject to local capacity, provincial and territorial governments devolve trapline management to Aboriginal governments.

2.4.73

In Quebec, where exclusive Aboriginal trapping preserves have existed for many decades, the provincial government devolve trapline management of these territories to Aboriginal governments and share overall management responsibilities with them.

Water resources

Aboriginal people have been seeking to protect themselves from actual or potential adverse effects of hydroelectricity generation on their traditional territories, but Aboriginal interests in water resources are much broader. They include domestic use and water-related activities such as fishing, trapping, wild rice harvesting and farming. We noted, for example, how provincial control over water privileges severely limited Aboriginal participation in the British Columbia fruit growing industry.

As a consequence, Aboriginal people have expressed considerable interest in participating in the management and protection of watersheds with provincial or federal governments and in exercising their riparian rights — including the power to restrain upstream activities that will adversely affect the quality or quantity of water flows. They have also sought to receive benefits from the development of water resources, such as a share of water use rents, royalties and taxes paid by utilities to provincial governments from existing and proposed hydroelectric developments.

We heard from a number of Aboriginal organizations and, on one occasion, a former vice-president of a Crown utility (Ontario Hydro) who argued in favour of the last point:

But it also seems that Aboriginal people should have some equitable share of the benefits from the development of these watersheds. There are two sub-issues: one is, what is an equitable share; and the other is, how should it be distributed among First Nations along the watershed.

Currently, Ontario Hydro pays the Ontario government a tax on water use, water use royalties, which exceeds $100 million annually, and none of this goes directly to First Nations who are impacted by those developments, and they have been asking for a share in the benefits.

Sam Horton
Toronto, Ontario
3 June 1993

Among the barriers to be overcome is that water rights in many jurisdictions are already tied up in long-term leases to public utilities or private individuals and corporations. Nevertheless, there have been some interesting developments in jurisdictions across the country, and these form the basis for our recommendations.

Royalties

In a recent agreement between Ontario Hydro and Wabaseemoong Independent Nations in northwestern Ontario, the parties agreed that Ontario Hydro will provide Wabaseemoong with an annual payment, pending the completion of an agreement to share the benefits of the hydroelectric developments in Wabaseemoong's traditional territory that have had negative effects on the community. Once an agreement is in effect, it will replace the annual payment. By extension, the agreement will require Ontario Hydro to undertake discussions with the provincial government to redirect rents normally paid to the government to Wabaseemoong.

Non-utility generation

In recent years, a number of provincial Crown hydroelectric utilities (Ontario, British Columbia, Manitoba, Quebec) have actively encouraged non-utility generation within their jurisdictions.[444] Under these arrangements, private hydroelectric companies acquire the water rights to develop a site and, subsequent to the development, sell all or a portion of the hydroelectricity back to the Crown utility for distribution on the grid.

These projects generally involve sites of less than 25 megawatts. Such small-scale developments do not usually require the reservoirs and impoundment necessary for larger projects and therefore do not have devastating effects of the kind that have sparked Aboriginal protests in northern Manitoba and

Quebec. Smaller projects therefore offer great potential for Aboriginal economic development, particularly in northern areas. In northeastern Ontario, for example, a private developer has recently reached an agreement with the Constance Lake First Nation community that would see it participate in the development of a small-scale hydro project on the nearby Nagagami and Shekak Rivers. The agreement includes a share in royalties, participation in construction, and training and management programs for First Nation members.

Shared management

Of all the natural resources, water is perhaps the best suited to shared management because, even under western property law, no one can 'own' water. Instead, people and jurisdictions have specific rights of use.[445] The management and administration of water resources falls under provincial jurisdiction with respect to domestic and industrial water supply, pollution abatement, power development, irrigation, reclamation and recreational uses. However, water matters of national concern, such as navigation, fisheries, agriculture, international waters and the administration of waters on Aboriginal lands and in national parks, are within federal jurisdiction. Where water bodies, rivers and waterways flow through a number of jurisdictions, joint regulation and administration are required by federal and provincial government arrangements, and in the case of water resources crossing the international border, through such arrangements as the International Joint Commission.

There are some precedents for joint water management arrangements between Aboriginal and non-Aboriginal governments. One is provided by the Fort Peck tribe in Montana (see box). The most recent example is the Nunavut Water Board, created in 1993 under the terms of the agreement between Canada and the Inuit of Nunavut.

The board has responsibilities and powers over the regulation, use and management of water in the Nunavut settlement area, "on a basis at least equivalent to the powers and responsibilities currently held by the Northwest Territories Water Board under the *Northern Inland Waters Act*". The board is to be made up of an equal number of representatives from the territorial government, the federal government and the designated Inuit organization, with the chairperson appointed by the federal government based on consultation with the other members. All water applications will be approved through the board. In addition to water management duties, the board will play a role in the development and regulation of land use plans and environmental assessment

pertaining to water. It is also expected that where a drainage basin is shared by the settlement area and another jurisdiction, agreements pertaining to the use and managemen t of such drainage basins will be negotiated.

The Nunavut Water Board is perhaps the most important management model to date. Inuit rights to water use, management and administration are now recognized and have been integrated into the joint management regimes. The board also contemplates a cohesive and co-ordinated approach to water management and administration in the settlement area by way of the interface between the board and land use planning and environmental assessment provisions. The Nunavut model could be adopted elsewhere in Canada.

Joint Water Management in Montana

Because of continuing litigation over water rights between non-Aboriginal and Aboriginal users, the state of Montana established the Reserved Water Rights Compact Commission in 1979 in an attempt to deal with such disputes in a comprehensive manner. The commission was empowered to negotiate with Indian tribes. In 1985, an agreement was reached with the Assiniboine and Sioux tribes of the Fort Peck Indian Reservation that quantified the tribal water right for the reservation. The tribal water right is administered by the tribes, and the state administers all rights to water that are not part of the tribal water right.

To adjudicate disputes arising out of the dual administration, a joint water board — the Fort Peck-Montana Compact Board — was set up. Its mandate is to resolve controversies between the state and the tribes (and those claiming through them) regarding the use of water on the reservation. The board consists of a representative of the state, a representative of the tribes and a third member appointed by agreement or, failing agreement, by the chief judge of the United States District Court for Montana

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Recommendations

The Commission recommends that

2.4.74

Unless already dealt with in a comprehensive land claims agreement, revenues from commercial water developments (hydroelectric dams and commercial irrigation projects) that already exist and operate within the traditional land use areas of Aboriginal communities be directed to the communities affected as follows:

(a) they receive a continuous portion of the revenues derived from the development for the life of the project; and

(b) the amount of revenues be the subject of negotiations between the Aboriginal community(ies) and either the hydroelectric utility or the province.

2.4.75

If potential hydroelectric development sites exist within the traditional territory(ies) of the Aboriginal community(ies), the community have the right of first refusal to acquire the water rights for hydro development.

2.4.76

If a Crown utility or non-utility company already has the right to develop a hydro site within the traditional territory of an Aboriginal community, the provinces require these companies to develop socio-economic agreements (training, employment, business contracts, joint venture, equity partnerships) with the affected Aboriginal community as part of their operating licence or procedures.

2.4.77

Federal and provincial governments revise their water management policy and legislation to accommodate Aboriginal participation in existing management processes as follows:

(a) the federal government amend the Canada Water Act to provide for guaranteed Aboriginal representation on existing interjurisdictional management boards (for example, the Lake of the Woods Control Board) and establish federal/provincial/Aboriginal arrangements where none currently exist; and

(b) provincial governments amend their water resource legislation to provide for

Aboriginal participation in water resource planning and for the establishment of co-management boards on their traditional lands.

7.3 Co-management

The objective of co-management is to bring together the traditional Inuit system of knowledge and management with that of Canada's. We knew we could manage our resources in our own tradition, but we also recognized that the government's management system had something to offer. Our definition of co-management is the blending of these two systems of management in such a way that the advantages of both are optimized, and the domination of one over the other is avoided.[446]

Formal legal recognition of Aboriginal title and jurisdiction on Category II lands, along with delineation of the specific content of each party's rights and responsibilities, will be one important result of treaty processes. At the same time, there has been already a great deal of practical movement in this direction, chiefly under the rubric of co-management. Sometimes referred to as joint or shared stewardship, joint management, or partnerships, co-management has come to mean institutional arrangements whereby governments and Aboriginal entities (and sometimes other parties) enter into formal agreements specifying their respective rights, powers and obligations with reference to the management and allocation of resources in a particular area of Crown lands and waters.

Several current examples of co-management are described in Appendix 4B. Here we examine the strengths and weaknesses of these models, in the context of a tripartite land scheme. Because of the important lessons they offer for future treaty negotiations, we believe that further experiments of this type should be encouraged.

The origins of co-management

The term co-management has been used loosely to describe a variety of institutional arrangements encompassing consultation with members of the public on matters of land and resource allocation and management; the devolution of administrative, if not legislative, authority; and multi-party decision making. Co-management is thus essentially a form of power sharing, although the relative balance among parties, and the specifics of the implementing structures, can vary a great deal. As can be seen from Appendix 4B, most

examples of co-management to date involve Aboriginal parties in a central role, either sharing power with governments exclusively or in conjunction with other interested parties. However, almost all arrangements envisage provincial, territorial or federal governments having the final say on matters of central concern.

What exists today, therefore, represents a compromise between the Aboriginal objective of self-determination and governments' objective of retaining management authority. This compromise is not one between parties of equal power, however, and Aboriginal peoples certainly regard co-management as an evolving institution.

Only 20 years ago, Canadian governments considered their authority in respect of lands and resources as unlimited, except by signed Indian treaties, and then only in the most minimal way. The origins of co-management, therefore, were in crisis and struggle. Governments at all levels have been forced to deal with Aboriginal land claims as well as with the adverse effects of resource development and the need to mitigate them. This was the case with the James Bay and Northern Quebec Agreement (and the related Northeastern Quebec Agreement), which came about because of Cree protests against the province's plans for large-scale hydroelectric development. Many people — not only Aboriginal people — have been raising concerns about real or perceived resource depletion and are demanding a share in management decisions. The result has been a partial convergence of goals between Aboriginal peoples and other Canadians, although governments have responded in several ways, depending on the array of interests ranged against them.

Co-management arrangements can be grouped into three broad categories:

• *claims-based co-management*, consisting of the land and environment regimes established under comprehensive claims agreements;

• *crisis-based co-management*, which is an ad hoc, and possibly temporary, policy response to crisis.

These two include the oldest and most widely known co-management arrangements, such as the Beverly-Qaminirjuak caribou management board, established in 1982, as well as more recent arrangements in political hotspots like Temagami (Ontario) and Clayoquot Sound.

• *community-based resource management*, which has the least Aboriginal

involvement. It consists of government initiatives (such as Ontario's community forest program) to involve the inhabitants of resource-based communities in resource management planning.

See Appendix 4B for more details concerning these categories. These distinctions are artificial, and there is considerable overlap among them. For example, comprehensive claims negotiations — such as those leading to the James Bay and Northern Quebec Agreement — were themselves a response to crisis. Moreover, earlier crisis arrangements like the Beverly-Qaminirjuak board and 'pre-implementation' boards like the Denendeh conservation board set some important precedents and models for the claims-based regimes in the north as well as the ad hoc arrangements south of the 60th parallel. Nevertheless, the distinctions can serve as a valuable organizing tool because they highlight a number of different issues of title and jurisdiction.

Claims-based co-management

Comprehensive claims agreements are the products of negotiation between Aboriginal peoples and the government of Canada (and, in the case of Quebec, the province). Once enacted, they are constitutionally protected. As can be seen in Appendix 4B, co-management under comprehensive claims agreements covers a broad range of land and resource matters. These include power sharing and co-operation as concerns fish and wildlife harvesting, the management of parks and conservation areas, environmental screening and review procedures, land use planning and water. We noted, for example, the usefulness of the Nunavut water management board as a precedent for Aboriginal involvement in other regions of Canada.

All the agreements in the territorial north provide for co-management of wildlife and fisheries. The James Bay and Northern Quebec Agreement and Northeastern Quebec Agreement provide for consultative committees. In each case, a new structure is created: a board whose members are usually appointed in equal numbers by government and beneficiaries. The responsibilities and powers of the boards fall into two main spheres: allocation, in which they have actual decision-making power; and management, in which they have advisory roles. The general pattern is that allocation and licensing are delegated to the boards and the local harvester organizations, while management for conservation remains the prerogative of governments. There is substantial variation with respect to the latter, however. In the James Bay and Northern Quebec Agreement, the roles of the Cree and Inuit are more limited than under the Inuvialuit Final Agreement, where the co-management

bodies are the effective determinants of conservation (although, as noted earlier, the harvester support program under the James Bay agreement is the envy of other northern harvesters).[447]

In the case of the Yukon Umbrella Final Agreement and the Nunavut Final Agreement, the management board may approve, among other things, management plans, the establishment of conservation areas and management zones, and the designation of rare, threatened, and endangered species. It may provide advice to management and other agencies with respect to wildlife and fisheries management and research, mitigation and compensation resulting from damage to wildlife habitat, and wildlife education.

In all co-management regimes under claims agreements, ultimate authority remains with the government. In the case of fish and wildlife matters, that authority resides with the federal departments of fisheries and oceans (for fisheries and marine mammals) and environment (for migratory birds), and the provincial and territorial wildlife management agencies (for terrestrial mammals). The respective ministers can adopt, reject or vary the recommendations of the boards, as well as appoint the government representatives on these boards. In practice, however, board decisions are seldom overridden if boards establish their competency, credibility and effectiveness among the parties.

One interesting feature of agreements in the territorial north is that the extent of co-management is the same as the settlement region itself. In the Inuvialuit and Nunavut final agreements, for example, the co-management regimes apply to both public and Inuit lands and operate quite apart from whatever protection Inuit as landowners wish to provide on their own lands. The co-management regimes are therefore instruments of regional or territorial government that apply to all persons, all tenure and permit holders, and all developers within the territory. The intent is that everything concerning fisheries, wildlife, land use and the environment be reviewed and consented to by the co-management bodies and, for this reason, by Inuit. The effect is that while Inuit have less than full control over these matters on their own lands, they retain some measure of control on all remaining public lands. Co-management differs in this respect from self-government, because the emphasis is on power *sharing*.

Category II (or shared) lands will be very large. Such an arrangement will undoubtedly work well in the new territory of Nunavut and in the residue of the Northwest Territories, where Aboriginal people will have a major (and in the case of Nunavut, dominating) role in public government. If regional public

governments were established in the northern areas of provinces where Aboriginal peoples are a majority or significant minority of the population (as in Labrador and northwestern British Columbia), this kind of regime could be equally effective. But in more southerly areas, where Aboriginal people continue to be heavily outnumbered, Aboriginal parties to treaty negotiations are likely to resist limitations on their self-governing powers on their own settlement or Category I lands, in exchange for a greater share in power over non-settlement lands (Category II and Category III lands). Moreover, many non-Aboriginal people would object to the shared lands (Category II) being that large.

Nevertheless, some sign of the kinds of co-management arrangements that might be included in new or renewed treaties are apparent from the several models discussed in the next section.

Crisis-based co-management

In many cases, the most important models of co-management have come about as a result of crisis. This is not surprising. As we saw earlier, it is difficult to change established ways of doing things. It often takes the eruption of a major problem for governmental institutions to consider surrendering power. Many institutions of crisis-based co-management have been created over the past 15 years.

The Beverly-Qaminirjuaq caribou management board (see Appendix 4B) was created jointly by federal, provincial and territorial governments in response to a perceived crisis in caribou populations. Instead of stepping up enforcement against Aboriginal harvesters — which would have been the earlier response — the government brought the harvesters into the decision-making process. In addition to being species-specific, this board co-manages among three jurisdictions (though Aboriginal governments are not represented) and between users and managers. With the addition of Aboriginal governments, the caribou board would become a model of a special interjurisdictional co-management arrangement.

In essence, most of the other examples in Appendix 4B represent interim measures in advance of treaty negotiations. The Auyuittuq National Park reserve on Baffin Island was established originally in 1976. Because of opposition to its creation from two Inuit communities — in part because of their unresolved comprehensive claim — Inuit were given a role in management decisions, and the resulting committee has since evolved into a true co-

management body. The park reserve was established without prejudice to the claim and, under the terms of the Tungavik Federation of Nunavut Agreement, will become a national park. But Inuit have secured continuing harvesting rights within its boundaries and guarantees of employment and other economic benefits.

A somewhat similar situation arose with Gwaii Haanas/South Moresby National Park reserve in British Columbia. Although the federal government accepted a Haida comprehensive claim in 1983, there were no interim measures to protect Haida lands during negotiations. Because of continued logging, the Haida decided to take matters into their own hands and created their own tribal park, designating Gwaii Haanas and Graham Island as protected areas. The ensuing publicity, along with protests from environmentalists, led the federal government to create the South Moresby park reserve, with the consent of the province. While there is a shared management structure for the park, its exact legal status awaits the outcome of treaty negotiations. The Haida have stated that they will not surrender their jurisdiction as part of any eventual settlement.

This same combination — protests from Aboriginal people and environmentalists — led the Ontario government to create the Wendaban Stewardship Authority in 1990-91. In this case, the dispute was over logging of old growth pine and the unresolved claim of the Teme-Augama Anishinabai. As part of treaty negotiations, the authority was given full management responsibility for a 400 square kilometre area of northeastern Ontario, including much of the pine and a controversial forest access road. Ontario and the Teme-Augama Anishinabai each appointed six members of the board and agreed on a non-voting chair. In a neighbouring area of Quebec, the Barriere Lake Trilateral Agreement — which covers a much larger area of 10,000 square kilometres — came into existence at about the same time because of similar protests over logging and its impact on the local Algonquin community at Rapid Lake. Unlike the Wendaban authority, the Barriere Lake agreement includes the federal government as well as the province. While the agreement is not based on recognition of Algonquin title within the region, and is not tied directly to treaty negotiations, the Algonquins of Barriere Lake see it very much as an interim measure that will help protect their rights to lands and resources in advance of their eventual comprehensive claim.

The title of the 1994 Interim Measures Agreement Between British Columbia and the First Nations of Clayoquot Sound is self-explanatory. The result of an intense and highly public period of protest over clearcut logging in the Clayoquot Sound watershed of Vancouver Island, the agreement is tied

specifically to the B.C. treaty process and is without prejudice to the eventual resolution of the claim of the Hawiih of the Tla-o-qui-aht First Nation community and the Ahousaht, Hesquiaht, Toquaht and Ucluelet First Nation peoples. Like the Wendaban authority on which it was modelled, the Clayoquot Sound agreement establishes a joint land and resource management process with equal representation from each side.

The Interim Hunting Agreement Between the Algonquins of Golden Lake First Nation and the Government of Ontario establishes the right of Golden Lake people to hunt within Algonquin Provincial Park, pending completion of tripartite negotiations over the Algonquin claim — which the federal government treats as a claim of a third kind. As noted in the introduction to this chapter, widespread protests from local non-Aboriginal people and urban park users over Algonquin hunting led to the agreement.

Finally, the Whitedog Area Resources Committee, set up in 1993 under the terms of a 1991 memorandum of understanding between Wabaseemoong Independent Nations (formerly Islington First Nation) and the government of Ontario, is technically not an interim measure, but it does represent another step in a long process of resolving problems created in the 1950s and ‘60s by hydroelectric dams and pulp mill pollution. A 1983 agreement between the parties provided for consultation, but not co-management. Formally established in 1993, with a four-year mandate and equal representation from Ontario and the First Nation, the committee is charged with developing and designing a co-management arrangement to govern all proposed activities by any parties in Wabaseemoong’s traditional land use area.

While some of these boards are concerned with only a single animal species (such as caribou), a single activity (such as hunting), or a single designated area (such as a park), others generally adopt a holistic and ecosystem approach to land and resource management, whatever the geographic size of their mandate. This is in contrast to the claims-based co-management agreements, which have multiple boards for different mandates. These ad hoc arrangements also come much closer to true co-jurisdiction than any of the claims-based agreements. The Wendaban authority, for example, whose management area was removed from the control of the local ministry of natural resources office, was also intended to be a shared jurisdiction body — with the board reporting to the government of Ontario and the Teme-Augama Anishinabai, rather than to a provincial government minister alone.

The areas covered by the Clayoquot Sound agreement, Gwaii Haanas/South

Moresby park, the Barriere Lake agreement, the Wendaban authority and the Whitedog committee are all situated in the mid-north, where Aboriginal people share the land with many small non-Aboriginal communities and other interested parties such as forest companies. These interim arrangements clearly represent the kinds of lands that might be included as shared or Category II lands in new or renewed treaties. Because they already feature provincial involvement, they offer more appropriate — and in some cases more innovative — models of land and resource management than those in the existing comprehensive claims agreements. They can also be contrasted in several ways with arrangements in the next category, which also involves areas of the mid-north.

Community-based resource management

Across Canada, provincial and territorial governments have been adopting a number of strategies to increase community involvement in land and resource management decisions. They have been doing so for two principal reasons. First, some residents of rural and remote communities have come to resent centralized planning and control, which they feel does not adequately reflect local concerns about employment or access to resources. Other provincial and territorial residents have argued that policies should give greater weight to non-extractive uses of natural resources. The second reason is financial. Governments have an increasing incentive to devolve power in a period of fiscal restraint.

Ontario's community forestry initiative, which consists of four pilot projects, is one kind of provincial response. Another is the system of controlled exploitation zones for fish and wildlife in Quebec. A third involves recent proposals for multi-party stewardship of the Bras d'Or Watershed on Cape Breton Island in Nova Scotia. (See Appendix 4B for more details concerning these projects.)

If Ontario's experience is a guide, these projects will be extremely popular among non-Aboriginal residents of rural and remote Canada. The Elk Lake community forest project in northeastern Ontario, for example, has generated wide public support, and its board members lobbied the government successfully to have its mandate and funding extended beyond the 1995 termination date. Like many northern communities, the principal economic base of Elk Lake is a small sawmill. Community members feel that for the first time, they have obtained some power over resource management decisions that affect their lives and livelihoods, in contrast to a system where most major decisions are made elsewhere and reflect broader provincial interests.

Technical staff for the community forest projects is provided by the ministry of natural resources, and there is a close working relationship between the ministry and the project board. The structure of these community forest initiatives bears some resemblance to the caribou management board, in that government managers have retained ultimate responsibility for planning decisions. In fact, by comparison with most of the co-management boards already discussed, the community forest boards have very little power at this stage in their evolution.

Quebec's controlled exploitation zones (ZECs) are specific areas in the mid-north of the province in which development, harvesting and conservation of wildlife are managed by local non-profit organizations. They were created in the 1970s as a means of dismantling private hunting and fishing reserves where public and Aboriginal hunting, fishing and trapping were previously prohibited. The 80 ZECs are divided into three major categories: wildlife ZECs, waterfowl ZECs and salmon ZECs. Like Ontario's community forest initiatives, the ZECs are very popular with non-Aboriginal residents of rural and remote communities, who have come to treat them as a form of common property.

These volunteer organizations are not co-management bodies in the sense that the government and a community undertake to manage an area or species jointly, but rather another form of delegated community-based resource management. All decisions must conform to provincial regulations, and the applicable minister retains ultimate authority.

Apart from having relatively less power, the other major difference between these arrangements and those just discussed concerns the involvement of Aboriginal people. In Quebec, Aboriginal people can participate as individuals on the local association, but the ZEC enabling legislation does not provide for guaranteed Aboriginal involvement in management, nor does the act recognize Aboriginal rights to resource use within the zones. This can lead to conflict — one of the cases currently before the Supreme Court of Canada involves charges against Aboriginal people for fishing in a ZEC without a licence.[448] However, some individual ZECs, such as the one dealing with Atlantic salmon, have tried to ensure more equal representation between Aboriginal and non-Aboriginal people. It is our view that these kinds of arrangements should be encouraged.

In the case of Ontario's community forest projects, one is entirely Aboriginal (covering Wikwemikong unceded reserve on Manitoulin Island). However, the

initiative is generally aimed at the non-Aboriginal population of the provincial north. While the Elk Lake project reserves one of 15 seats on its board for an Aboriginal representative (with an alternate), the remaining two projects (Geraldton and Kapuskasing) include no Aboriginal representatives at all, even though they fall within the traditional territories of the Long Lake and Moose Factory First Nation communities respectively. In general, the plans being developed by community forest partnerships are required to respect provincial regulations and procedures but are not required to pay similar attention (with the exception of Wikwemikong) to treaty and Aboriginal rights or to other Aboriginal issues and concerns.

In fact, Ontario currently applies the term co-management to a wide variety of stakeholder boards or committees — many of which include few or no Aboriginal members. When Aboriginal people do agree to participate in such activities, they can find themselves out-voted. Thus, in May 1994, a majority of the members of the Sturgeon Lake co-management committee in northwestern Ontario voted to create a total sanctuary on all walleye spawning grounds within the management area — at the same time accusing Aboriginal people of damaging fish stocks and habitat. The committee, which included tourist outfitters and local hunters and anglers among its members, also voted to review the legal status of all Aboriginal fishing in sanctuaries. Representatives from the local Saugeen First Nation resigned from the committee in protest.[449]

Such disputes are indicative of the lack of agreement over definitions of conservation. They also reflect the tendency of resource managers and local citizens to treat Aboriginal people as just one among many stakeholder groups with interests in lands and resources. Of the three kinds of co-management regimes we have outlined, Aboriginal people clearly prefer the first two — since they are the only structures that offer them some rough equality in membership and decision making.

Community-based resource management boards are a very suitable model for Category III lands — that is, those over which the Crown will retain full management rights. In many areas of the mid-north, this is likely to be the largest category under treaty. For boards that deal with resource management, such as the Elk Lake community forest initiative, one Aboriginal board member out of 15 may be entirely appropriate. But harvesting rights are among the more limited Aboriginal board rights that would continue to apply throughout Category III lands. It is important, therefore, that community boards with wildlife management responsibilities, such as the ZECs, acknowledge that Aboriginal people are the only stakeholders whose harvesting rights are constitutionally

protected. Here, the approach of the Atlantic salmon ZEC is a much more appropriate model.

It is also possible, however, that community-based resource management boards could evolve into true co-management boards that would combine elements of Category II and Category III lands. This is the case, for example, with a recent proposal for a stewardship body for the Bras d'Or watershed on Cape Breton Island in Nova Scotia. At the moment, responsibility for developing and protecting land and water resources within the watershed rests with 20 different government agencies at the federal, provincial and municipal levels. This fragmentation has made it difficult to develop plans for sustainable development. The Bras d'Or Lakes working group, made up of a variety of stakeholder interests such as tourist outfitters and local municipalities, government departments, and local Mi'kmaq, with the assistance of the University College of Cape Breton, spent 12 months developing organizational plans for a new streamlined single-window agency. This proposal was presented to the provincial and federal governments in April 1995.

The report calls for the creation of a Bras d'Or Stewardship commission by November 1996. It would be a community-based organization with a mandate for resource planning and management for the entire watershed area. Responsibility for stewardship would be shared between the Mi'kmaq and non-Aboriginal residents of the watershed. There would be five voting Mi'kmaq members and seven voting members representing other local interests; the board would be filled out with six non-voting members, four appointed by local municipalities, one by the federal government and one by the province of Nova Scotia.

Improving co-management regimes

Lessons learned

As these examples have shown, Aboriginal peoples have been quite successful at bringing governments to the negotiating table in circumstances of political crisis. Governments and the public may be sending the wrong message — that direct, obstructive action produces positive results for Aboriginal communities. As interim measures, the ad hoc or crisis-based co-management regimes have created several important precedents. But they lack the certainty and staying power of regimes created by new treaties (comprehensive claims settlements). As soon as the precipitating crisis drops from the headlines, governments can lose interest or turn to more pressing matters, forgetting the obligations

assumed in the agreement that ended the crisis.

In addition, responding only to crisis results in random patterns of management arrangements. The Algonquin of Barriere Lake, for example, have a trilateral agreement, but the neighbouring Algonquin of Grand Lac, who face much the same circumstances, do not. The difference is that the Barriere Lake Algonquin took action against government, blockading forest access roads and seeking a court injunction against logging. Because ad hoc arrangements usually cover relatively small areas, this raises the prospect of a patchwork approach to environmental planning and management, with associated problems of cost and harmonization.

In most comprehensive claims negotiations, by contrast, individual First Nation communities or traditional territories are consolidated for purposes of title and management. For example, while there are about 30 communities in Nunavut, each with a traditional land-use area represented by a designated organization, the agreement there calls for only one co-management board for the entire settlement area. While this kind of arrangement may be inappropriate in the mid-north or more southerly areas, it has many advantages in the far north. It represents not only a considerable saving but also the consolidation of individual territories, which, for land and resource management purposes, is more in keeping with the broader governance models we recommended in Chapter 3.

Operations

How boards or committees operate may be as important as their powers. For example, the language of operation, the role of traditional knowledge, the location of meetings, provisions for training and employment, access to independent expertise, and adequate funding are important factors affecting successful operation. There is also a need for flexibility and adaptability. There is a danger that operating mandates and techniques can become so fixed in stone that they tend to obstruct rather than assist in implementing the spirit of agreements.

Communication is also an important function of co-management. A good board with low member turnover and regular attendance can develop as a team; mutual respect and understanding can help overcome long-standing differences at the board level. But this can have only limited impact if the wider public — both Aboriginal and non-Aboriginal — does not understand and agree with the board's decisions. Effective communication is crucial, because

traditions of decision making and implementation can vary substantially between government agencies, non-Aboriginal board members and Aboriginal communities. Many of the claims-based co-management boards have tended to operate more in the government than in the Aboriginal style, though some of the crisis-based organizations — such as the Wendaban Stewardship Authority — have tried to operate by consensus and adopt other cross-cultural methods.

Representation on co-management boards

The contrast between claims-based and crisis-based co-management also extends to representation. Because most comprehensive claims settlements have been in the far north, where there are few other interested parties, boards have generally consisted of equal numbers of Aboriginal representatives and public servants. At provincial or territorial levels, however, government appointments to boards generally consist of stakeholders rather than government employees. Indeed, the need to build communication, trust and confidence at the local level was borne out in presentations to the Commission, as non-Aboriginal Canadians and groups such as the Yukon Fish and Wildlife Association argued that they should participate directly in co-management arrangements with Aboriginal communities and Canadian governments or be assured access to some forum through which to be heard.

Where resolving conflicting management objectives is a central task of the co-management board, the way stakeholders are identified and represented in the management system is obviously crucial. The negotiation of Aboriginal claims sets a certain pattern that will not necessarily apply to others. While insistence on participating in co-management arrangements can be attributed to the reluctance of non-Aboriginal Canadians to see the management of resources turned over to Aboriginal governments, it also reflects a broader trend in Canadian society: Canadians have consistently and increasingly demanded more of a say in public decision-making processes, particularly with respect to conservation and environmental protection. Therefore, while the role of public representation on co-management boards is largely a subject for negotiation between Aboriginal and non-Aboriginal governments, it is clear that these agreements will not enjoy a large measure of success over the long term without some forum for interested people and organizations in the broader community.

The notion that government representatives also represent major non-Aboriginal stakeholders is not well accepted. For example, in their submission to the Commission, the Ontario Federation of Anglers and Hunters argued that

the appointment of provincial natural resources employees to co-management boards is inappropriate because they cannot, as Crown employees, fairly represent the interests of non-Aboriginal citizens.[450]

The Commission believes that public servants can serve most appropriately as technical advisers to boards. If they are actually members, they should be non-voting rather than voting members. This is particularly true if the mandate of the co-management body is based on power sharing.

Technical advice

At best, co-management boards supplement but do not replace existing resource management agencies. Most have either no secretariats or purely administrative ones. This means that they get technical advice for planning and decision making primarily from resource management agency scientists. Aboriginal people generally argue that this is not neutral information. Some advocate that Aboriginal or 'user' members of boards obtain independent technical advice, but whether they can actually do so will depend on funding levels and operating procedures. Only some of the claims-based boards have been successful in doing this, with the most outstanding examples being the co-management boards established in the western Arctic as a result of the Inuvialuit Final Agreement. Indeed, the creation of separate secretariats to support co-management arrangements may be easier to achieve north of the 60th parallel, where these agreements tend to cover an enormous geographic area.

South of the 60th parallel, it may be too unwieldy and expensive to create separate secretariats to support individual co-management areas, which conceivably could be quite numerous in any given region. It may be worthwhile, therefore, to consider enhancing the capacity of existing secretariats at the community, tribal or regional level, such as the natural resources secretariat of Manitoba Keewatinowi Okimakanak, which already provides support services to its member communities. Another option would be to create one regional secretariat or research institute to assist all management regimes within an entire region.

At the very least, co-management has resulted in open discussion of research and management techniques that formerly occurred behind closed doors. Although research and management do not always incorporate Aboriginal knowledge and concepts, managers do have to justify and explain what they are doing and in some cases will not undertake programs that Aboriginal

harvesters clearly object to.

The research and information requirements of planning and management boards can be substantial, especially for major regional regimes. Questions arise about the knowledge system in which management occurs, the actual requirements and tests for documentation, control of intellectual property, and access to and control over data. For local co-management initiatives, the costs and availability of expertise may be beyond their capacity. This emphasizes the need for better and cheaper ways of disseminating knowledge and experience and for training Aboriginal people in relevant disciplines. One option is to rely on existing secretariats to provide the necessary support. This is being pursued by the Union of Ontario Indians, further to their memorandum of understanding with Ontario respecting the negotiation of sole and shared management of fisheries with member First

Nations communities. The parties agree to establish a joint fisheries resource centre to act as a central and independent source of information on technical conservation and management issues. The creation of these centres would go a long way to alleviating conflicts between government and Aboriginal parties on matters such as the accuracy of data and access to and control over information.[451]

Recognizing and incorporating traditional knowledge

Aboriginal self-management systems are based on what is often referred to as traditional knowledge, which in turn is incorporated into language. The experience of co-management systems in accounting for and incorporating traditional knowledge has varied widely. It is not always recognized that many key terms used in the technical idiom of biology and resource management, such as ‘wildlife’ and ‘conservation’ — have no direct equivalent in Aboriginal languages. The way Aboriginal harvesters define scarcity and abundance may differ substantially from the way resource managers define matters such as surplus and sustainable yield. The language of resource management, therefore, is far from unambiguous, especially from a cross-cultural perspective.

The real issue is how the parties reconcile such differences. It is sometimes hard for Aboriginal representatives to formulate or articulate their contributions, particularly if they are intimidated by the dominant resource management ethos. This may make it hard to move beyond platitudes, reinforcing resource managers’ scepticism that there is really anything important to be gained from

traditional knowledge. Cross-cultural education is therefore crucial to the success of co-management.

Encouraging co-management

Despite these caveats, an incremental approach to co-management does offer a number of benefits. In the absence of fundamental changes in the law recognizing Aboriginal title and jurisdiction outside Aboriginal lands, co-management arrangements are a valuable option in the short term for dealing with competing interests, so that day-to-day issues and activities can be managed in a manner that incorporates the concerns and interests of Aboriginal communities.

More important, although existing arrangements do not formally recognize Aboriginal jurisdiction over land and resource management, co-management enables Aboriginal communities to gain greater control in practice. Aboriginal control and involvement in management can be entrenched on an incremental basis as the new way of doing things becomes familiar and palatable to government agencies and other interested parties. The goal is to entrench and gain support at the local level so that government cannot unilaterally and suddenly dismantle the regime without provoking a reaction.

Moreover, this kind of arrangement enables the Aboriginal community to acquire management expertise, experience and authority at a comfortable pace. Commission research indicates that building trust and capacity at the local level is essential for mutually acceptable and successful implementation.[452]

Models for effective co-management already exist — as in the western Arctic, where Inuvialuit have had nearly ten years of experience in implementing their agreement. Inuvialuit are committed to their co-management regimes because their title and rights give them a certain standing in dealing with their government counterparts, with whom they have good relations and achieve effective results. The Wendaban Stewardship Authority in Ontario and the Barriere Lake Trilateral Agreement in Quebec are other important examples. But to be truly effective, these models need time to develop and mature. This requires stable funding levels and the co-operation of all parties.

With their constitutional responsibilities for lands and resources, provincial and territorial governments will bear the main burden of ensuring the effectiveness of co-management and co-jurisdiction regimes and play a central role in land

selection processes. Most provinces are already sharing management with Aboriginal and other local communities and addressing the concerns of non-Aboriginal resource users, and we applaud these initiatives. We believe, moreover, that it is reasonable to count on these governments to accelerate their efforts, in partnership with the federal government and Aboriginal governments, and to build on the successes already achieved.

Recommendation

The Commission recommends that

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The following action be taken with respect to co-management and co-jurisdiction:

(a) the federal government work with provincial and territorial governments and Aboriginal governments in creating co-management or co-jurisdiction arrangements for the traditional territories of Aboriginal nations;

(b) such co-management arrangements serve as interim measures until the conclusion of treaty negotiations with the Aboriginal party concerned;

(c) co-management bodies be based on relative parity of membership between Aboriginal nations and government representatives;

(d) co-management bodies respect and incorporate the traditional knowledge of Aboriginal people; and

(e) provincial and territorial governments provide secure long-term funding for co-management bodies to ensure stability and enable them to build the necessary management skills and expertise (which would involve cost sharing on the part of the federal government).

8. Conclusions

As with our development activities, Inuvialuit have reached beyond the Settlement Region to build partnerships and achieve agreements that will ensure our future well-being and that of our land and resources. The Settlement Region is neither an economic enclave, nor a protectorate under the

watchful eye of government. Like our business activities and development initiatives, our land and wildlife are affected by decisions and events external to where we live and hunt and fish. Here as well, we have sought to exert our influence beyond the specific provisions of the [Inuvialuit Final Agreement] and the boundaries of the Settlement Region.[453]

We believe that the principle of sharing of our homeland, its natural resources, is the basis of the treaty arrangements, not surrender or extinguishment. Accordingly, the concepts of resource co-management and revenue sharing from the Crown lands and resources are the proper forms of treaty implementation.

Chief George Fern
Prince Albert Tribal Council
La Ronge, Saskatchewan, 28 May 1992

Inuvialuit of the western Arctic now have a land settlement with Canada that is enabling them to build their communities and economy. While the Inuvialuit Final Agreement does state that their Aboriginal title to lands and resources has been extinguished (a requirement that we recommend should no longer be imposed on Aboriginal people), Inuvialuit have secured a sizeable land base that they — not the department of Indian affairs — control. Moreover, Inuvialuit have also obtained a share in the management of resources on Crown lands throughout the entire region covered by the agreement.

These are important accomplishments. They are also among the stated goals of Aboriginal peoples throughout Canada, whether they live in or near urban centres or in rural and remote regions, and whether they now have treaties or seek to enter into a treaty relationship. Aboriginal peoples want to control and expand their land base and, as Chief George Fern of the Prince Albert Tribal Council stated, to share in the natural resources and revenues of their traditional lands. This, he says, is the proper form of treaty implementation.

Inuvialuit have already experienced the effects on well-being of adequate lands, resources and political powers. They are building their own communities and expanding their economic interests beyond the region and settlement area — using funds from the settlement to invest, for example, in enterprises in Edmonton, Vancouver and other urban centres.

Claims settlements are not the only means of expanding Aboriginal access to lands and resources. According to a 1994 auditor’s report, the Meadow Lake

Tribal Council in northern Saskatchewan is making a profit and paying millions in corporate taxes on revenues generated by the sawmill the council bought in 1988 in a joint venture with the mill's employees. Under the associated forest management licence, the tribal council now employs many of its own members in woods operations in parts of northern Saskatchewan. Chief Raymond Gladue has been happy to publicize the company's success because, he says, it is important that Aboriginal people be seen as contributors to Canada's economic prosperity, not a drain on it.[454]

The Meadow Lake example is significant for several reasons. The nine First Nations communities participating in the project through the tribal council have been able to purchase lands and assets outside their reserves, as well as gain access to resources on provincial Crown land, despite the fact that their treaties (Treaty 8 and Treaty 10) purport to extinguish Aboriginal title.[455] Changes in forest tenure systems and regulations are one of the many ways federal, provincial and territorial governments can alter the legal and policy framework to improve Aboriginal access to lands and resources. These alterations do not have to await the broad changes in laws, regulations and policies that we recommend.

The Meadow Lake case is also significant because it shows that gains for Aboriginal people do not automatically mean losses for other Canadians. The mill and the woods operations of the Meadow Lake Tribal Council are providing jobs for Aboriginal and non-Aboriginal people alike. This kind of positive example can help to allay the fears about the expected impact of claims settlements on the rights of landowners, resource industries, municipalities, anglers and hunters, and other interested parties.

We discuss these topics again in Chapter 5, but for now our point is clear: Given the right circumstances, Aboriginal people are more than capable of building a viable economy. The question is, will they have that chance? As we have shown in this chapter, Aboriginal peoples consistently have been put on the defensive, compelled to react in the face of intrusive development instead of participating actively in development planning that is compatible with their rights, values and cultures.

Contemporary events offer both a lesson and a warning. In the Northwest Territories, a diamond rush is in progress. Diamond formations have also been found recently along the Attawapiskat River, in a remote corner of northeastern Ontario. At Voisey's Bay in Labrador, a junior resources company searching for diamonds has instead found a huge deposit of base minerals, one of which has

already attracted a multi-million dollar investment from Teck Corporation and the direct involvement of the giant nickel producer, INCO.

Staking fever, at least in Labrador and the Northwest Territories, is reminiscent of mining booms earlier in this century. Hundreds of prospectors and geologists have staked every inch of ground in the affected areas, swamping regional airlines, hotels and restaurants. Businesses have welcomed the unexpected stimulus to the regional economy and look forward to the development of viable mines.

If we return to the map of population distribution (see Figure 4.5), we can see that all this activity is taking place in areas where Aboriginal people form a majority of the population. But despite their majority status, Dene and Métis of the Northwest Territories, the Cree of northeastern Ontario, and Inuit and Innu of Labrador all find themselves in the same uncertain situation. Will they have any say in decisions about how, when — and even if — the projects go ahead? Will they have a guaranteed share in the employment opportunities and other economic spinoffs of mineral development, if those projects prove viable and are approved? Or, as we saw earlier, will they instead bear most of the social and economic costs of resource development, with few of the benefits?

The mining industry is simply following the rules of the game as laid out by governments. For a number of years, the industry has been increasingly solicitous of Aboriginal interests and if government and industry adopt the measures set out in our recommendations, there will be many potential benefits for Aboriginal people from these recent developments. At Voisey's Bay, for example, Archaean Resources is already employing 15 Inuit and four Innu on its survey crews, and there is the prospect of more employment during the exploration phase.[456]

Our concerns are more fundamental: they relate to the treaty relationship, or lack of it. The Cree of northeastern Ontario have a treaty with the Crown (Treaty 9), but neither the federal nor the provincial government considers that the treaty guarantees the Cree employment benefits or a share in the revenue from resource development, much less entitles them to oppose projects or control their implementation. Inuit and Innu of Labrador do not have a treaty, although Inuit had been negotiating with the provincial and federal governments until intergovernmental disputes over cost sharing ended the discussions. In the Northwest Territories, while the Gwich'in Dene and the Dene-Métis of Sahtu have now concluded land claims agreements with the Crown, the remaining Dene and Métis people have been negotiating a new arrangement with the

federal government for much of the past 20 years. But governments do not consider that assertions of Aboriginal title trump the rights of the Crown or industry.

In short, there is no certainty for Aboriginal people in the current relationship. They are forced to rely on the grace and favour of government and industry for development benefits, and governments can create new third-party interests both before and during negotiations. This is a fundamental weakness of the comprehensive claims process, one that many groups commented on in their submissions to the Commission. We urge government to provide interim protection, including land withdrawals and shared management, to limit the ability to create new interests until negotiations are concluded.

Inuit and Innu of Labrador are speaking from personal experience. The creation of new interests is already apparent from the pace of development at Voisey's Bay. The main mineral discovery lies about 35 kilometres southwest of the Inuit community of Nain and some 60 kilometres north of the Innu community of Davis Inlet. But exploration companies have now staked virtually all the islands and mainland within a 100-kilometre radius of Nain, and exploration is proceeding outward at an exponential rate. The staked lands include not only the immediate vicinity of Nain, but campsites, harvesting areas and other areas traditionally used by Inuit and Innu. The exploration zone thus contains areas that Aboriginal people would presumably wish to keep for themselves or to protect from development, or from which they would wish to derive revenue benefits under any new treaty.

In almost every instance to date, resource development has forced Aboriginal communities into a reactive position. As we saw earlier in this chapter, during the copper boom of the 1840s on Lake Superior, an Ojibwa and Métis war party occupied one of the mines to protest the fact that the provincial government had authorized mining development before making a treaty with them. In this century, Aboriginal communities have gone to court or used direct action — blockades, boycotts and adverse publicity — to gain the attention of government. The institutions of crisis-based shared management are the direct result of Aboriginal reaction to resource development.

Courts are a blunt instrument. The process is costly, the outcome is never certain, and the all-or-nothing nature of the process can lead to results that satisfy no one. Legal processes and direct action can also delay projects, leading to accusations that Aboriginal people are obstructionist, that they are harming the country's economic interests. But if Aboriginal people feel they

have no alternative to equalize their bargaining power with government, the choice between doing nothing and direct action is an easy one.

Many Canadians have expressed concern about the cost of settling Aboriginal grievances. But can we afford not to deal with them? In other parts of our report we have talked about the cost of doing nothing — about the health and social welfare expenditures, the overburdened justice system, the toll in suicide and lost opportunities (See, for example, Volume 5, Chapter 2, Volume 3, Chapter 3, and *Bridging the Cultural Divide*, our special report on the justice system.) Unresolved land and resource issues, while not entirely responsible, lie behind many of these problems. In the case of Voisey's Bay and similar developments, it is not difficult to see the potential problems. The cost of doing nothing, or of doing too little, could far outweigh the benefits of proceeding with development before issues of Aboriginal title are responsibly addressed.

Labrador Inuit are negotiating with government once again. The Innu of Davis Inlet have suspended their protest against drilling efforts — but not their assertion of Aboriginal title to their traditional lands. They are seeking negotiations as well. A major development like Voisey's Bay represents both a challenge and an opportunity. It can lead to years of protests, court cases and general social conflict. Or it can lead to a fruitful new relationship between Aboriginal peoples and other Canadians. In the next chapter, we outline the many ways Aboriginal peoples could benefit from resource development. First, however, they need a land base, guaranteed access to resources, and powers of governance — as Inuvialuit of the western Arctic and other nations with modern treaties already have.

Our recommendations in this chapter would require Parliament to protect Aboriginal lands and resources. The changes we are recommending in federal claims policies, and the establishment of interim measures while treaties are being negotiated, would make a significant difference to all Aboriginal people who seek to make new treaties or to renew and implement old ones. It is the treaty relationship that will establish a genuine reconciliation between Aboriginal peoples and other Canadians, based on the principles of mutual respect and sharing.

Notes:

***** Because of its length, Volume 2 is published in two parts, the first containing chapters 1 to 3 and the second chapters 4 to 6.

***** Transcripts of the Commission's hearings are cited with the speaker's name and affiliation, if any, and the location and date of the hearing. See *A Note About Sources* at the beginning of this volume for information about transcripts and other Commission publications.

1 Chiefs of the Shuswap, Okanagan and Couteau (Thompson) Tribes of British Columbia to Prime Minister Sir Wilfrid Laurier, as quoted in Kamloops *News*, 25 August 1910.

2 Chief James Montour of Kanesatake (Oka), appearing before the Joint Committee of the Senate and the House of Commons on Indian Affairs, as quoted in John Thompson, "A History of the Mohawks at Kanesatake and the Land Dispute to 1961", in *Materials Relating to the History of the Land Dispute at Kanesatake*, report prepared for the Department of Indian Affairs and Northern Development (DIAND), revised edition (1993), p. 42.

3 This figure includes reserves, Indian settlements and Métis settlements in Alberta. Reserves south of the sixtieth parallel amount to approximately 26,600 square kilometres. See DIAND, *Schedules of Indian Bands, Reserves and Settlements Including Membership and Population Location and Area in Hectares* (Ottawa: Government Services Canada, 1992).

4 In 1990, there were 1,878,285 Native Americans in the lower 48 states æ or .008 per cent of the total U.S. population of 248,709,873: *1990 Census of Population: General population characteristics, United States* (Washington, D.C.: U.S. Department of Commerce, 1992). There are 64,647,429 acres (261,822 square kilometres) of Indian lands in the lower 48 states: Bureau of Indian Affairs, "Acreage of Indian Lands by State", 1992 (unofficial figures). In Australia, Aborigines make up 1.2 per cent of the total population and hold title to 10.3 per cent of the land mass: Robert White-Harvey, "Reservation Geography and the Restoration of Native Self-Government" (1994) 17 Dalhousie L.J. 587 at 588.

5 See Royal Commission on Aboriginal Peoples [RCAP], *Focusing the Dialogue: Discussion Paper 2* (Ottawa: Supply and Services, 1993).

6 Rudy Platiel, "Coping with a land claim", *Globe and Mail* (1 October 1994),

pp. A1 and A9; Diane Forrest, “Our Home and Native Land”, *Cottage Life*, November/December 1994, pp. 30-39. See also Appendices 4A and 4B to this chapter.

7 RCAP, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Supply and Services, 1995).

8 These three categories are discussed at some length in *Treaty Making in the Spirit of Co-existence*.

9 Patrick Moore and Angela Wheelock, eds., and Dene Wodih Society, comp., *Wolverine Myths and Visions: Dene Traditions from Northern Alberta* (Edmonton: University of Alberta Press, 1990), pp. xxi-xxv, 59-70, 84-86.

10 One of these parcels, Moose Prairie Indian Reserve #208, was surrendered to the Crown in 1954.

11 Moore and Wheelock, *Wolverine Myths and Visions* (cited in note 9), pp. xii-xiii; Dennis Madill, *Treaty Research Report: Treaty Eight* (Ottawa: Indian Affairs and Northern Development, 1986), pp. 85, 135-142, 149.

12 Moore and Wheelock, *Wolverine Myths and Visions*, pp. 72-76.

13 See Volume 4, Chapter 6.

14 For this and the following discussion, see generally, Peter J. Usher, Frank J. Tough and Robert M. Galois, “Reclaiming the land: aboriginal title, treaty rights and land claims in Canada”, *Applied Geography* 12/2 (1992), pp. 109-132.

15 Eleanor B. Leacock, “Les relations de production parmi les peuples chasseurs et trappeurs des régions subarctiques du Canada”, *Recherches amérindiennes au Québec* 10/1-2 (1980), pp. 79-80.

16 Olive Patricia Dickason, “For Every Plant There is a Use: The Botanical World of Mexica and Iroquoians”, in *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, ed. Kerry Abel and Jean Friesen (Manitoba: University of Manitoba Press, 1991), p. 23.

17 J.A. Cuoq, *Lexique de la langue algonquine* (Montréal: J. Chapleau et Fils, 1886), p. 296.

18 John Joe Sark, transcripts of the hearings of the Royal Commission on Aboriginal Peoples [hereafter RCAP transcripts], Charlottetown, Prince Edward Island, 5 May 1992.

19 National Archives of Canada (NAC), Record Group (RG) 10, volume 266, p. 163126, report of Commissioners Alexander Vidal and T.G. Anderson, 1849. See also James Morrison, "The Robinson Treaties of 1850: A Case Study", research study prepared for RCAP (1993). For information about research studies prepared for RCAP, see *A Note About Sources* at the beginning of this volume.

20 See also Morrison, "The Robinson Treaties of 1850".

21 An elder quoted in Anastasia M. Shkilnyk, *A Poison Stronger than Love: The Destruction of an Ojibwa Community* (New Haven, Conn.: Yale University Press, 1985), p. 66.

22 Shkilnyk, *A Poison Stronger than Love*, pp. 71-72.

23 F.G. Speck, *Family Hunting Territories and Social Life of Various Algonkian Bands of the Ottawa Valley: Memoir 70, No. 8, Anthropological Series* (Ottawa: Government Printing Bureau, 1915), p. 21. Aboriginal people are generally reluctant to discuss spiritual sanctions to cause misfortune, as the potential consequences of doing so are understood as being just as harmful. Others, however, have documented instances where its use, or threat of use, has been a means of punishing or resolving conflicts (including those related to resource access and allocation) among clans or between nations. See, for example, Shkilnyk, *A Poison Stronger than Love* (cited in note 21) and Edward S. Rogers, *The Round Lake Ojibwa*, Occasional Paper 5 (Toronto: Royal Ontario Museum, 1962).

24 See Peter Usher, "Contemporary Aboriginal Lands, Resources, and Environment Regimes æ Origins, Problems, and Prospects", research study prepared for RCAP (1993); Adrian Tanner, "Existe-t-il des territoires de chasse?", *Recherches amérindiennes au Québec* 1 (1971), pp. 69-83; José Mailhot, "La mobilité territoriale chez les Montagnais-Naskapis du Labrador", *Recherches amérindiennes au Québec* 15/3 (1985), pp. 3-12; Jean-Guy Deschênes, "La contribution de Frank G. Speck à l'anthropologie des Amérindiens du Québec", *Recherches amérindiennes au Québec* 11/3 (1981), pp. 205-221.

25 Speck, *Family Hunting Territories* (cited in note 23), p. 17.

26 Quoted in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the Negotiations on which they were based, and other information relating thereto* (Toronto: Belfords, Clarke & Co., Publishers, 1880; Saskatoon: Fifth House Publishers, 1991), p. 59.

27 World Wildlife Fund Canada, "Protected Areas and Aboriginal Interests in Canada", brief submitted to RCAP (1993). For information about briefs submitted to RCAP, see *A Note About Sources* at the beginning of this volume.

28 William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983).

29 Henry T. Lewis, "A Time for Burning", Occasional Publication Number 17 (Edmonton: Boreal Institute for Northern Studies, University of Alberta, 1982), p. 25.

30 On this general topic, see the collected papers in Nancy M. Williams and Eugene S. Hunn, eds., *Resource Managers: North American and Australian Hunter-Gatherers* (Canberra: Australian Institute of Aboriginal Studies, 1986).

31 Andrew Chapeskie,"Land, Landscape, Culturescape: Aboriginal Relationships to Land and the Co-management of Natural Resources", research study prepared for RCAP (1995).

32 Chapeskie, "Land, Landscape, Culturescape".

33 Chapeskie, "Land, Landscape, Culturescape".

34 Canadian Arctic Resources Committee, "Aboriginal Peoples, Comprehensive Land Claims, and Sustainable Development in the Territorial North", brief submitted to RCAP (1993), Appendix F; see also The Inuit Circumpolar Conference, "The Participation of Indigenous Peoples and the Application of their Environmental and Ecological Knowledge in the Arctic Environmental Protection Strategy: A Report on Findings", report prepared for DIAND (1993).

35 Thomas R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992* (Vancouver: Douglas and McIntyre, 1991), pp. 126-139.

36 Dianne Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993).

37 See Victor P. Lytwyn, "Ojibwa and Ottawa Fisheries around Manitoulin Island: Historical and Geographical Perspectives on Aboriginal and Treaty Fishing Rights", *Native Studies Review* 6/1 (1990), pp. 1-30; John J. Van West, "Ojibwa Fisheries, Commercial Fisheries Development and Fisheries Administration, 1873-1915: An Examination of Conflicting Interest and the Collapse of the Sturgeon Fisheries of the Lake of the Woods", *Native Studies Review* 6/1 (1990), pp. 31-65; and Tim E. Holtzkamm, Victor P. Lytwyn and Leo G. Waisberg, "Rainy River Sturgeon: An Ojibway Resource in the Fur Trade Economy", *The Canadian Geographer* 32/3 (1988), pp. 194-205.

38 The discussion that follows is taken from Peter Usher, "Lands, Resources and Environment Regimes Research Project: Summary of Case Study Findings and Recommendations", research study prepared for RCAP (1994).

39 See, for example, Fikret Berkes, "Native Subsistence Fisheries: A Synthesis of Harvest Studies in Canada", *Arctic* 43/1 (1990), pp. 35-42.

40 See Elizabeth Robinson, "The Health of the James Bay Cree", *Canadian Family Physician* 34 (July 1988), pp. 1606-1613.

41 Even in the early 1970s, it was still unusual for graduate students in English Canada (though not in Quebec) to consider writing a thesis dealing with an Aboriginal issue. On the general topic of the treatment of Aboriginal people in educational materials, see Donald B. Smith, "A Look Backwards: Canada in 1892, 1927 and 1967", *ASC [Association for Canadian Studies] Newsletter* 14/3 (Fall 1992), pp. 10-15; and Sylvie Vincent and Bernard Arcand, *L'Image de l'Amérindien dans les manuels scolaires du Québec* (Montreal: Hurtubise HMH, 1979).

42 See Jacques Rousseau, "The Northern Québec Eskimo Problem and the Ottawa-Québec Struggle", *Anthropological Journal of Canada* 7/2 (1969), pp. 2-15; Barnett Richling, "Diamond Jenness and 'useful anthropology' in Canada", *Stout Centre Review* 2/1 (1991), pp. 5-9; and T.F. McIlwraith, "'At Home with

the Bella Coola Indians'", *B.C. Studies* 75 (Autumn 1987), pp. 43-60.

43 See Jean-Paul Bernard, "L'historiographie canadienne récente (1964-94) et l'histoire des peuples du Canada", *The Canadian Historical Review* 76/3 (September 1995), pp. 330-332, 348-350; Harold Franklin McGee, Jr., "No Longer Neglected: A Decade of Writing Concerning the Native Peoples of the Maritimes", *Acadiensis* 10 (Autumn 1980), pp. 135-142; James W. St. G. Walker, "The Indian in Canadian Historical Writing, 1971-1981", in *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*, Nakoda Institute Occasional Paper No. 1, ed. Ian A.L. Getty and Antoine S. Lussier (Vancouver: University of British Columbia Press, 1983), pp. 340-357; and Bruce G. Trigger, *Natives and Newcomers: Canada's 'Heroic Age' Reconsidered* (Kingston and Montreal: McGill-Queen's University Press, 1985), pp. 3-49.

44 Claims of territorial sovereignty by European nation-states were bolstered by indefensible assertions of religious, ethnic, cultural and political superiority. As described by Chief Justice John Marshall of the United States Supreme Court, in *Johnson* v. *M'Intosh*, 5 U.S. (8 Wheaton) 543 at 573 (1823):

The character and religion of [North America's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.

See also William Edward Hall, *A Treatise on International Law*, 8th ed. (London: Oxford University Press, 1924), p. 47 (international law only governs states that are "inheritors of that civilization"); Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Volume 1 (Boston: Little, Brown, and Company, 1922) p. 164 ("native inhabitants possessed no rights of territorial control which the European explorer or his monarch was bound to respect"); and John Westlake, *Chapters on the Principles of International Law* (Cambridge: University Press, 1894), pp. 136-138, 141-143 (a distinction is drawn between "civilization and want of it").

45 See generally, Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1996) Osgoode Hall L.J. (forthcoming).

46 See RCAP, *Treaty Making in the Spirit of Co-existence* (cited in note 7) and RCAP, *Partners in Confederation: Aboriginal*

Peoples, Self-Government, and the Constitution (Ottawa: Supply and Services, 1993), pp. 5-27. See also J.C. Smith, "The Concept of Native Title" (1974) 24 U.T.L.J. 1 at 9 (the origin of the law of Aboriginal title lies in institutions that give recognition to the near-universal principle that land belongs to those who have used it from time immemorial).

47 See *Calder* v. *British Columbia (A.G.)*, [1973] S.C.R. 313; see also *Mabo* v. *Queensland* (1992), 107 A.L.R. 1; *Worcester* v. *Georgia (1832)*, 8 U.S. 6 Peters 515.

48 For the view that extinguishment did occur, see Henri Brun, "Les droits des Indiens sur le territoire du Québec", in *Le territoire du Québec: Six études juridiques* (Quebec City: Presses de l'Université Laval, 1974), pp. 49-51; and G.F.G. Stanley, "The First Indian 'Reserves' in Canada", *Revue d'histoire de l'Amérique française* 4/2 (1950).

For the pluralist perspective, see Denys Delâge, "L'alliance franco-amérindienne 1660-1701", *Recherches amérindiennes au Québec* 19/1 (1989), pp. 3-15; Gilles Havard, *La grande paix de Montréal de 1701: Les voies de la diplomatie franco-amérindienne* (Montreal: Recherches amérindiennes au Québec, 1992); Brian Slattery, "Did France Claim Canada Upon 'Discovery'?", in *Interpreting Canada's Past*, ed. J.M. Bumsted, Volume I (Toronto: Oxford University Press, 1986), pp. 2-26; and Brian Slattery, "The Land Rights of Indigenous Canadian Peoples", PH.D. dissertation, Oxford University, 1979, pp. 70-94.

49 See Andrée Lajoie, "Synthèse introductive", research study prepared for RCAP, in A. Lajoie, J.-M. Brisson, S. Normand and A. Bissonnette, *Le statut juridique des autochtones au Québec et le pluralisme* (Cowansville, Quebec: Les Éditions Yvon Blais, 1996).

50 *Connolly* v. *Woolrich* (1867), 17 Rapport judiciaires revisés de la Province de Québec. 75 at 82 (Sup. C.).

51 The Proclamation provides:

In order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively, within which they shall lie; and in case they shall lie within the Limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose. The complete text of the Royal Proclamation is reproduced in Volume 1, Appendix D.

52 *Constitution Act, 1867* (U.K.) 30 & 31 Vict., c. 3, s. 91(24) (assigning exclusive legislative authority over "Indians, and Lands reserved for the Indians" to the Parliament of Canada); *Rupert's Land and North-Western Territory Order*, 1870 (U.K.), reprinted in R.S.C. 1985, App. II, No. 9 (admission of northern territory to Canada conditional on "adequate provision for the protection of Indian tribes whose interests and well-being are involved in the transfer"); *Adjacent Territories Order*, 1880 (U.K.), reprinted in R.S.C. 1985, App. II, No. 14; *Manitoba Act, 1870* (U.K.) 33 Vict., c. 3,
5.31, reprinted in R.S.C. 1985, App. II, No. 8 (providing for land allotment to Métis people); and *British Columbia Terms of Union*, 1871 (U.K.), reprinted in R.S.C. 1985, App. II, No. 10 ("the charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government"). Natural resource agreements were entered into between Canada and the three prairie provinces and were given constitutional effect by the *Constitution Act, 1930*, 20-21 George V, c. 26 (U.K.), reprinted in R.S.C. 1985, App. II, No.
26. The natural resource agreements guarantee Indians the right to take game and fish "for food" at all seasons of the year on specified territory. *Constitution Act, 1982*, s. 35(1) (recognizing and affirming "existing aboriginal and treaty rights of the aboriginal peoples of Canada").

53 *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1052-53.

54 See *Indian Treaties and Surrenders from 1680 to 1890,* Volume I (Ottawa:

King's Printer, 1905).

55 On this general subject, see Morrison, "The Robinson Treaties" (cited in note 19).

56 NAC RG10, volume 5, pp. 2082-2084, statement of the Mississauga Indians, 3 April 1829. See also Donald B. Smith, *Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) & the Mississauga Indians* (Toronto: University of Toronto Press, 1987).

57 NAC RG10, volume 27, p. 420, speech of Chief Quinepenon, 6 September 1806. See also Smith, *Sacred Feathers*.

58 See J.E. Chamberlin, *The Harrowing of Eden: White Attitudes Toward North American Natives* (Toronto: Fitzhenry & Whiteside, 1975).

59 See, for example, Eugene C. Hargrove, "Anglo-American Land Use Attitudes", *Environmental Ethics* 2/2 (1980).

60 *Indian Treaties and Surrenders* (cited in note 54), p. 112.

61 See Paul Tennant, "The Place of *Delgamuukw* in British Columbia History and Politics æ And Vice Versa", in *Aboriginal Title in British Columbia:* Delgamuukw *v.* The Queen, ed. Frank Cassidy (Montreal: Institute for Research in Public Policy, 1992).

62 See Denys Delâge, "Le Français, l'Anglais et l'Indien allaient être égaux: Autochtones du Québec dans l'histoire", research study prepared for RCAP (1995); Marc Jetten, "Recognition and Acquisition of Aboriginal Property in North America (from the 17th to the 18th Centuries): The Case of the Nations Domiciled in Canada", in Denys Delage et al., "Cultural Exchanges within the Franco-Amerindian Alliance, 1600-1760", research study prepared for RCAP (1995) [translation]; Sylvio Normand, "Les droits des Amérindiens sur le territoire sous le Régime français", in Lajoie et al., *Le statute juridique des autochtones* (cited in note 49); and Alain Beaulieu, "Réduire et instruire: Deux aspects de la politique missionnaire des Jésuites face aux Amérindiens nomades (1632-1642)", *Recherches amérindiennes au Québec* 17/1-2 (1987), pp. 139-154.

63 Thompson, "A History of the Mohawks" (cited in note 2), p. 17. See also our

discussion of this topic in Volume 1, Chapter 6, and “Documents relatifs aux Droits du Séminaire et aux Prétentions des Indiens sur la Seigneurie des Deux Montagnes”, *Recherches amérindiennes au Québec* 21/1-2 (1991), pp. 93-94.

64*Indian Treaties and Surrenders* (cited in note 54); Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991); Morrison, “The Robinson Treaties” (cited in note 19).

65 John F. Leslie, *Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a corporate memory for the Indian department* (Ottawa: Indian Affairs and Northern Development, 1985).

66 The example of the Mohawk sachem Thayandanega (Joseph Brant) æ who lived among his people on the Six Nations Reserve on the Grand River and also owned land on Burlington Bay in his private capacity æ had clearly been forgotten.

67 Amendments made to the *Indian Act* purposively excluded treaty Indians from acquiring a homestead unless they became enfranchised, while European immigrants were offered free land holdings. See *An Act to amend and consolidate laws respecting Indians*, S.C. 1876, c. 18, s. 70.

68Note that this section deals primarily with the experience of treaty and non-treaty Indian peoples, as Inuit remained relatively isolated until the mid-20th century, and Métis people were left to their own resources. See Volume 4, Chapters 5 and 6.

69 Although RCMP officers were generally uncomfortable with the pass system (believing it to be illegal), whenever they stopped enforcing it æ as in 1893 in southern Alberta æ they received angry criticism from the local settler population. There is at least some evidence that the pass system was still in use in the areas covered by Treaties 4, 6 and 7 as late as the mid-1930s. See Brian Bennett, “Study of Passes for Indians to Leave their Reserves” (Indian and Northern Affairs, 1974); and Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen’s University Press, 1990).

70 See also J.R. Miller, “Owen Glendower, Hotspur, and Canadian Indian Policy”, *Ethnohistory* 37/4 (1990); Carter, *Lost Harvests*; and John L. Tobias, “Canada’s Subjugation of the Plains Cree, 1879-1885”, in *Sweet Promises: A*

Reader on Indian-White Relations in Canada, ed. J.R. Miller (Toronto: University of Toronto Press, 1991).

71 Stewart Raby, "Indian Land Surrenders in Southern Saskatchewan", *The Canadian Geographer* 17/1 (1973).

72 See J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, rev. ed. (Toronto: University of Toronto Press, 1989).

73 See D.N. Sprague, "The Manitoba Land Question 1870-1882", *Journal of Canadian Studies* 15/3 (1980); and Paul L.A.H. Chartrand, "The Obligation to Set Aside and Secure Lands for the 'Half-Breed' Population Pursuant to Section 31 of the *Manitoba Act, 1870*", LL.M. thesis, University of Saskatchewan, 1988.

74 DIAND, *Specific Claim Settlement Agreement between Her Majesty the Queen, in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development and the Keeseekoowenin Indian Band, as represented by its Chief and Councillors* (Ottawa: 16 March 1994).

75 George Stewart, Jr., *Canada Under the Administration of the Earl of Dufferin* (Toronto: Rose-Belford Publishing Company, 1878), pp. 492-493.

76 *British Columbia Terms of Union* (cited in note 52). The following discussion is based on a number of sources. See especially Louise Mandell and Leslie Pinder, "B.C. Issues", research study prepared for RCAP (1993); Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990); Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver: University of British Columbia Press, 1977); Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: University of British Columbia Press, 1974); Dennis Madill, *British Columbia Indian Treaties in Historical Perspective* (Ottawa: Indian and Northern Affairs, 1981); and Duane Thomson, "The Response of Okanagan Indians to European Settlement", *B.C. Studies* 101 (Spring 1994).

77 NAC, Manuscript Group (MG) 26A, Sir John A. Macdonald Papers, pp. 127650-127651, Trutch to Macdonald, 14 October 1872. See Robin Fisher, "Joseph Trutch and Indian Land Policy", *BC Studies* 12 (1971-72).

78 The historical population data in the 1931 census put the Indian population at 29,275 in 1871. See John Lutz, “The White Problem æ State Racism and the Decline of Aboriginal Employment in 20th Century British Columbia”, paper presented to the 1994 Canadian Historical Association Meeting, p. 7; and Robert Galois and Cole Harris, “Recalibrating Society: The Population Geography of British Columbia in 1881”, *The Canadian Geographer* 38/1 (1994), pp. 37-53. See also Plate 36 (by the latter two authors) in *Historical Atlas of Canada*, Volume II: *The Land Transformed, 1801-1891* (Toronto: University of Toronto Press, 1993).

79 S.B.C. 35 Vict. cap. 37 s. 13 (1872). Since women could not vote either, the electorate consisted entirely of men who met the property qualification æ in effect, only a few hundred people.

80 *An Ordinance to amend and consolidate the Laws affecting the Crown Lands in British Columbia*, 1 June 1870. Article III gave males age 18 and over the right to pre-empt up to 320 acres of land north and east of the Cascade mountains and 160 acres elsewhere, with the proviso that “such right of pre-emption shall not be held to extend to any of the Aborigines of this Continent, except to such as shall have obtained the Governor’s special permission in writing to that effect”. See Cail, *Land, Man and the Law* (cited in note 76).

81 An 1864 colonial ordinance had limited reserves made thereafter to 10 acres per head; the effective average at that time was between one and three acres per person. When the federal government in 1873 instead proposed a formula of 80 acres, the provincial government offered 20 acres per head. See Cail, *Land, Man and the Law*.

82 See Tennant, *Aboriginal Peoples and Politics* (cited in note 76).

83 *An Act to amend and consolidate the Laws affecting Crown Lands in British Columbia*, S.B.C. (1874), No. 2.

84 NAC MG11 CO42/735, folios (ff.) 99-120v, dispatch of Governor-General Lord Dufferin to the Colonial Secretary, 26 January 1875, enclosing Minute of the Canadian Privy Council (23 January 1875) with Opinion of the Minister of Justice (19 January). The opinion itself is at ff. 99-115v.

85 Madill, *British Columbia Indian Treaties* (cited in note 76).

86 Usher et al., “Reclaiming the Land” (cited in note 14).

87 See Tennant, *Aboriginal Peoples and Politics,* pp. 92-93; and Cail, *Land, Man and the Law* (both cited in note 76).

88 “Report of Commissioners for Treaty No. 8”, in *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* (Ottawa: Queen’s Printer, 1966).

89See generally Morris Zaslow, *The Opening of the Canadian North 1870-1914* (Toronto: McClelland and Stewart, 1971).

90 See Gérard L. Fortin and Jacques Frenette, “L’Acte de 1851 et la création de nouvelles réserves indiennes au Bas-Canada en 1853”, *Recherches amérindiennes au Québec* 19/1 (1989), pp. 31-37.

91 *An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*, 14 & 15 Vict. 106, S.C. 1851. See also Lajoie et al., “The French Regime” (cited in note 49).

92 Greg Sarazin, “Les Algonquins de l’Ontario”, in *Minuit moins cinq sur les réserves*, ed. Boyce Richardson, trans. Jacques B. Gélinas (Montréal: Libre Expression, 1992), pp. 134-168.

93 See Larry Villeneuve, “The Historical Background of Indian Reserves and Settlements in the Province of Quebec”, rev. Daniel Francis (Ottawa: Indian Affairs and Northern Development, 1984); Jacques Frenette, “Kitigan Zibi Anishnabeg: Le territoire et les activités économiques des Algonquins de la Rivière Désert (Maniwaki), 1850-1950”, *Recherches amérindiennes au Québec* 23/2-3 (1993).

94 For a detailed examination of the background and content of those agreements see Morrison, “The Robinson Treaties” (cited in note 19).

95 Quoted in Morrison, “The Robinson Treaties”.

96*The James Bay Treaty: Treaty No. 9 (made in 1905 and 1906), and Adhesions made in 1929 and 1930* (Ottawa: Queen’s Printer, 1964), p. 5; Pierre Trudel, “Comparaison entre le Traité de la Baie James et la Convention de la Baie James”, *Recherches amérindiennes au Québec* 9/3 (1979).

97 See *Re Paulette and Registrar of Land Titles* (1973), 42 D.L.R. (3d) 8.

98 Rémi Savard and Jean-René Proulx, *Canada: Derrière l'épopée, les autochtones* (Montreal: L'hexagone, 1982).

99 House of Commons, "Report from Inspector for Treaty No. 8", in Sessional Papers No. 27 (1904) at 235. See Madill,*Treaty Research Report: Treaty Eight* (cited in note 11).

100 See *Lubicon Settlement Commission of Review Final Report*, March 1993.

101 *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 A.C. 46 (P.C.) at 54. For more discussion of this case, see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

102 *In re Southern Rhodesia* (1918), [1919] A.C. 211 (P.C.). But see *Amodu Tijani* v. *The Secretary, Southern Nigeria*, [1921] 2 A.C. 399 at 407 (P.C.) ("a mere change in sovereignty is not to be presumed as meant to disturb rights of private owners"). For discussion of this case, see McNeil, *Common Law Aboriginal Title* (cited in note 101). See also *Calder* v. *A.G.B.C.* 1970, 13 D.L.R. (3d) 64 at 66 (B.C.C.A.) per Davey C.J.B.C. at 66 ("I see no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these primitive people are of a kind that it should be assumed the Crown recognized them when it acquired the mainland of British Columbia by occupation"). For discussion of the Court of Appeal's decision in *Calder*, see Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984), pp. 47-49.

103 Special Joint Committee of the Senate and the House of Commons to Inquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their Petition submitted to Parliament in June 1926, *Proceedings, Reports and the Evidence* (Ottawa: King's Printer, 1927), p. 187.

104 See, for example, *R.* v. *Syliboy*, [1929] 1 D.L.R. 307 at 313, (N.S. Co. Ct.) in which the Mi'kmaq nation is said to be an "uncivilized people" and its 1752 treaty "at best a mere agreement made by the Governor and council with a handful of Indians"; and *Pawis* v. *The Queen*, [1980] 2 F.C. 18 (F.C.T.D.) at 25 where the Robinson-Huron treaty is said to be "tantamount to a contract". For more discussion of these and related cases, see Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination"

(1991) 36 McGill L.J. 382.

105 Department of Indian and Northern Affairs, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen's Printer, 1969), p. 11 (the 'white paper'). For more discussion of the white paper in the context of lands and resources, see RCAP, *Treaty Making in the Spirit of Co-existence* (cited in note 7), pp. 33-34. See, generally, Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981).

106 Quoted in Edwin May, "The Nishga Land Claim, 1873-1973", M.A. thesis, Simon Fraser University, 1979.

107 *An Act to amend the Indian Act*, S.C. 1927, c. 32, s. 6.

108 See John Giokas, "The Indian Act: Evolution, Overview and Options for Amendment and Transition", research study prepared for RCAP (1995).

109 *Copy of the Robinson-Huron Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Huron, Conveying Certain Lands to the Crown* (Ottawa: Queen's Printer, 1964), p. 4.

110 The texts of the first seven numbered treaties are in Morris, *The Treaties of Canada* (cited in note 26). For the texts of Treaties 8 through 11, see Madill, *Treaty Research Report: Treaty Eight* (cited in note 11); James Morrison, *Treaty Research Report: Treaty Nine (1905-06)*, *The James Bay Treaty*, report prepared for DIAND (1986); Kenneth S. Coates and William R. Morrison, *Treaty Research Report: Treaty Ten (1906)*, report prepared for DIAND (1986); and Kenneth
S. Coates and William R. Morrison, *Treaty Research Report: Treaty Eleven (1921)*, report prepared for DIAND (1986). See also Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen's University Press, 1992).

111 Neal Ferris, "Continuity within Change: Settlement-Subsistence Strategies and Artifact Patterns of the Southwestern Ontario Ojibwa A.D. 1780-1861", M.A. thesis, York University, 1989; see also Edward S. Rogers and Flora Tobobondung, "Parry Island Farmers: A Period of Change in the Way of Life of the Algonkians of Southern Ontario", in Canadian Ethnology Service Paper No. 31, *Contributions to Canadian Ethnology, 1975*, ed. David Brez Carlisle

(Ottawa: National Museums of Canada, 1975).

112 Leo G. Waisberg and Tim E. Holzkamm, "'A Tendency to Discourage Them from Cultivating': Ojibwa Agriculture and Indian Affairs Administration in Northwestern Ontario", *Ethnohistory* 40/2 (1993), pp. 175-211.

113 George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Don Mills, Ont.: Collier-Macmillan Canada, Ltd., 1974), pp. 33-34.

114 On the subject of federal Indian agricultural policy generally, see Buckley, *From Wooden Ploughs to Welfare* (cited in note 110) and Carter, *Lost Harvests* (cited in note 69). For a parallel study of Indian agriculture in the United States in the last half of the nineteenth century, see Leonard A. Carlson, *Indians, Bureaucrats, and Land: The Dawes Act and the Decline of Indian Farming* (Westport, Conn.: Greenwood Press, 1981).

115 Waisberg and Holzkamm, "'A Tendency to Discourage them from Cultivating'" (cited in note 112).

116 NAC RG10, volume 10,872, file 901/20-10, part 2, Indian Agent E. McLeod, Lytton, to Chairman of Game Conservation Board of British Columbia, 20 May 1925; Indian Agent H.E. Taylor, Williams Lake, to Assistant Indian Commissioner for British Columbia, 24 January 1936.

117 NAC RG10, volume 3661, file 9755-6, W.E. Ditchburn to D. Pattullo, 28 August 1923. See Thomson, "The Response of Okanagan Indians" (cited in note 76).

118 British Columbia Archives and Records Service (BCARS), GR 1995, file: micro B 1454, McKenna-McBride Commission Testimony, 10 June 1913, p. 279. See Lutz, "The White Problem" (cited in note 78).

119 *Indian Conditions: A Survey*, cat. no. R32-45/1980E (Ottawa: Department of Indian Affairs and Northern Development, 1980).

120 Archives of Ontario (AO), MU 1514, Irving Papers 75/16, p. 261, Order in Council, 8 July 1874. See S. Barry Cottam, "Federal/Provincial Disputes, Natural Resources and the Treaty #3 Ojibway, 1867-1924", PH.D. dissertation, University of Ottawa, 1994, p. 263.

121 The Agreement of 16 April 1894 was made pursuant to *An Act for the settlement of certain questions between the governments of Canada and Ontario respecting Indian Lands*, S.C. 1891, 54-55 Vict., c. 5. See Cottam, "Federal/Provincial Disputes" (cited in note 120), p. 211.

122 Morrison, *Treaty Research Report: Treaty Nine* (cited in note 110).

123 Madill, *Treaty Research Report: Treaty Eight* (cited in note 11).

124 See Richard H. Bartlett, "Indian and Native Rights in Uranium Development in Northern Saskatchewan" (1980-81) 45 Saskatchewan L.Rev. 13 at 24-26.

125 *Montreal Gazette*, 7 July 1849, p. 2.

126 See Pierre Berton, *Klondike: The Last Great Gold Rush 1896-1899* (Toronto: McClelland and Stewart, 1972).

127 See Julie Cruikshank, "Images of Society in Klondike Gold Rush Narratives: Skookum Jim and the Discovery of Gold", *Ethnohistory* 39/1 (1992), pp. 20-41.

128 Vernon Dufresne and Dave Ohring, "Early History of the Larder Lake Gold Camp", *Proceedings of the Local History Workshop, 29 April 1995* (Temiskaming-Abitibi Heritage Association, 1995).

129 NAC RG10, volume 3109, file 315,190. See Bruce W. Hodgins and James Morrison, "Tonene (c.1841-1916)", *Dictionary of Canadian Biography*

130 . *St. Catherine's Milling* at 54, and McNeil, *Common Law* (both cited in note 101).

131 *Quebec (A.G.)* v. *Canada (A.G.)* (1921), A.C. 401.

132 *Ontario Mining Company* v. *Seybold* (1900), 31 O.R. 386; *Ontario Mining Company* v. *Seybold* (1901), 31 S.C.R. 125. For a detailed discussion of the background to this case, see Cottam, "Federal/Provincial Disputes" (cited in note 120).

133 Morris, *The Treaties of Canada* (cited in note 26). See also Morrison, "The

Robinson Treaties" (cited in note 19). Morris went on to say that that right would not apply on off-reserve lands; however, "as regards other discoveries, of course, the Indian is like any other man. He can sell his information if he can find a purchaser".

134 *Indian Act, 1876*, S.C. 1876 c. 18, s. 3(6).

135 *An Act for the Settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Land*, S.C. 1924, 14-15 Geo. V, c. 48.

136 See *An Act to confirm and give effect to certain agreements entered into between the Government of the Dominion of Canada and the Governments of the Provinces of Manitoba, British Columbia, Alberta and Saskatchewan respectively* (U.K.) 20-21 Geo. V, c. 26

137 . *The British Columbia Indian Reserves Mineral Resources Act*, S.C. 1944, c. 19.

138 NAC RG10, Red Series, volume 2217, file 43168-71, Thomas Walton to Superintendent-General of Indian Affairs, 21 August 1893.

139 See James T. Angus, "How the Dokis Indians Protected their Timber", *Ontario History* 81/3 (1989); and Ian Radforth, *Bushworkers and Bosses: Logging in Northern Ontario, 1900-1980* (Toronto: University of Toronto Press, 1987).

140 See John Charles Pritchard, "Economic Development and Disintegration of Traditional Culture Among the Haisla", PH.D. dissertation, University of British Columbia, 1977, p. 147.

141 BCARS, GR1995, file: micro B 1454, McKenna-McBride Commissions Transcripts, examination of William Robertson, 10 June 1913. See Lutz, "The White Problem" (cited in note 78).

142 Ontario Environmental Assessment Board, *Reasons for Decision and Decision: Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario* (Toronto, 20 April 1994); National Aboriginal Forestry Association, "Forest Lands and Resources for Aboriginal People", brief submitted to RCAP (1993),

143 NAC RG10, volume 6743, file 420-8, volume 2, F.R. Latchford to Attorney General J.J. Foy, 31 October 1914; Latchford to D.C. Scott, Deputy Superintendent General of Indian Affairs, 13 November 1914. Justice Latchford had considerable experience in fish and wildlife matters. A prominent amateur zoologist, he had been the first commissioner (in 1898) of the provincial fisheries branch.

144 NAC RG10, volume 6743, file 420-8, volume 2, Mulligan to Department of Indian Affairs, 29 March 1915. See generally, Frank Tough, "Ontario's Appropriation of Indian Hunting: Provincial Conservation Policies vs. Aboriginal and Treaty Rights, ca. 1892-1930", paper prepared for Ontario Native Affairs Secretariat (1991); and Morrison, "The Robinson Treaties" (cited in note 19).

145 The English common law relating to fishing was that in navigable (tidal) waters, the right was vested in the public as a whole, while in non-navigable (non-tidal) waters, the right was vested in the Crown or its grantees. Private fishing clubs in Quebec and New Brunswick owed their existence to the latter. See Roland Wright, "The Public Right of Fishing, Government Fishing Policy, and Indian Fishing Rights in Upper Canada", *Ontario History* 86/4 (1994). In Quebec, under the Civil Code, there has been a long controversy over the ownership of fishing rights, but the provincial legislature has granted and regulated fishing rights.

146 On the lands of the Cree, Assiniboine and Métis in what are now southern Manitoba and southern Saskatchewan, the great herds had largely vanished by the early 1870s, although in the Blackfoot country of the western plains, buffalo were still hunted throughout the rest of the decade. See John S. Milloy, *The Plains Cree: Trade, Diplomacy and War, 1790 to 1870* (Winnipeg: University of Manitoba Press, 1988).

147 Robert G. McCandless, *Yukon Wildlife: A Social History* (Edmonton: University of Alberta Press, 1985).

148 Wright, "The Public Right of Fishing" (cited in note 145).

149 *The Fishery Act*, S. Prov. C., 20 Vict., c. 21.

150 See Wright, "The Public Right of Fishing" (cited in note 145).

151 Lytwyn, “Ojibwa and Ottawa Fisheries” (cited in note 37).

152 Van West, “Ojibwa Fisheries”; and Holtzkamm et al., “Rainy River Sturgeon” (both cited in note 37).

153 For a discussion of eastern Canada and the salmon fishery, see Anne-Marie Panasuk and Jean-René Proulx, “Les rivières à saumon de la Côte-Nord ou ‘Défense de pêcher æ Cette rivière est la propriété de---’”, *Recherches amérindiennes au Québec* 9/3 (1979), pp. 203-219.

154 Lutz, “The White Problem” (cited in note 78).

155 R. Alan Douglas, ed., *John Prince, 1796-1870: A Collection of Documents* (Toronto: The Champlain Society, 1980), p. 155.

156 See United Chiefs and Councils Manitoulin, “UCCM Fish & Wildlife Project”, brief submitted to RCAP (1993).

157 U.S. Department of the Interior, “Casting Light Upon the Waters: A Joint Fishery Assessment of the Wisconsin Ceded Territories” (1991).

158 Morrison, “The Robinson Treaties” (cited in note 19).

159 *An Act to amend the Act for the Protection of Game and Fur-bearing Animals*, S.O. 1892, 55 Vict., c. 58; *An Act to amend and consolidate the Laws for the Protection of Game and Fur-bearing Animals*, S.O. 1893, 56 Vict., c. 49; *An Act to amend and consolidate the Acts for the Protection of certain Animals, Birds, and Fishes*, S.B.C. 1895, 58 Vict., c. 23; and *An Act respecting Game in the Northwest Territories of Canada*, S.C. 1917, 7-8 Geo. V, c.36.

160 McCandless, *Yukon Wildlife* (cited in note 147). Toby Morantz, “Provincial Game Laws at the Turn of the Century Protective or Punitive Measures for the Native Peoples of Quebec: A Case Study”, paper presented at the annual Algonkian meetings, October 1994.

161 *An Act respecting a certain Convention between His Majesty and The United States of America for the Protection of Migratory Birds in Canada and the United States*, S.C. 1917, c. 18 and *An Act respecting the transfer of the Natural Resources of Alberta*, S.C. 1930, c. 3.

162 See Farley Mowat, *Sea of Slaughter* (Toronto: McClelland and Stewart, 1984).

163 Wright, “The Public Right of Fishing” (cited in note 145). Whitcher ended his professional career as the first superintendent of Banff National Park.

164 NAC RG10, volume 2064, file 10,009 1/2, W.F. Whitcher to L[awrence] Vankoughnet, Deputy Superintendent General of Indian Affairs, 15 September 1878.

165 NAC RG10, volume 2064, file 10,009 1/2, Charles Skene to L[awrence] Vankoughnet, 24 October 1878.

166 Wright, “The Public Right of Fishing” (cited in note 145).

167 Van West, “Ojibwa Fisheries”; and Holtzkamm et al., “Rainy River Sturgeon” (both cited in note 37).

168 *An Act to amend the Act for the Protection of Game and Fur-bearing Animals*, S. O. 1892, 55 Vict., c. 58, s. 12.

169 See *An Act to amend and consolidate the Acts for the Protection of certain Animals, Birds and Fishes*, R.S.B.C. 1897, c. 88.

170 See, for example, E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Markham, Ont.: Penguin Books Canada Ltd., 1975); Douglas Hay, “Poaching and the Game Laws on Cannock Chase”, in *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Douglas Hay et al. (Markham, Ont.: Penguin Books Canada, Ltd., 1975).

171 NAC RG10, volume 6746, file 420-8X, part 3, D.J. Taylor to T.R.L. MacInnes, 15 January 1936.

172 See the detailed exchange of correspondence on this topic in NAC RG10, volume 6742, file 420-6, volumes 1-3.

173 NAC RG10, volume 8863, file 1/18-11-8, part 1, J.P.B. Ostrander to F. Matters, 17 September 1954.

174 NAC RG10, volume 8862, file 1/18-11-5, George Mitton to Superintendent General, 26 October 1925; J.D. McLean to Mitton, 2 November 1925.

175 *Syliboy* (cited in note 104).

176 *Simon* v. *The Queen*, [1985] 2 S.C.R. 387.

177 NAC RG10, volume 8862, file 1/18-11-5, Mrs. Peter Wm. Narvie to Department, 9 April 1929.

178 NAC RG10, volume 8862, file 1/18-11-5, Indian Agent Charles Hudson to Department, 16 April 1929; Department to J. Thomas Troy, 12 July 1929.

179 Ontario Federation of Anglers and Hunters, “Position Paper on Comanagement of Crown Lands and Resources in Ontario” (1993), p. 3 [emphasis in original].

180 NAC RG10, volume 8862, file 1/18-11-5, Petition of Chief and Members of the Restigouche Band, 10 April 1899; Department of Indian Affairs to Attorney General New Brunswick, 5 May 1899; Attorney General to Department, 25 May 1899

181 . For a detailed treatment of the issues discussed in this section, see generally Arthur J. Ray, *The Canadian Fur Trade in the Industrial Age* (Toronto: University of Toronto Press, 1990).

182 NAC RG10, volume 6750, file 420-10; see Morantz, “Provincial Game Laws” (cited in note 160).

183 NAC RG10, volume 6750, file 420-10, Armand Tessier, “Les Lois de chasse et les sauvages”, *Action sociale* (January 1913).

184 Hudson’s Bay Company Archives (HBCA), series II, A12/FT 319/1 (a), C.C. Chipman to William Ware, 1 March 1910; NAC RG10, volume 6743, file 420-8 1, McCarthy, Osler, Hoskin and Harcourt to Deputy Superintendent General of Indian Affairs, 17 March 1910

185 . HBCA, series II, A12/FT 319/1 (a) ff. 57-62, C.C. Chipman to William Ware, 8 April 1910; series II, A12/FT 319/1 (b) ff. 1-3, McCarthy, Osler, Hoskin and Harcourt to Premier J.P. Whitney, 20 January 1913; NAC RG10, volume

6743, file 420-8 1, McCarthy, Osler, Hoskin and Harcourt to Deputy Superintendent General of Indian Affairs, 23 August 1912.

186 HBCA, series II, A12/FT 319/1 (b) ff. 30-32, A.M. Nanton to F.C. Ingrams, 25 June 1914; AO RG4, series C-3, file 441, McCarthy, Osler, Hoskin and Harcourt to J.J. Foy, 14 January 1914; NAC RG10, volume 6743, file 420-8X 1, M.V. Ludwig, K.C., to Secretary of Indian Affairs, 15 October 1930.

187 NAC RG10, volume 6743, file 420-8X 1, J.D. McLean to D.F. McDonald, 11 March 1929.

188 NAC RG10, volume 6743, file 420-8X 1, typescript copy of *Rex* v. *Joe Padjena and Paul Quesawa*, unreported, Fourth Division Court of the District of Thunder Bay, 10 April 1930.

189 NAC RG10, volume 6743, file 420-8X 2, Department to Charles McCrea, 16 May 1930.

190 NAC RG10, volume 6743, file 420-8X 2, Ludwig, Schuyler and Fisher to Department, 13 December 1930.

191 NAC RG10, volume 6743, file 420-8X 2, M.H. Ludwig to D.C. Scott, 16 June 1929.

192 NAC RG10, volume 6743, file 420-8X 2, D.C. Scott to Ralph Parsons, Hudson's Bay Company, 28 November 1931; T.R.L MacInnes to Boulton Steward Marshall, 2 June 1939; M.P. for Algoma to Deputy Superintendent General, 14 January 1931; volume 6743, file 420-8X 3, Memorandum of Hugh R. Conn, 19 April 1944.

193 Philip H. Godsell, *Arctic Trader: The Account of Twenty Years With the Hudson's Bay Company* (New York: G.P. Putnam's Sons, 1932), pp. 196-197. See also Kerry Abel, *Drum Songs: Glimpses of Dene History* (Montreal and Kingston: McGill-Queen's University Press, 1993).

194 NAC RG10, volume 10-872, file 901/20, part 1, George Pragnell to Provincial Game Board, 21 August 1924.

195 P.C. 1862, 22 September 1923.

196 Regulation respecting beaver reserves, R.R.Q., c. C-61, r. 31. See Commission des droits de la personne du Québec, *La controverse des droits de chasse, de pêche et de piégeage des autochtones au Québec*, a report prepared for the Quebec Human Rights Commission by Marc Voinson (1980).

197 Morantz, “Provincial Game Laws” (cited in note 160).

198 Ontario had begun the process in 1935 (though registration did not reach the more northern parts of the province until after the Second World War), followed by Alberta (1937), Manitoba (1940), Quebec (1945), Saskatchewan (1946), the Northwest Territories (1949) and the Yukon (1950).

199 NAC RG10, volume 8862, file 1/18-11-5, part 1, Indian Agent A. Lee Fraser, Hexton, N.B., to Branch, 4 August 1945; DIAND file 373/30-22-0, volume 1, D.J. Allan to Hugh Conn, 24 August 1945.

200 NAC RG10, volume 6748, file 420-8-2 1, H.R. Conn to Dr. W.J.K. Harkness, Chief, Fish and Wildlife Division, Dept. of Lands and Forests, 29 October 1947. See also Volume 1, Chapter 12.

201 NAC RG10, volume 6748, file 420-8-2 1, Dr. W.J.K. Harkness to Hugh Conn, 4 November 1947.

202 See Lutz, “The White Problem” (cited in note 78).

203 NAC RG10, volume 8865, file 1/18-11-13, part 1, Frank Edwards to General Superintendent of Indian Agencies, 15 April 1939. This quotation is cited in the 1994 Ontario Environmental Assessment Board ruling on the province’s timber management plans, Chapter 10, page EA-87-02.

204 See, for example, Ken Coates and W.R. Morrison, “The Federal Government and Urban Development in Northern Canada after World War II: Whitehorse and Dawson City, Yukon Territory”, *BC Studies* 104 (Winter 1994-95).

205 Paul Charest, “Les barrages hydro-électriques en territoire montagnais et leurs effets sur les communautés amérindiennes”, *Recherches amérindiennes au Québec* 9/4 (1980), pp. 323-338.

206 Thalassa Research, “Nation to Nation: Indian Nation-Crown Relations in

Canada", research study prepared for RCAP (1994). Indeed, a variation of this theme was used in a recent Supreme Court of Canada decision (albeit with reference to "subsistence" harvesting) with respect to treaty harvesting rights and the killing in self-defence of a bear whose hide was later sold under licence (see *Horseman* v. *The Queen*, [1990] 1 S.C.R. 901; dissenting judgement by Madam Justice Wilson).

207 NAC RG10, volume 6748, file 420-8-2 1, F.A. Matters to Dept. of Game and Fisheries, 19 November 1945.

208 NAC RG10, volume 7051, file 486/20-7-4-69 1, Fred Matters to Department, 21 July 1958.

209 Manitoba, Committee on Manitoba's Economic Future, *Manitoba, 1962-1975, A Report to the Government of Manitoba,* as quoted in Buckley, *From Wooden Ploughs to Welfare* (cited in note 110), p. 74.

210 Canadian Labour Congress, "Aboriginal Rights and the Labour Movement", brief submitted to RCAP (1993). See also Canadian Labour Congress, RCAP transcripts, Ottawa, 15 November 1993.

211 For this and the following discussion see generally Daniel W. Bromley, *Environment and Economy: Private Rights and Public Policy* (Oxford: Basil Blackwell, 1991).

212 Daniel W. Bromley, "Property Rights as Authority Systems: The Role of Rules in Resource Management", in *Emerging Issues in Forest Policy*, ed. Peter N. Nemetz (Vancouver: UBC Press, 1992).

213 British Columbia, *Timber Rights and Forest Policy in British Columbia*, Volumes 1 and 2, Report of the Royal Commission on Forest Resources (Victoria: Queen's Printer, 1976); British Columbia, report of the Forest Resources Commission *The Future of Our Forests* (Victoria: 1991).

214 L. Anders Sandberg, ed., *Trouble in the Woods: Forest Policy and Social Conflict in Nova Scotia and New Brunswick* (Fredericton: Acadiensis Press, 1992).

215 See McCandless, *Yukon Wildlife* (cited in note 147).

216 On the importance of forests in the European imagination, see Simon Schama, *Landscape and Memory* (Toronto: Random House of Canada, 1995).

217 Wright, “The Public Right of Fishing” (cited in note 145).

218 John W. Bruce and Louise Fortmann, “Property and Forestry”, in *Emerging Issues* (cited in note 212).

219 F. Murindagomo, “Wildlife management in Zimbabwe: the CAMPFIRE programme”, *Unasylva* 43/168 (1992); D.M. Lewis, A. Mwenya and G.B. Kaweche, “African solutions to wildlife problems in Africa: insights from a community-based project in Zambia”, *Unasylva* 41/161 (1990).

220 See Lawrence Berg, Terry Fenge and Philip Dearden, “The Role of Aboriginal Peoples in National Park Designation, Planning and Management in Canada”, in *Parks and Protected Areas in Canada*: *Planning and Management*, ed. Philip Dearden and Rick Rollins (Toronto: Oxford University Press, 1993).

221 Ontario Federation of Anglers and Hunters, “Self-Government and Comanagement in Ontario,” brief submitted to RCAP (1993), p. 17.

222 Lorne Schollar, Northwest Territories Wildlife Federation, RCAP transcripts, Yellowknife, Northwest Territories, 9 December 1992.

223 G. Hardin, “The Tragedy of the Commons”, *Science* 162/3859 (1968).

224 Neil S. Forkey, “Maintaining a Great Lakes Fishery: The State, Science, and the Case of Ontario’s Bay of Quinte, 1870-1920”, *Ontario History* 87/1 (1995), pp. 45-64.

225 Bromley, “Property Rights” (cited in note 212).

226 Chapeskie, “Land, Landscape, Culturescape” (cited in note 31).

227 North Shore Tribal Council, “North Shore First Nations Government”, brief submitted to RCAP (1993).

228 Quoted in Barry May, “Newfoundland and Labrador: A Special Place”, in *Endangered Spaces: The Future for Canada’s Wilderness*, ed. Monte Hummel (Toronto: Key Porter Books, 1989), p. 128.

229 Bruce and Fortmann, “Property and Forestry”, in *Emerging Issues* (cited in note 212).

230 World Wildlife Fund Canada, “Protected Areas and Aboriginal Interests in Canada”, brief submitted to RCAP (1993).

231 Patrick Madahbee, speech to Robinson-Huron Treaty Commemoration, Garden River First Nation Territory, 9 September 1995.

232 Lloyd I. Barber, “Indian Land Claims and Rights”, in *The Patterns of “Amerindian Identity”: Symposium, Montmorency, October 1974*, ed. Marc-Adélard Tremblay (Quebec City: Les Presses de l’Université Laval, 1976), pp. 73-74.

233 On these legal instruments generally, see Volume 1; on Jay’s Treaty, signed by Britain and the United States in 1794, see Rémi Savard, “Un projet d’État indépendant à la fin du XVIIIe siècle et le Traité de Jay”, *Recherches amérindiennes au Québec* 24/4 (1994), pp. 57-69.

234 Special Joint Committee of the Senate and the House of Commons appointed to examine and consider the *Indian Act*, *Minutes of Proceedings and Evidence*, 1946, 1947, 1948. See John Leslie, “A Historical Survey of Indian-Government Relations, 1940-1970”, paper prepared for DIAND (1993), pp. 6-8.

235 Joey Thompson, “Dancing Between Two Worlds”, *National* [Canadian Bar Association] 2/2 (1993).

236 Richard C. Daniel, “A History of Native Claims Processes in Canada, 1867-1979”, report prepared for DIAND (1980).

237 See *An Act to amend the Indian Act* (cited in note 107). This remained in force until the *Indian Act* was extensively amended in 1951.

238 Hugh L. Keenleyside, *Memoirs of Hugh L. Keenleyside*: *On the Bridge of Time*, Volume 2 (Toronto: McClelland and Stewart, 1982).

239 *An Act to create an Indian Claims Commission, to provide for the powers, duties and functions thereof, and for other purposes.* (U.S.) Pub. L. No. 79-726 (13 August 1946).

240 During House of Commons debates in 1950 on amendments to the *Indian Act*, John Diefenbaker argued publicly for an independent commission similar to the American body. See Indian Claims Commission, *Indian Claims Commission Proceedings [ICCP]*, Volume 2, Special Issue on Land Claims Reform (Ottawa: Supply and Services, 1995), p. 30.

241 In January 1950, the Indian affairs branch was transferred from the department of mines and resources to the newly created department of citizenship and immigration, with Walter Harris as minister.

242 Leslie, "A Historical Survey" (cited in note 234), pp. 14-15.

243 Leslie, "A Historical Survey", pp. 33-34.

244 Letter from Prime Minister John Diefenbaker to Senator James Gladstone, 11 March 1963. See Hugh A. Dempsey, *The Gentle Persuader: A Biography of James Gladstone, Indian Senator* (Saskatoon: Western Producer Prairie Books, 1986),
p. 188.

245 This and the following discussion are based on Daniel, "A History of Native Claims Processes" (cited in note 236). See also Indian Claims Commission, *ICCP*, Volume 2 (cited in note 240).

246 Daniel, "A History of Native Claims Processes", pp. 149-153.

247 Daniel, "A History of Native Claims Processes", pp. 152-153.

248 William B. Henderson and Derek T. Ground, "Survey of Aboriginal Land Claims" (1994) 26 Ottawa L. Rev. 187 at 197-198.

249 Indian Commission of Ontario, *An Introduction to the Indian Commission of Ontario and the Tripartite Process, 1990-1991* (Toronto: Indian Commission of Ontario, 1992).

250*R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1103-1105.

251 In April-May 1995, B.C.'s ministry of Aboriginal affairs prepared a document entitled "British Columbia's Approach to Treaty Settlements". The

document has not been officially published, but it is on the Internet and is considered public. Copy provided to RCAP by Nerys Poole, Executive Director, Treaty Mandates Branch, B.C. Ministry of Aboriginal Affairs.

252DIAND, *In All Fairness: A Native Claims Policy æ Comprehensive Claims* (Ottawa: 1981; amended 1986).

253 DIAND, *Outstanding Business: A Native Claims Policy* (Ottawa: 1982).

254 DIAND, *Federal Policy for the Settlement of Native Claims* (Ottawa: 1993).

255 The following documents contain critiques of land claims policy: Indian Commission of Ontario, "Discussion Paper Regarding First Nation Land Claims" (Toronto: 1990), reprinted in Indian Claims Commission, *ICCP,* Volume 2 (cited in note 240), p. 177; Chiefs Committee on Claims/First Nations Submission on Claims (Ottawa: 14 December 1990), reprinted in *ICCP*, Volume 1 (1994), p. 187; Canadian Human Rights Commission, *Annual Report 1990; Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: 1988); D.M. Johnston, "A Theory of Crown Trust Towards Aboriginal Peoples", 18 Ottawa L. Rev 307; D. Knoll, "Unfinished Business: Treaty Land Entitlement and Surrender Claims in Saskatchewan" (unpublished, 1986); Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements æ Report of the Task Force* (the Coolican report) (Ottawa: DIAND, 1985); Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee* (the Penner report) (Ottawa: House of Commons, 1983); B.W. Morse, ed., *Indian Land Claims in Canada* (Wallaceburg: A.I.A.I. et al., 1981); and Eric Colvin, *Legal Process and the Resolution of Indian Claims* (Saskatoon: University of Saskatchewan Native Law Centre, 1981).

For more recent comment, see S.M. Weaver, "After Oka: 'The Native Agenda' and Specific Land Claims Policy in Canada" (University of Waterloo, April 1992); Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991); Assembly of First Nations, "Background and Approach to Changing the Federal Claims Process" (unpublished draft, 19 May 1994); John A. Olthius and H.W. Roger Townshend, "Is Canada's Thumb on the Scales? An Analysis of Canada's Comprehensive and Specific Claims Policies and Suggested Alternatives", research study prepared for RCAP (1995); Henderson and Ground, "Survey of Aboriginal Land Claims" (cited in note 248) , p. 187; Indian Commission of Ontario, "Indian Negotiations in Ontario: Making

the Process Work" (Toronto: 1994); Indian Claims Commission, *ICCP*, Volume 2; A.C. Hamilton, *Canada and Aboriginal Peoples: A New Partnership* (Ottawa: DIAND, 1995).

256 Indian Commission of Ontario, "Discussion Paper" (cited in note 255).

257 DIAND does have a test case funding program, but it has no mandate to fund litigation at the trial level. While this frustrates most claimants, government did find significant funds for trial of the *Delgamuukw* case [*Delgamuukw* v. *British Columbia* (*A.G.*) (1993), 104 D.L.R. (4th) 470 (B.C.C.A.), Lambert J.A.], underscoring for others the arbitrary nature of claims policies.

258 For a discussion of government's response to some claims as technical breaches not remediable under the claims policies, see Indian Commission of Ontario, "Discussion Paper" (cited in note 255), pp. 45-46. The Indian Commission of Ontario suggests that such glosses on the policies are calculated to frustrate the negotiation and settlement of claims.

259 Indian Commission of Ontario, "Discussion Paper", p. 27.

260 Georges Erasmus, "Vingt ans d'espoirs déçus" and "Les solutions que nous préconisons", *Recherches amérindiennes au Québec* 21/1-2 (1991), pp. 7, 25.

261 DIAND, *Comprehensive Land Claims Policy* (Ottawa: Supply and Services, 1987), p. 23.

262 *Baker Lake* v. *Minister of Indian Affairs and Northern Development* (1979), 107 D.L.R. (3d) at 513 (F.C.T.D.).

263 DIAND, *Federal Policy* (cited in note 254), pp. 5-6.

264 Indian Claims Commission, "Interim Ruling: Athabasca Denesuline Treaty Harvesting Rights Inquiry" (May 1993), *ICCP*, Volume 1 (cited in note 255), pp. 159-168.

265 Ross Howard, "A terrible territorial tangle", *Globe and Mail* (29 May 1995), p. A13; Melvin H. Smith, *Our Home or Native Land? What Governments' Aboriginal Policy Is Doing to Canada* (Victoria: Crown Western, 1995), p. 97. The misperception appears to have arisen from a response to a question on a

government form asking a claimant to identify its traditional territory. In that particular case it included territory jointly claimed by others. History is replete with examples of joint use of territory by neighbouring Aboriginal peoples, and all modern treaties have had to deal with questions of overlapping territory.

266 DIAND, *Comprehensive Land Claims Policy* (cited in note 261), p. 12.

267 Michael Jackson, "A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements", research study prepared for RCAP (1994).

268 DIAND, *Comprehensive Land Claims Policy* (cited in note 261), pp. 12-15 and 17-18.

269 DIAND, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services, 1995).

270 DIAND, *Comprehensive Land Claims Policy* (cited in note 261), p. 18; and *Federal Policy* (cited in note 254), p. 9.

271 DIAND, *Comprehensive Land Claims Policy*, p. 14.

272 DIAND, *Comprehensive Land Claims Policy*, p. 14.

273 *Ontario (A.G.)* v. *Bear Island Foundation,* [1991] 2 S.C.R. 570.

274 See John Goddard, *Last Stand of the Lubicon Cree* (Vancouver: Douglas & McIntyre 1991).

275 Task Force to Review Comprehensive Claims Policy, *Living Treaties* (cited in note 255), p. 30.

276 DIAND, *Comprehensive Land Claims Policy* (cited in note 261).

277 RCAP, *Treaty Making* (cited in note 7).

278 The Gwich'in and the Sahtu Dene and Métis agreements have yet to

receive royal assent.

279 Olthius and Townshend, “Is Canada’s Thumb on the Scales?” (cited in note 255).

280 Agreement between the First Nations Summit, Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of the Province of British Columbia, 21 September 1992. See *British Columbia Treaty Commission Act,* S.C. 1995, C. 45.

281 Task Force to Review Comprehensive Claims Policy, *Living Treaties* (cited in note 255), pp. 79-82.

282 Hamilton, *Canada and Aboriginal Peoples* (cited in note 255), p. 114.

283 Hamilton, *Canada and Aboriginal Peoples,* p. 71.

284 RCAP, *Treaty Making* (cited in note 7), pp. 59-60.

285 Hamilton, *Canada and Aboriginal Peoples* (cited in note 255), p. 88.

286 While this was a significant change to those affected by the exclusion, it was a relatively minor one in terms of the overall policy. Yet it remains the only official change to that policy since 1982.

287 G.V. La Forest, “Report on Administrative Processes for the Resolution of Specific Indian Claims” (DIAND, 1979, unpublished), p. 14.

288 The policy directs that neither is to be considered. Since the department of justice’s legal opinion is not disclosed, however, it is not possible to know what actual weight, if any, is given to these factors. Before the Indian Claims Commission, for example, government has argued that evidence of preliminary negotiations of treaties is barred by the parol evidence rule, a technical rule of evidence, even though the policy states that “All relevant historical evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law”.

289 See Indian Claims Commission, *ICCP*, Volume 1 (cited in note 255), p. 179. The policy also includes examples described as “Beyond Lawful Obligation” to accept claims for the taking of reserve lands without

compensation and claims based on fraud by government agents. The first set was clearly intended to incorporate B.C. 'cut-off lands' claims relating to the reduction of certain reserves on the advice of the McKenna-McBride Commission early in this century. See our discussion earlier in this chapter on how losses occurred.

290 When this argument was made before the Indian Claims Commission, it was found to be "an overly narrow interpretation of the Policy": Indian Claims Commission, ICCP, Volume 1 (cited in note 255), p. 82.

291 Manitoba Treaty Land Entitlement Commission, "Report of the Treaty Land Entitlement Commission" (1983), pp. 69-71.

292 *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335, a landmark decision awarding compensation in respect of the Crown's breach of fiduciary duty and equitable fraud in leasing Indian land. The enlargement of the fiduciary concept to the constitutional level in *Sparrow* (cited in note 250) has also failed, as yet, to have any impact upon claims policy.

293 This doctrine is particularly appropriate in the case of the historical treaties because, although the formal treaty documents are written in English, they were negotiated in Aboriginal languages through interpreters. This is the basis for the rule, advanced by the Supreme Court in *Nowegijick* v. *The Queen,* [1983] 1 S.C.R. 29, *Simon* (cited in note 176), and *Sioui* (cited in note 53), that treaties must be construed "in the sense in which they would naturally be understood by the Indians".

294 *Guerin* (cited in note 292) at 354.

295 Indian Claims Commission, *ICCP*, Volume 1 (cited in note 255).

296 Increased funding for claims settlements was one of the initiatives taken by the federal government in the wake of the 1990 Oka crisis.

297 Coopers & Lybrand Consulting Group, "Draft Report on the Evaluation of the Specific Claims Negotiation and Settlement Process" (unpublished, 1994).

298 Russel Lawrence Barsh, "Indian Land Claims Policy in the United States" (1982) 58 North Dakota Law Review 7 at 22-23; 76-77. As in Canada, Native American tribes generally lack investment opportunities or sources of goods

and services on their reservations. A cash settlement therefore amounts to a substantial indirect transfer payment to regional non-tribal businesses but results in relatively little reservation capital formation. See also Chapter 5 of this volume.

299 Coopers & Lybrand, “Draft Report” (cited in note 297).

300 See generally Weaver, “After Oka” (cited in note 255).

301 This document and subsequent correspondence are reprinted in Indian Claims Commission, *ICCP*, Volume 1 (cited in note 255).

302 Order in Council P.C. 1992-1730, amending P.C. 1991-1329.

303 *Indian Claims Commission Annual Report, 1991-1992 to 1993-1994* (Ottawa: Supply and Services, 1993). The commission did not indicate whether it was prepared to assume the backlog of several hundred claims already submitted but unresolved.

304 Indian Claims Commission, *ICCP*, Volume 2 (cited in note 240), p. 23.

305 Indian Claims Commission, *ICCP*, Volume 2.

306 Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993), p. 103.

307 *Indian Claims Commission Annual Report* (cited in note 303).

308 Manuel and Posluns, *The Fourth World* (cited in note 113), pp. 163-165.

309 Quoted in Leslie, “A Historical Survey” (cited in note 234), p. 16.

310 The following discussion is based on Leslie, *Commissions of Inquiry* (cited in note 65); Leslie, “A Historical Survey” (cited in note 234); and J.S. Milloy, “A Historical Overview of Indian-Government Relations, 1755-1940”, paper prepared for DIAND (1992).

311 Special Committee on Indian Self-Government, *Indian Self-Government in Canada* (cited in note 255), pp. 12-14.

312 For example, a recent book by a former official of the B.C. government begins with a laudatory account of the white paper policy. See Smith, *Our Home or Native Land?* (cited in note 265).

313 In 1992, the Roman Catholic Church formally committed itself to "effectively block or eliminate assimilationist policies of forced integration which cause autochtonous cultures to disappear, as well as the obverse policies which seek to keep native people isolated on the periphery of national life" (John Paul II, Santo Domingo Document No. 251, 1992, as quoted in Peter-Hans Kolvenbach, "Living People, Living Gospel", *Mission* 1/2 (1994), p. 325).

314 RCAP, *Treaty-Making* (cited in note 7).

315 DIAND and Department of Justice, "Background Paper: Achieving Certainty in Comprehensive Land Claims Settlements" (Ottawa: 1995).

316 Hamilton, *Canada and Aboriginal Peoples* (cited in note 255), p. 84.

317 L.I. Barber, "Indian Claims Mechanisms" (1973-1974) 38 Sask. L. Rev. 11 at 15.

318 See also *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34.

319 Robert Mainville, "Visions divergentes sur la compréhension de la Convention de la Baie James et du Nord québécois", *Recherches amérindiennes au Québec* 23/1 (1993), pp. 69-80.

320 Treaty 9 was negotiated in 1905-1906, with adhesions in 1908 and 1929-1930.

321 John S. Long, "Treaty Making, 1930: Who got what at Winisk?", *The Beaver* 75/1 (February/March 1995).

322 See Volume 4, Chapter 6 of this report for a description of this program; see also Ignatius E. La Rusic, "Subsidies for Subsistence: The place of income security programs in supporting hunting, fishing and trapping as a way of life in subarctic communities", research study prepared for RCAP (1993).

323 *Calder* (cited in note 47). Six members of the court held Aboriginal title to be recognized by Canadian law. Three members of the Court (Judson, Martland and Ritchie JJ. concurring) were of the view that Aboriginal title had been extinguished by Crown and legislative action; three members of the court (Hall, Laskin and Spence JJ. concurring) were of the view that Nisg_a'a title had not been extinguished; the remaining member (Pigeon J.) held that judicial determination of the case required a fiat from the lieutenant governor of the province.

324 *Guerin* (cited in note 292).

325 *Simon* (cited in note 176) at 402 quoting *Jones* v. *Meehan* 175 U.S. 1 (1899); see also *Nowegijick* (cited in note 293) at 36 ("statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians").

326 *Sparrow* (cited in note 250) at 1108. For an analysis of this case as it relates to the inherent right of self-government, see Chapter 3 and RCAP, *Partners in Confederation,* (cited in note 46). For a discussion of this case in light of federal extinguishment policy, see RCAP, *Treaty Making* (cited in note 7). For academic commentary on *Sparrow*, see W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217; Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991) 29 Alta.
L. Rev. 498.

327 *Kruger et al.* v. *The Queen*, [1978] 1 S.C.R. 104 at 109.

328 *Canadian Pacific Ltd.* v. *Paul*, [1988] 2 S.C.R. 654 at 678. See also *Sparrow* (cited in note 250) at 1112 ("[c]ourts must be careful---to avoid the application of traditional common law concepts of property as they develop their understanding of---the *sui generis* nature of aboriginal rights").

329 *Baker Lake* (cited in note 262). See also *Bear Island Foundation* (cited in note 273) (requiring "sufficient" occupation).

330 See, for example, *Calder* (cited in note 47); *Baker Lake*; and *Mabo* (cited in note 47).

331 *Sparrow* (cited in note 250). See also *Twinn* v. *Canada*, [1987] 2 F.C. 450

at 462 (F.C.T.D.) (“aboriginal rights are communal rights”).

332 RCAP, *Treaty Making* (cited in note 7), p. 50; see also *Sparrow* at 1093 (“an approach---which would incorporate ‘frozen rights’ must be rejected”).

333 For a discussion of Métis rights, see Volume 4, Chapter 5. For discussion of the impact of the fur trade and Christianity on Ojibwa identity, see John J. Borrows, “A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government” (1992) 30 Osgoode Hall L.J. 291.

334 *Johnson* v. *M’Intosh* (cited in note 44) at 574 (“They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion”); see also Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 728 at 746 (“The doctrine of aboriginal title attributes to a native group a sphere of autonomy, whereby it can determine freely how to use its lands”).

335 *Sparrow* (cited in note 250).

336 See, for example, *Canadian Pacific Ltd.* (cited in note 328) at 677 (Aboriginal title cannot “be transferred, sold or surrendered to anyone other than the Crown”).

337 *Guerin* (cited in note 292) at 382. (Aboriginal title “gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians”); see also *Sparrow* at 1108 (“the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples”).

338 *Sparrow* at 1110.

339 Canadian Bar Association [CBA], *Report of the Canadian Bar Association Task Force on Alternative Dispute Resolution: A Canadian Perspective* (Ottawa: 1989), p. 23. See also *MacMillan Bloedel Ltd.* v. *Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.) at 607, Macfarlane J.A. (a judicial proceeding is “but a small part of the whole of a process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations”); *Pacific Fishermen’s Defence Alliance* v. *Canada*, [1987] 3 F.C. 272 (T.D.) at 284 (“Because of their socio-economic and political nature, it is indeed much preferable to settle aboriginal rights by way of negotiations than through the

Courts").

340 See Owen M. Fiss, "Against Settlement" (1984) 93 Yale L.J. 1073.

341 See Melvin Aron Eisenberg, "Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking" (1976) 89 Harv. L. Rev. 637.

342 For more discussion of the relationship between participation and legitimacy, see "Opening the Door" in Volume 1 of this report. For an assessment of the relationship between participation and legitimacy in the context of negotiated settlements, see Carrie Menkel-Meadow, "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference" (1985) 33 U.C.L.A. L. Rev. 485.

343 See Kent Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 1995), p. 15-3 ("negotiation---has historical origins in the treaty-making process").

344 See Robert L. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State" *Political Science Quarterly* 38 (1923), p. 470 (bargaining power constituted in part by background distribution of property rights).

345 CBA, *Alternative Dispute Resolution* (cited in note 339), pp. 85-86. See also Roach, *Constitutional Remedies in Canada* (cited in note 343); Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281 at 1302 (a fundamental feature of public law litigation is that "the remedy is not imposed but negotiated").

346 Alberta Law Reform Institute, "Towards a New Alberta Land Titles Act" (Report for Discussion No. 8), Edmonton, 1990, p. 72.

347 *Paulette* v. *R.,* [1977] 2 S.C.R. 628.

348 *Uukw* v. *B.C. Govt.* (1987), 16 B.C.L.R. (2d) 145 (B.C.C.A.); *Lac La Ronge Indian Band* v. *Beckman*, [1990] 4 W.W.R. 211 (Sask. C.A.); *James Smith Indian Band* v. *Saskatchewan (Master of Titles)*, [1994] 2 C.N.L.R. 72 (Sask. Q.B.); but see *Ontario (A.G.)* v. *Bear Island Foundation* (cited in note 273).

349 See, generally, Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book Limited, 1983), ch. 2.

350 See *American Cyanamid Co.* v. *Ethicon Ltd*., [1975] A.C. 396 (H.L.); and *Manitoba (A.G.)* v. *Metropolitan (MTS) Stores Ltd.*, [1987] 1 S.C.R. 110.

351 See, generally, Kent Roach, "Remedies for Violations of Aboriginal Rights" (1992) 21 Man. L.J. 498; Roger Townshend, "Interlocutory Injunctions in Aboriginal Rights Cases", [1991] 3 C.N.L.R. 1.

352 *Société de Développement de la Baie James* v. *Kanatewat,* [1975] C.A. 166, rev'g [1974] R.P. 38, leave to appeal to S.C.C. dismissed [1975] 1 S.C.R. 48; see also *Ominayak* v. *Norcen*, [1985] 3 W.W.R. 193 (Alta. C.A.).

353 *MacMillan Bloedel* (cited in note 339); *Westar Timber Ltd.* v. *Ryan* (1989), 60 D.L.R. (4th) 453 (B.C.C.A.); *Touchwood File Hills* v. *Davis* (1985), 41 Sask. R. 263 (Q.B.); and *Mohawk Bands of Kahnawake* v. *Glenbow-Alberta Institute*, [1988] 3 C.N.L.R. 70 (Alta. Q.B.).

354 See, for example, *Vieweger Construction Co. Ltd* v. *Rush & Tompkins Construction Ltd. (1964)*, [1965] S.C.R. 195; see, generally, Sharpe, *Injunctions and Specific Performance* (cited in note 349).

355 Roach, *Constitutional Remedies* (cited in note 343), p. 15-3.

356 *R.* v. *Agawa* (1988), 28 O.A.C. 201 at 216; *R.* v. *Sparrow* (cited in note 250). See also Slattery, "Understanding Aboriginal Rights" (cited in note 334), 727 at 753 (governments ought to protect Aboriginal people "in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands").

357 *Sparrow* at 1077.

358 *Guerin* (cited in note 292).

359 *Delgamuukw* (cited in note 257). See also Leonard I. Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility" (1994) 32 Osgoode Hall L.J. 735. Reference should also be made to the landmark decision by the High Court of Australia in *Mabo* (cited in note 47), in which six members of a seven-member panel agreed that Australian common law recognizes a form of Aboriginal title that, in cases where it has not been extinguished, protects Aboriginal use and enjoyment of

ancestral land. Justice Toohey would have gone further to recognize a general fiduciary obligation on the part of the Crown that exists independently of any "obligation arising as a result of particular action or promises by the Crown" (at 204). Extinguishment or impairment of Aboriginal rights to land "would not be a source of the Crown's obligation, but a breach of it" (at 205). Justice Brennan, Chief Justice Mason and Justice McHugh concurring, together with Justice Dawson dissenting on other grounds, did not agree with this approach, holding that the Crown is not in breach of any duty when it exercises sovereign authority and extinguishes Aboriginal rights. For commentary on *Mabo*, see Jeremy Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*" (1995) 17 Sydney L. Rev. 5. For a collection of essays on Australia's legislative response to *Mabo*, see M.A. Stephenson, ed., *Mabo: The Native Title Legislation æ A Legislative Response to the High Court's Decision* (St. Lucia: University of Queensland Press, 1995).

360 *Sparrow* (cited in note 250) at 1108.

361 See Henderson and Ground, "Survey of Aboriginal Land Claims" (cited in note 248), p. 225 ("The concept of the fiduciary relationship between the Crown and Aboriginal peoples must be at the heart of any claims process").

362 *Sparrow* (cited in note 250) at 1113 ("We find the 'public interest' justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights").

363 *Pacific Fishermen's Defence Alliance* (cited in note 339) at 280-281. See also Mary Ellen Turpel, "A Fair, Expeditious, and Fully Accountable Land Claims Process", in Indian Claims Commission, *ICCP*, Volume 2 (cited in note 240), p. 61; Wilson A. McTavish, "Fiduciary Duties of the Crown in the Right of Ontario" (1991) 25 Law Soc. Gaz. 181.

364 "Draft Declaration on the Rights of Indigenous Peoples" (as agreed to by the members of the working group at its eleventh session), U.N. Doc. E/CN.4/Sub.2/1994/ 2/Add.1 (20 April 1994), Article 3.

365 S. James Anaya, "Canada's Fiduciary Obligation Toward Indigenous Peoples in Quebec under International Law in General", in S. James Anaya, Richard Falk and Donat Pharand, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, Volume 1, *International Dimensions* (Ottawa: RCAP, 1995), p. 24.

366 "The Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries", in International Labour Organisation, *Conventions and Recommendations Adopted by the International Labour Conference, 1919-1966* (Geneva: International Labour Office, 1966), pp. 1026-1042. Canada is not a party to the Convention. For an assessment of the ILO convention, see Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Oxford University Press, 1991), pp. 334-368. See also Martinez-Cobo, *Analytical Compilation of Existing Legal Instruments and Proposed Draft Standards Relating to Indigenous Rights*, U.N. Doc. M/HR/86/36, Annex V, for a summary of submissions by indigenous organizations sharply criticizing the convention on a number of grounds.

367 *Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*, in Centre for Human Rights, *Human Rights*: *A Compilation of International Instruments*, Volume 1 (second part), Universal Instruments (New York: United Nations, 1994), p. 475. The convention was adopted 27 June 1989 by the general conference of the International Labour Organisation and entered into force 5 September 1991.

368 Anaya, "*Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, Volume 1, *International Dimensions*" (cited in note 365); and Donat Pharand, "The International Labour Organisation Convention on Indigenous Peoples (1989): Canada's Concerns", in Anaya et al., *Canada's Fiduciary Obligation* (cited in note 365), Annex 3; Lee Swepston, "A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989" (1990) 15 Okla. City University L. Rev. 677. See also Patrick Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government", in *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: RCAP, 1995), pp. 1-54.

369 Anaya, "*Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, Volume 1, *International Dimensions*", p. 20.

370 *Manitoba Act, 1870*, 33 Vict., c. 3 (Canada) reprinted in R.S.C. 1985, App. II, No. 8. See, generally, Volume 4, Chapter 5 on Métis perspectives.

371 This figure is based on the B.C. government's policy position that settlement land would be proportional to the percentage of First Nations people

in the total provincial population æ that is, approximately three to five per cent (information furnished by Nerys Poole, Executive Director, Treaty Mandates Branch, B.C. Ministry of Aboriginal Affairs).

372 To the extent that Aboriginal title is inalienable except to the Crown, treaty recognition of Aboriginal title alone may not establish Aboriginal authority to grant interests to third parties. However, we are of the view that an Aboriginal party can be vested with such authority by treaty.

373 Labrador Inuit Association, "Submission to the Royal Commission on Aboriginal Peoples" (1992), p. 28. See also Task Force to Review Comprehensive Claims Policy, "*Living Treaties*" (cited in note 255).

374 See, for example, "Submission of the Inuit Tapirisat of Canada", brief submitted to RCAP (1994); and Draft Conference Proceedings, "ITC Inuit Round-Tables on Economic Development, Negotiation and Implementation, and Self-Government", Pangnirtung, Northwest Territories, 26-28 July 1993.

375 See, generally, Rotman, "Provincial Fiduciary Obligations" (cited in note 359).

376 *Intervenor Funding Project Act*, R.S.O. 1990, c. I.13. Enacted in 1988 and renewed for five years in 1991, the act was allowed to lapse at the end of March 1996.

377 *P.E.I. Potato Marketing Board* v. *Willis*, [1952] 2 S.C.R. 392. See also *British Columbia (Milk Board)* v. *Grisnich*, [1995] 2 S.C.R. 895.

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