LAWS OF THE LAND:

ABORIGINAL CUSTOMARY LAW, STATE LAW

AND SUSTAINABLE RESOURCE MANAGEMENT

IN CANADA'S NORTH

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A Thesis Filed to Meet the Requirements of a
Masters Degree in Law

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ABSTRACT

This thesis presents a comparative analysis of Aboriginal customary law and Canadian law in relation to the management and conservation of natural resources on crown lands. By reference to field research carried out with respect to a specific context of Aboriginal resource management, the thesis highlights the sophistication and distinctiveness of the customary Aboriginal regulation of community-based common property resource harvesting and management in both subsistence and commercial use contexts. This perspective reveals the conflictual tendencies between Aboriginal and State systems of the regulation of resource management where the former has been largely unrecognized by the latter. An analysis of the relevant jurisprudence highlights the ethnocentric bias mitigating against the recognition and acceptance of Aboriginal resource management that has continued right up to the present time.

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ABSTRACT

This thesis presents an analysis of the conflict resulting from the interaction between aboriginal customary law and state law in a particular resource use context in Northwestern Ontario. Specifically, it deals with the Manomin (wild rice) resource. Manomin has been central to the domestic and commercial economy of the Anishinaabe (Ojibwa) people of the region for centuries. The aboriginal subjects of the thesis are the Wabigoon Anishinaabe people; that is, the Anishinaabe people who live in the Wabigoon River watershed above Dryden, Ontario. The analysis of the interaction between state law and aboriginal customary law regulating the management of Manomin that is presented in the thesis has been developed in light of the results of ethnographic field research that was conducted by the author pertaining to the customary Anishinaabe regulation of the harvesting and management of Manomin. The field research was conducted most intensively from 1986 to 1989.

Prior to 1959, the regulation of Manomin had not been formally brought under the management control of the Ontario Ministry of Natural Resources pursuant to provincial jurisdiction over the Crown land base of Ontario. Given this situation, the customary management system for Manomin employed by the Wabigoon Anishinaabe people was the sole means by which the resource was allocated and its abundance maintained. The thesis sets out an ethnographic description of this management system and an analysis of its dynamics in order to provide a specific setting against which the interaction between state law and aboriginal customary law is then examined.

The relationships of the Wabigoon Anishinaabe people to Manomin are established in the thesis by

way of an initial description of the particular anthropogenic character of the resource. This analysis describes the Wabigoon people's experience of the loss of economic benefits, caused by flooding of their customary lands, that would otherwise have accrued to them as a result of their work in nurturing Manomin. The analysis also highlights their efforts to mitigate these losses even though they were not responsible for them. This work has never been formally recognized by the Province of Ontario. The description of this situation is set out in the thesis to provide a particular perspective from which to examine how these losses have been exacerbated by the imposition of provincial management over the resource.

In spite of this dislocation, the ethnographic evidence shows that a distinctive Manomin resource management system regulated by the customary law of the Wabigoon aboriginals has persisted up to the present time. The same management system governs Anishinaabe relationships to Manomin whether in domestic or commercial use contexts. The results of the field research are organized in the thesis to serve as a description of how the application of the aboriginal management system in both types of uses is essential to its health and integrity. The analysis of the thesis here emphasizes the mutuality that exists between domestic and commercial uses of Manomin in relation to its management by the Wabigoon Anishinaabe people. The field research also shows how the management of Manomin has responded to technological change while maintaining the essential character of an indigenous community-based resource management system. In short, the results of the research show that the Wabigoon Anishinaabe people have expended considerable time and energy devising workable institutions and complex strategies for regulating the management of Manomin as a common property resource. This is central to the subsequent consideration given to problems concerning the status of the system that arise in Euro-Canadian law, especially in the current judicial articulation of aboriginal and treaty rights.

In the thesis, a detailed description of the structural features of the Manomin management system of the Wabigoon Anishinaabe people is set out in reference to the rapidly expanding body of interdisciplinary scholarly literature on aboriginal resource management. This same approach is used to contrast the indigenous system for managing the resource with the system for its management that has been developed by the Province of Ontario. This analysis includes a discussion of relevant characteristics of the larger provincial jurisdictional and management framework pursuant to which the management of the resources of the Crown land base of the province is organized. The purpose of the analysis is to draw out the Euro-centric bias inherent in provincial resource management vis a vis the system employed by the Wabigoon aboriginals. Because of the power of its legal sanctions, the provincial system of resource management has suppressed the aboriginal self-management of Manomin throughout much of the customary land base of the Wabigoon aboriginals.

This analysis is presented in relation to the disconcerting experience of the Anishinaabe people of Manitoba in relation to the exercise of management control over the Manomin resource under provincial law. It arose in the context of a legal dispute concerning an affirmative action program to get aboriginal people involved in "developing" the resource within the provincial management framework that had been established to regulate the resource. This analysis serves as a caution highlighting the fragility of Anishinaabe authority with respect to the management of Manomin that exists at the present time in provincial law and policy. It serves to highlight crucial questions concerning the status of aboriginal access to natural resources generally as well as their authority to manage these resources within the wider context of federal jurisprudence governing aboriginal and treaty rights.

An analysis of the implications of federal jurisprudence on aboriginal resource management rights, set in the context of the specific resource management situation with which the thesis is concerned, is the focus of the second half of the thesis. A contextual analysis of the major themes governing the evolution of judicial decisions on aboriginal and treaty land rights in relation to the self-management of natural resources is set out. The analysis shows how the legal principles concerning the nature of aboriginal title are rooted in implicit ethnocentric assumptions about the nature of indigenous societies. While much of the terminology describing aboriginal people as "savages" and "primitive" has been repudiated in more recent judicial pronouncements concerning aboriginal and treaty land rights, the general principles of aboriginal title underlying the decisions have remained remarkably constant. In essence, the decisions continue to assert the doctrine of discovery as the justification for declaring the validity of the underlying sovereignty and authority of the Crown over aboriginal lands.

The analysis of the thesis demonstrates that the doctrine of discovery found little support amongst the writers of the classical texts of international law. Nonetheless, beginning with judicial decisions concerning aboriginal title that were handed down in the first half of the nineteenth century in the United States of America, where its Supreme Court initially admitted an obligation to ratify the "political process" of colonialism no matter what its ideological origins were, reliance by the courts both in that country and in Canada on the doctrine of discovery quickly became customary judicial practice. The further articulation of the "usufructuary" nature of aboriginal rights as subsistence rights relating to group survival (more recently they have been held to include ceremonial practices) grew out of the judicial reliance on the doctrine of discovery by which the radical underlying Crown title to aboriginal territories has been affirmed.

A further objective of the legal analysis in this part of the thesis is to assess the extent of the impact of judicial legitimation of the doctrine of discovery and its inherent ethnocentrism on aboriginal relationships to land. A primary result of this ethnocentrism is that the sovereignty of aboriginal peoples over their territories is necessarily denied or at least profoundly diminished. A secondary result is that aboriginal customary self-management of natural resources has often been deleteriously circumscribed by state resource management institutions.

Measured against the reality of the complexity of aboriginal resource management systems in Northern Canada and their potential to contribute to the sustainable management of natural resources, even judicial developments on aboriginal and treaty rights questions since 1981 must inevitably be construed as providing little security for aboriginal resource management. The Manomin management system of the Wabigoon Anishinaabe people continues to be threatened by the possibility of further encroachment of provincial resource management authority over the resource.

The conclusion reached in the thesis is that if aboriginal resource management, together with the customary law that regulates it, is to survive and flourish in the coming years, judicial perspectives on aboriginal land rights must be transformed. The doctrine of discovery and the implications of its articulation must be reassessed by the courts. A new judicial appreciation of aboriginal relationships to land is a prerequisite for a legal pluralism which will both recognize and respect aboriginal relationships to land that are necessary for the cultural well-being of the Anishinaabe people. No new strategies for developing a more appropriate legal pluralism on these issues are proposed in the thesis. However, reference is made to recommendations which have been proposed by the United Nations in recent years on this very issue. These could provide a useful framework to resolve the issue.

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CHAPTER ONE

INTRODUCTION

I. BEGINNINGS

I remember standing on the eastern shore of Lake St. Joseph in Northwestern Ontario one day in the spring of 1985. I was with a small group of Aboriginal Elders from the Osnaburgh First Nation. Morris Loon, the Chief of the community at that time, was also present. He and a younger Anishinaabe (Ojibwa) man were facilitating the conversation. They also acted as translators as we talked. Two of the Councillors from the community were also with us. These people knew that I was still completing my articles as a law student at the time. But I had offered to come and visit with them at their request and explain what I knew of various possibilities of redress for the situation they were about to describe to me.

On that day the air was silent and closed in by a slate grey sky. Low lying clouds hung on the horizon and blended into rises in the land. A cold quiet drizzle was drifting in from the west. It clung to our clothes as we stood and talked. I could hear the snow contracting as it slowly melted around us. We were standing close to a dam which had been constructed about a third of a century earlier at the outflow of the Albany River from Lake St. Joseph on its course to James Bay.

The Elders spoke in quiet, measured phrases describing what this dam had brought to their lives on Lake St. Joseph. Community sites had vanished. Burial grounds had been flooded. In the years which followed the flooding, human skeletal remains continued to wash up onto the shore of the lake. Aquatic Manomin (wild rice) fields in bays around the lake had been submerged in water that was now too deep to permit the plant to grow. The Elders said that the large sturgeon in the lake which they had highly valued had all but disappeared. Fluctuations in water levels disturbed the annual nesting patterns of migratory waterfowl. Much of the water from Lake St. Joseph itself was regularly diverted from the Albany River watershed to which it belonged into the English River system.

The Osnaburgh First Nation membership had been relocated as a result of the flooding. Gold mining commenced in the area around the time that the dam was built. To support these developments, a highway was constructed through the middle of Osnaburgh Reserve lands. Sport hunters and fishers, together with lodges that catered to them, had systematically invaded the customary hunting and fishing territories of the Elders who were speaking to me that day.

In the face of it all the membership of the Osnaburgh First Nation descended into a state of despair. Often they internalized the dislocation that they suffered. When it boiled to the surface it was frequently manifested in violence that was inflicted inward onto the community itself. The tragedy resulting from the events that were described to me continues to afflict the community a third of a century after this development activity had begun.

As I stood on the shore of Lake St. Joseph listening to recollections of the Elders about catching large sturgeon and reaping abundant harvests of Manomin from the lake, I wondered about the future. I wondered about how the future might be better even though I was listening to their determination to redirect the energy of the youth of their community in ways that would lead to cultural renewal. I wondered about the future especially in light of the concerns they expressed to me about what they understood of the large scale exploitation of forest resources pending on their lands.

The visit to Lake St. Joseph with Osnaburgh First Nation Elders and Councillors, left me with a lasting impression. I knew little of Anishinaabe territoriality at that time. But the meeting generated much reflection on my part about basic Aboriginal land rights and resource management issues that had arisen as a result of outside development encroaching upon the customary lands of the Osnaburgh First Nation people. As I attempted to understand my initial encounter with these people, I became aware of the gulf that separated their culture from the non-Aboriginal one which was having a profound impact on their lives in these lands. How would two very different cultures come to terms with the issues concerning natural resource use and management that had been thrown up as a result of outside development in their land? For what these people were lamenting, as much as anything else, was the denial of their capacity to maintain their relationships with the Lake St. Joseph watershed in a way that was appropriate to their culture. My work to come to terms with these problems, at both the practical and theoretical levels, would begin in earnest the following year.

One day in late July, 1986, I was being taken by boat to view aquatic fields of Manomin on the Wabigoon River. The location was on the upper reaches of the river whose waters also course through Northwestern Ontario. I was being taken upstream from the Wabigoon Lake Ojibway Nation Reserve. It was in the late afternoon of a hot, cloudless, calm summer day. Yet out on the water the heat was not overbearing. The driver of the boat was an Anishinaabe (Ojibwa) man, Joe Pitchenese. He took ample time to point out and explain various biological and cultural features of this location. Its spiritual and cultural significance to him was apparent. I marvelled at the extent and the beauty of the Manomin fields at this place.

After a time, however, I was struck by the fact that there were long dead trees still standing out in the middle of parts of these Manomin fields. Joe Pitchenese explained this to me. I learned that the ecosystem I was observing, with the many ducks, a moose, several muskrats, bald eagles and other wildlife that we encountered during the trip, had not always been like this. In fact, the bulk of these Manomin fields had once been dry land. The land had been flooded as a result of the construction of a dam on the Wabigoon River. The dam had been built in the early years of this century. It is located some distance downstream from the location where I was travelling with Joe Pitchenese. The dam was located at Dryden, Ontario and had been built about a third of a century before the dam on Lake St. Joseph was constructed.

The reality was that the Manomin that I had been observing had been planted at the location by Wabigoon Anishinaabe people after the land had been initially flooded. Manomin fields further down the watershed had been submerged by rising water from the flooding. The water, I was told, had risen by nearly three meters. The work of planting Manomin in the new fields at the location I was visiting with Joe Pitchenese had been carried out at a time when the Wabigoon people were suffering from the effects of several plagues including smallpox and influenza that afflicted them in the first quarter of the century.[1] They had not only to cope with the initial impact of these plagues but also

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[1]See for example, a history of the effects of plagues brought to the Americas on Aboriginal peoples in: A. Nikiforuk. The Fourth Horseman: A Short History of Epidemics, Plagues, Famines and Other Scourges (Toronto: Penguin Books Canada Ltd., 1991).

with the lingering social aftermath that accompanied them. These plagues followed on many which had ravaged these Aboriginal people before this time.

These events, however, were only the beginning of much more dislocation and marginalization that the Wabigoon Aboriginals would have to endure as the Twentieth Century wore on. Over the intervening decades between the time of the flooding of the Wabigoon River and the 1980's, networks of roads were cut through their customary territories. The industrial exploitation of forest resources in their lands rapidly accelerated during these decades. Hunting and trapping territories were affected. Then, after World War II, came the imposition of non-Aboriginal management of trapping in the territories of the Wabigoon Anishinaabe people. Indeed, all commercial resource extractive activities of Wabigoon Aboriginals came to be closely circumscribed by a foreign management regime with its attendant Euro-centric biases. For example, this development was accompanied by the frequent exercise of administrative fiat in the re-organization of these trapping territories. Through decisions unilaterally made by provincial politicians and resource managers, the original areas of more than a few Aboriginal trapping territories were contracted to make room for non-Aboriginals competing for fur-bearing resources. As a result, the Wabigoon Aboriginal began to lose access rights for the harvest of fur-bearers in significant portions on their customary lands. Much the same happened with other resources ranging from fish to timber.

No official attempts of any substance were ever made to ameliorate the destructive impact of all of this development on the Wabigoon people. I talked with Wabigoon Elders about this many times after I first travelled the Wabigoon River with Joe Pitchenese in 1986. Often I got the impression from these people that when development came, it came as if they, as the Aboriginal people of the region, had been invisible. They had to resist it where possible, but more often than not, resistance was not possible. Adaptation to it became necessary where resistance was not possible.

The outside development of natural resources that came to the lands of the Wabigoon Anishinaabe people amounted to a sea change for them. This resource development was itself accompanied by official programs of social development that included the establishment of an assimilationist residential school system in the region. But what is certain is that the Wabigoon Aboriginals did not disappear as Aboriginal people because of it. Somehow they coped with non-Aboriginal development in spite of the social dislocation it caused - dislocation that was manifested in the often alarming incidence of new social plagues such as alcohol addiction. In fact, even now, for example, Joe Pitchenese and other Wabigoon Anishinaabe people continue with efforts to remove flooded timber from Manomin fields at the location on the Wabigoon River that I first visited with him. It had at least been fortuitous that, because of the particular topographical characteristics of this location and the water control regime that was established for the watershed, the Wabigoon people were able to establish and maintain Manomin fields to offset some of the damage caused by the initial flooding of the Wabigoon River from the dam at Dryden. Many other Aboriginal communities throughout Northwestern Ontario have fared substantially worse than this with respect to their Manomin resource. As well, non-Aboriginals have increasingly coveted even those Manomin fields on the Wabigoon River that I first visited in 1986.

What is unmistakably evident in this setting is that centuries of contributions of Anishinaabe people toward the use and active management of renewable resources throughout their lands have remained largely invisible to the outside world. The management strategies employed to maintain many of these Manomin fields went unnoticed by provincial resource managers. No licences were issued and no permits were granted by the Province of Ontario approving the work with Manomin that was undertaken by Wabigoon Aboriginals at the location I first visited on the Wabigoon River in 1986. The Manomin selected to seed these new fields and many others throughout their region was not organized or directed by an official of the Ministry of Natural Resources or Agriculture. Of course the customary rules which governed specific management practices remained unnoticed. No lines on provincial maps were ever drawn delineating the allocation of benefits resulting from this work. No fences or gates were put up when one phase of the work was completed. It was undertaken by people relying on their own cultural heritage and human resources. It built on generations of work and accumulated knowledge about the land that had preceded it. It has still not been recognized by the non-Aboriginal society. It is not uncommon even now to hear outright denials that any work like this could even have been carried out by Anishinaabe people. This pattern of denial profoundly reflects on the inability of the dominant society in Canada to come to terms with its displacement of Aboriginal cultures right across the country. In particular this denial also reflects on the refusal to recognize and accept Aboriginal land management practices that, because they do not involve demarcation of private property interests, are not visible or even understandable to the dominant society.

This speaks to the competing interests that are at stake here:

> In our ...Western society, physical property - as well as intellectual property -are commodities to buy, sell, and own. Western law allows us to patent and copyright the products of our thoughts, and we are outraged when the fruits of our mental labour are stolen by others.
>
> Yet when such labour is the result of hundreds of years' worth of research and experimentation by a tribal society, then any claims to "property" go out the window. This is more than a question of group versus individual rights. Indigenous knowledge is the West's "new frontier"..., the last great resource rush.[2]

The work of the Wabigoon Anishinaabe people in their lands prior to and after non-Aboriginal resource development came to their territory reflects the distinctiveness of a particular society. Its results provide the evidence of this. In the culture, politics and economy of their Anishinaabe society, the values of co-operation, consensus, reciprocity and local autonomy have long been and remain normative. They have had a particular impact on the landscape - one that is crucial to understand in an age where the preservation of biodiversity is gradually becoming recognized as a critical normative value in relation to resource use and management. The customary values of resource use and management of the Wabigoon Anishinaabe people remain normative to a degree many might find surprising in light of the on-going interaction of these people with the dominant non-Aboriginal society and its distinct values that have so impacted on resource use and management throughout Aboriginal lands. These customary values continue to be reflected in their everyday practices of resource use and management. Throughout this study, I will attempt to pay attention to the influence of these normative values in resource management as practiced in the field.

It is also necessary to emphasize at this point that the customary relationships of Anishinaabe people

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[2]The Editors, "The Politics of Ownership" in 15(3) Cultural Survival Quarterly 3 (1991), at p. 3.

to their natural resources has evolved with their communities over time. They have adapted to the imposition of non-Aboriginal jurisdiction over their resource base. Because of this imposition, much indigenous ecological knowledge has been suppressed. Much of the knowledge that has been suppressed has been lost. But much still remains. Further, the overall forms of resource use and management of the Wabigoon Aboriginals, for example, remain consistent with customary norms and practices whether they involve commercial fishing or timber harvesting, trapping or putting up fish for food, harvesting Manomin or wildfruit for commercial purposes, or any of a variety of other economic activities that take place on the land. It is the maintenance of these overall customary normative values of resource use and management that remain important to Wabigoon Aboriginals. According to them, if the state suppression of any number of a variety of resource extraction and management activities can be ended, the Aboriginal base of ecological knowledge necessary to support suppressed customary resource management that they have not been able to practice even covertly can be rebuilt. They maintain that this involves both spiritual and what non-Aboriginal society would term scientific aspects. The former is something that is largely beyond the scope of this study, though for the Aboriginal people who have given rise to this study, they are central.

It is the case that many customary resource management practices of Anishinaabe people in Northwestern Ontario have become severely stressed over time. However, many other practices have been better able to survive in spite of non-Aboriginal jurisdiction over and development of the natural resource base in the region. In no area, however, has Anishinaabe resource use and management remained untouched by Canadian law and regulation. It is nothing short of remarkable, therefore, that its distinctiveness remains. The persistence of Anishinaabe systems of resource management in

the face of imposed non-Aboriginal laws and state sanctioned development serves as a testament to the strength of the Aboriginal culture from which they have grown.

What I hope will become clear in this study, however, is that the survival of community-based customary Aboriginal resource management in northwestern Ontario remains critically dependent upon certain contexts of access to resources for Anishinaabe people. Its strengthening is dependent upon an expansion of these contexts of access. The role of the State will be crucial here. The precarious security of access to Manomin that Wabigoon Aboriginals now possess on the Wabigoon River and at other locations extends to most resources important to Anishinaabe people throughout Northwestern Ontario. Nothing short of a new context of genuine legal pluralism must be established by the Canadian State if the suppression of Aboriginal resource management is to end. This is what has become the catalyst for this study. My hope is that the analysis I have set out in the study highlights this as much as anything else. The future of customary Anishinaabe resource management in Northwestern Ontario now depends in large part on the non-Aboriginal public generally, and Canadian law making and resource management institutions in particular, recognizing and accepting its validity. If this study points out any trends in this regard, it is that such recognition will probably not be easily forthcoming. It is perhaps likely that intensifying environmental problems will serve as a catalyst for change on the issue of Aboriginal resource management as much as anything else.

II. THE CONTEXT

In any event, this study must also be placed in a wider context. It involves the rapid rise to prominence of a new sense of urgency concerning environmental issues. "...[I]t has become clear that human activity has damaged the natural integrity of major ecosystems on every continent, seriously threatening the security of the societies that depend on these ecosystems."[3] Even some who are lawyers have concurred with this assessment.[4] They agree that:

> Modern residents of North America are facing ecological problems considerably more grave than those of the European immigrants, and without the option of immigrating away [sic] from those problems. As our awareness of the magnitude and the implications of these ecological problems has increased, so too has our search for solutions. Technological solutions are failing us, and there is a growing perception that it is our very culture and way of living which must change before solutions become possible. In a search for alternative ways of relating to the earth and her other inhabitants, it seems very natural to turn to cultures which successfully managed to live with this land, the culture of the Native Americans.[5]

In the pattern of non-Aboriginal development that spread across Northwestern Ontario, Aboriginal concerns regarding resource management and the environment were considered to be largely irrelevant. Going downstream on the Wabigoon River from the area I had first travelled with Joe Pitchenese in 1986, for example, the dislocation faced by the Anishinaabe people of this region from

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[3]Julia Gardner and Mark Roseland, "Thinking Globally: the Role of Social Equity in Sustainable Development", in 16(3) Alternatives 26, at p. 26 (1989).

[4]Randy Kapashesit and Murray Klippenstein, "Aboriginal Group Rights and Environmental Protection", in 36 (3) McGill Law Journal 925 (1991), at pp. 925-929.

[5]A.L. Booth and H.M. Jacobs, Environmental Consciousness: Native American Worldviews and Sustainable Natural Resource Management: An Annotated Bibliography (Chicago: Council of Planning Librarians, 1988), at p. 2.

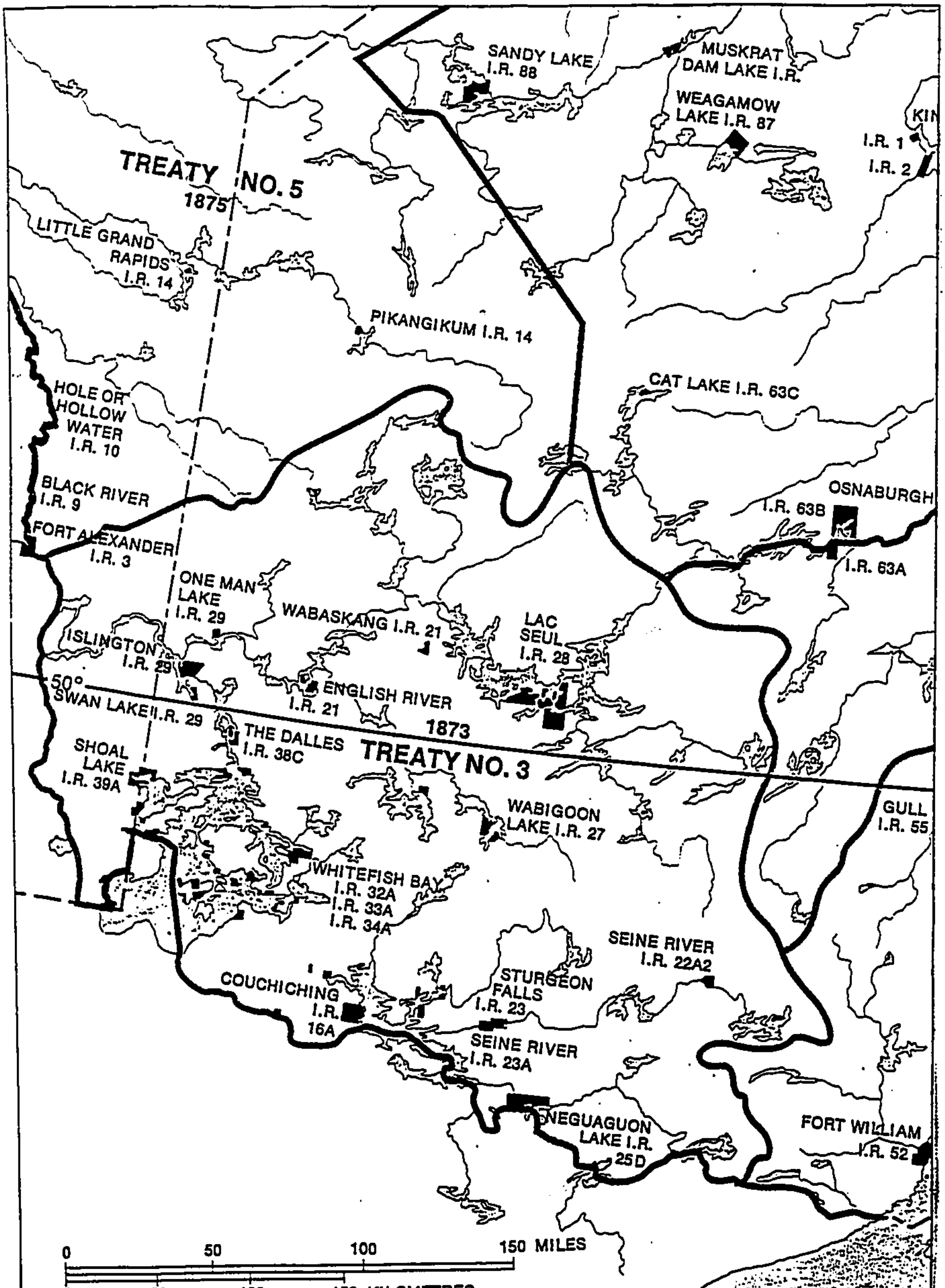

FIGURE #1: MAP - TREATY #3 TERRITORIES
SOURCE: ROYAL COMMMISSION ON THE NORTHERN ENVIRONMENT. NORTH OF 50: AN ATLAS OF FAR NORTHERN ONTARIO (TORONTO: UNIV. OF TOR. PRESS, 1985).

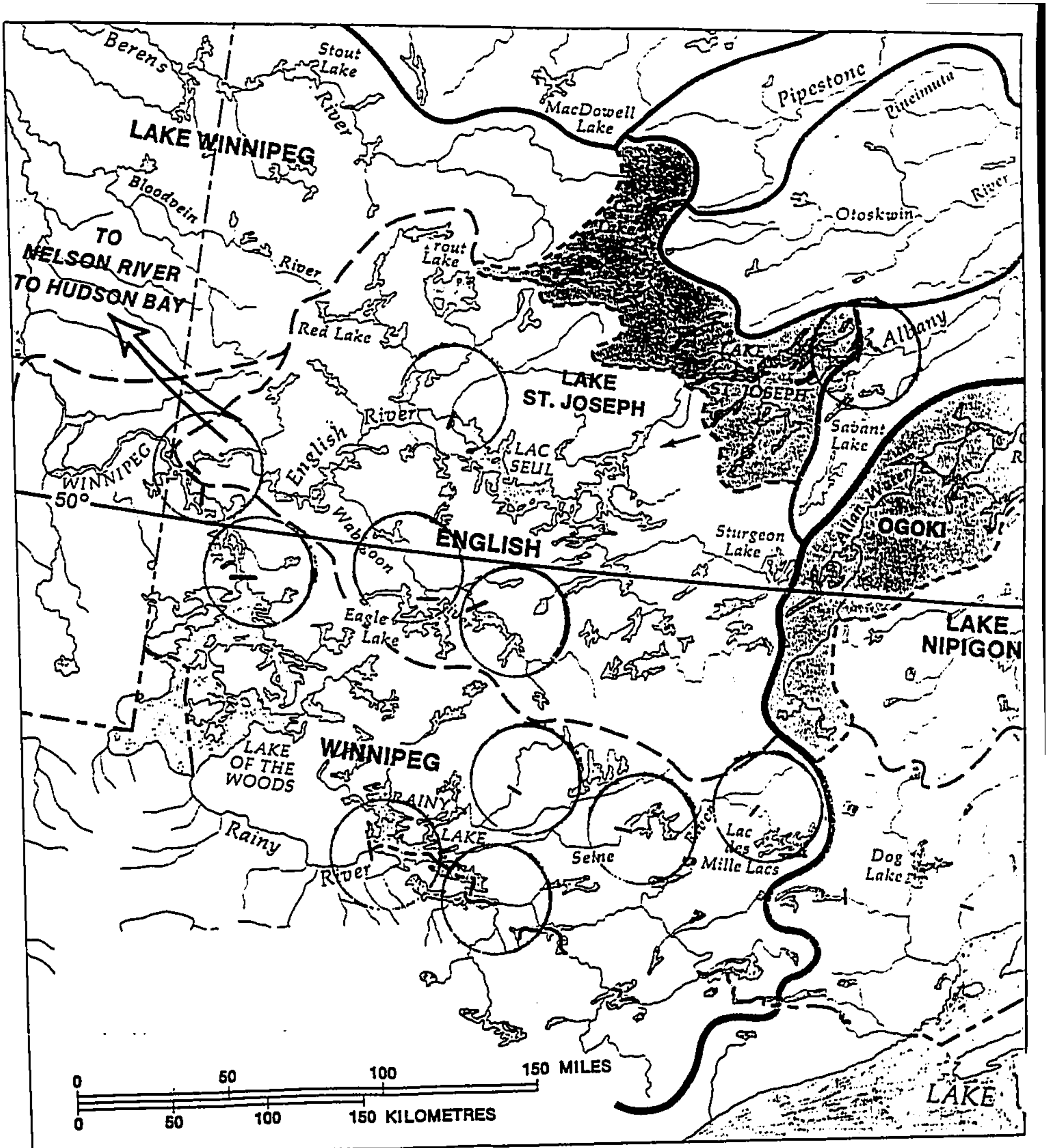

FIGURE #2: MAP - THE WINNIPEG RIVER AND ENGLISH RIVER DRAINAGE BASINS AND DAMS. SOURCE: ROYAL COMMISSION ON THE NORTHERN ENVIRONMENT. NORTH OF 50: AN ATLAS OF FAR NORTHERN ONTARIO (TORONTO: UNIV. OF TOR. PRESS, 1985) imposed development is readily apparent. Industrial development led to the poisoning of the fish of the Wabigoon and English rivers (the former flows into the latter) when mercury was released from a pulp and paper complex in Dryden, Ontario. This poisoning destroyed the customary commercial and subsistence fisheries of the Grassy Narrows and Wabaseemoong (Whitedog) Aboriginal people in these river systems. Major developments in the region also included the construction of a dam to generate hydro-electricity further upstream on the English River at Lac Seul. Lac Seul itself receives diverted waters from the Albany River system at Lake St. Joseph where the Osnaburgh Aboriginal people live. Aboriginal community sites on Lac Seul were flooded and the forced relocation of Aboriginal people there became necessary. Going downstream on the English River, dams for the Caribou Falls and Whitedog generating stations were built close to its confluence with the Winnipeg River. This flooding forced the relocation of the Wabaseemoong Aboriginal people. Its effects were only compounded by the poisoning of this watershed with mercury. Upstream on the Winnipeg River, dams were built where the river flows out of the Lake of the Woods. These dams were built close to the time that the dam at Dryden on the Wabigoon River was built. Flooding of lands around the Lake of the Woods dislocated Anishinaabe people belonging to at least eight First Nations. This particular development included the blasting of a diversionary channel to connect the Lake of the Woods and Shoal Lake. It also included the substantial diversion of water from Shoal Lake through a constructed aqueduct for consumption by the City of Winnipeg. Further upstream from the Lake of the Woods, dams at Fort Frances, Ontario and beyond have affected another score of Anishinaabe First Nations and their resource use and management systems. Downstream, in the lower regions of the Winnipeg River, more dam construction also affected the people of the Sakgeeng First Nation. Sakgeeng First Nation Reserve lands lie in Manitoba at the mouth of the Winnipeg River where it flows into Lake Winnipeg. The waters that have their source at the start of the Wabigoon River flow into Lake Winnipeg here. This is at the western end of the territories of the Anishinaabe people that are now sometimes referred to as the Treaty 3 region.

Non-Aboriginal resource development in Northwestern Ontario since the turn of the century is representative of a particular pattern of accelerating development that has occurred over recent decades. It now extends into most of the territory in the central latitudes of Canada.[6] Because of it, Aboriginal peoples throughout these regions must now confront many of the same stresses on their customary resource management systems that have plagued the Anishinaabe people of Northwestern Ontario for decades. The increased power of the technologies which are accompanying ever larger developments into Aboriginal territories is only compressing the time that is available to Aboriginal communities to respond to them.[7]

A critically important aspect of this development is that the vast bulk of the lands on which industrial scale resource exploitation is being carried out have not been alienated by the State into private lands held in fee simple. They remain constituted as provincial Crown lands. These are the lands from which conflicts between Aboriginal people and the State have arisen that led to the penning of much judicial ink in elaborating the present description and content of Aboriginal title

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[6]See for example: Andrew Nikiforuk and Ed Struzik, "The Great Forest Sell-Off: Behind Closed Doors, Alberta Dealt Away Timberlands Almost the Size of Great Britain - An Economic Windfall or an Environmental Disgrace?", in 6(5) Report on Business Magazine 56 (Toronto: The Globe and Mail, Nov. 1989), and Peter Gorrie, "The James Bay Power Project: The Environmental Cost of Reshaping the Geography of Northern Quebec" in 110(1) Canadian Geographic 20 (Feb./Mar., 1991).

[7]For one of the best records of this type of process see: Boyce Richardson. Strangers Devour the Land (Toronto: MacMillan of Canada, 1975).

and rights in Canada. The analysis of indigenous resource management presented in this study makes it fairly easy to conclude that the development of this law has taken place in the absence of any significant recognition of the reality of unique and valuable local systems of Aboriginal resource use and management.

At the same time, the elaboration of principles concerning Aboriginal title and rights by Canadian courts has largely determined the processes by which the conflicts over natural resources between Aboriginal communities and non-Aboriginal society are played out. It is only very recently that constitutional developments, which are themselves the result of the Canadian political process, have begun to have an impact in this state of affairs. Given the change that has occurred to date, I will argue that an accelerating pattern of conflict is bound to become the norm throughout these territories unless Canadian law makers act more quickly to come to terms with both the existence and complexity of indigenous resource management. Conflicts arising out of the interaction between State resource management and sanctioned development, and indigenous resource use and management in territories, where the latter remain strong, are now being generated at an increasingly rapid rate. This, for example, is the situation that characterizes conflicts over resource management in most of the customary territories of the Osnaburgh and Wabigoon Anishinaabe people. These Aboriginal people have borne the brunt of past development activity in their territories. Because of their cultural distinctiveness from the non-Aboriginal society, they are continuing to suffer disproportionately from the on-going impact of these alien forms of development. About the only thing that has changed for them is the accelerating rate of resource exploitation within the legal system of the State.[8]

In this study, therefore, I will show that the legal context determining resource use and management in Aboriginal territories like those of the Wabigoon Anishinaabe people yields up a variety of important contemporary perspectives concerning the suppression of Aboriginal customary resource use and management. Through reference to a specific indigenous resource management context, and with a sufficient awareness of the forms of Aboriginal resource management that are involved, it is possible to clearly establish the on-going negative impact of Canadian law on these Aboriginal customs.

The linkage between the continuing suppression of Aboriginal resource management and the articulation of Aboriginal rights in Canadian law takes on a special dimension in this light. The forms this suppression has taken are manifold. Firstly, there are the effects of a description of Aboriginal title that sanctions the outright appropriation of the territorial base of Aboriginal peoples by the State. A constricted set of use rights have been granted back to Aboriginal peoples that relate mostly to hunting and fishing on unoccupied Crown land for "subsistence" use purposes. Secondly, there are the effects of a description of Aboriginal title which is employed by the State to exercise a comprehensive management authority over the non-Aboriginal exploitation of the resource base in

[8]For the boreal region of Ontario, which includes the customary lands of the Wabigoon and Osnaburgh Anishinaabe people, the change amounts to the following with respect to the exploitation of forest resources: "In the decade that ended in the mid-eighties, there was a 31.4 percentage increase in the amount of Ontario forest being logged. And the amount of wilderness land sprayed with chemical herbicides also jumped. In 1976 one in every five hectares subject to treatment in Ontario was sprayed. Ten years later two of every three hectares treated got the herbicide once over. ...[An official]...of the Ontario Forest Industries Association, is optimistic about all the new seed orchards that will soon produce genetically manipulated trees [that will become an integrated part of this forest management context]" (Jamie Swift, "Ontario's Search for a New Way in the Woods" in 3(1) Borealis 38 (Fall 1991), at pp. 39 and 40).

Aboriginal territories. In certain limited cases, Aboriginal peoples are granted priority rights of access to harvest a narrow range of wildlife resources for subsistence purposes in their lands. Even here, however, constricted rights of access to non-Aboriginals most often do little to limit the State sanctioned non-Aboriginal exploitation of other resources (forest clearcutting, for example) which has a direct bearing on many resources to which Aboriginal people have harvesting rights. Thirdly, there are the effects of a description of Aboriginal title by which direct State management over Aboriginal uses of the natural resource base of their lands - especially in relation to commercial extraction activities - suppresses Aboriginal resource management after their subsistence use rights have been exercised.

The issue of management here is obviously of central importance. In this study, I will show that customary Aboriginal management systems are inextricably linked to Aboriginal forms of harvesting and resource allocation. Indeed, this seems to be the case no matter where indigenous peoples live.[9] Aboriginal overuse of natural resources can be effectively constrained by customary normative principles and management systems which apply these principles. In these systems, issues of conservation are usually central. As much as anything else, this is why Aboriginal communities continue to struggle for State recognition of their customary forms of resource management.

This study will indicate, therefore, that customary Aboriginal resource management in Northwestern Ontario has persisted in spite of Canadian law relating to Aboriginal rights. Where Aboriginal resource management has persisted, State management of resources through systems that are alien

[9]See for example: D.A. Posey and W. Balee, Editors, Resource Management in Amazonia: Indigenous and Folk Strategies (Bronx, N.Y.: The New York Botanical Garden, 1989).

to Aboriginal communities, even if it is undertaken for conservation purposes in relation to subsistence use rights, is demeaning to Aboriginal people. It presumes that indigenous resource management does not exist or, if it does exist, it is not up to the task of conserving resources in the modern world - even in subsistence use contexts.

It is necessary to emphasize that federal and provincial resource management authorities have legally prevailed in their regulation of virtually all indigenous commercial uses of resources in their territories which form the Crown land base of Canada. This is one of the most important issues with which this study is concerned. I will show, by reference to the normative character and specific aspects of the indigenous management system analyzed in this study, that the distinction in State law between subsistence and commercial resource harvesting by the Aboriginals involved is seriously problematic from their indigenous perspective.

The normative character indigenous resource management strategies analyzed in this study, whether they are employed for domestic or commercial resource use purposes, are not amenable to commercial/subsistence distinctions. The knowledge required for their operation and the strategies used to allocate the resources, which can be expressed in terms of property rights and conservation they employ, form part of a unified whole. Indeed, the maintenance of customary management for commercially important resources is often closely related to the maintenance of sustainable levels of resources that are important for domestic subsistence use. Customary management is the vehicle through which ecological knowledge and management practice for one resource that relates to others is cycled. This may in part explain why indigenous management of resources extracted for commercial purposes continues to persist - covertly if necessary - even in cases where State regulation is actively imposed. If they can, the Aboriginal people involved will cope with State management as best as they can, ignore it where possible, and practice their forms of "non-formal" resource management covertly if the situation allows it.

Aboriginal people who rely on natural resources for their livelihood resist State regulatory authority so that they can provide income for themselves, their families and their communities in accordance with their cultural norms. It should be fairly obvious that without an adequate income it is probably impossible for those Aboriginal people who spend much of their time on the land, to defend their culture and their way of life on it.[10] Therefore, it is often disheartening for them that, in those rare circumstances where indigenous resource management is more freely exercised in the commercial use of renewable natural resources, it is largely the result of political pressures alone. Its persistence can usually be traced to indigenous political resistance to the imposition of State authority. In these circumstances, the State has yielded somewhat in its authority to impose its non-Aboriginal resource management culture onto indigenous people.

III. OVERVIEW OF THE STUDY

In the preceding pages, I have gone to considerable lengths describing the situation of Aboriginal communities in Northwestern Ontario with respect to resource management. But it is only after

[10] Leslie Baker, "Cultural Survival Imports: Marketing the Rainforest", in 13(3) Cultural Survival Quarterly 64 (1990), at p. 64: "As communities organize to expand production and diversify income, they will strengthen the local organizations that are so critical to the defense of the forests. At Cultural Survival, we have learned over the years that without income indigenous peoples have little chance of defending themselves.

describing this setting that the analysis which follows in the subsequent pages makes particular sense. Within the setting previously described, then, this study first examines a customary resource use and management situation where the commercial importance of the resource involved has been central to the survival of the management system itself. At the same time this resource is also centrally important to the Aboriginal people involved for domestic use purposes. This examination assesses the Manomin (wild rice) management system of the Wabigoon Anishinaabe people. After the Wabigoon Manomin management system is set out, the analysis moves on to examine the normative features which underlies the system. These features are then compared with the normative character of current State resource management practice as it applies to Manomin, the focus of my field research.

I will conclude this part of the study with a description of the more distressing circumstances which befell Anishinaabe people who live in the Manitoba portion of Treaty #3 territories with regard to their Manomin resource. An analysis of this particular experience will serve to link the preceding analysis of indigenous resource management to the detailed analysis of issues in Canadian law which is presented in Chapter Three of this study. I hope to highlight the disconcerting effects that single legal judgements can have on Aboriginal resource management systems that are central to the vitality of extremely important indigenous harvesting activities.

The research that was undertaken in order to prepare the analysis presented in this study is the result of on-going fieldwork with the Wabigoon Anishinaabe people. Further, this research has built on my field experience with Anishinaabe "harvesters" throughout Northwestern Ontario. The research methods, which have usually involved an ethnographic approach, are outlined in more detail in Chapter Two of this study. My field work on these issues also has involved Aboriginal people in Eastern Manitoba, though to a significantly lesser degree. At any rate, all of the research presented in this study has built on my experience as a legal counsel and natural resources "development" fieldworker for Aboriginal people throughout the region.

In terms of my analysis of the customary law involved in the Aboriginal resource management setting in this study, I want to show that the people involved:

> ...expend considerable time and energy devising workable institutions for governing and managing common-pool resources;
>
> ...follow costly rules so long as they believe that most of the others affected also follow these rules;
>
> ...monitor each others conformance with these rules; and
>
> ...impose sanctions on each other at a cost to themselves.[11]

In these situations, it is not possible to disregard the role of equity as an important factor in determining the effectiveness of customary Aboriginal resource management systems.[12] Amongst the Anishinaabe people who are the focus of this study, this equity is achieved through co-operative mechanisms which involve kinship factors and practices of reciprocity which are important for their societies at the local level. A further collateral result of my analysis is that it highlights the

[11] Elinor Ostrom, "Introduction: Managing our Common Resources", in 27(4) Nature and Resources (UNESCO) 2 (1991), at p. 2.

[12] Ibid.

mechanisms employed by the Aboriginal people concerned to accumulate and cycle amongst themselves important ecological knowledge that is necessary for effective community-based resource management. The analysis implicitly speaks to the deleterious impact of imposed State management on this important knowledge.

It seems opportune at this point to make a few remarks about the extent of ethnographic analysis that I propose to set out in this study. This analysis concerns the Aboriginal customary regulation of natural resource use and management. Firstly, there is an urgent need to acquire more knowledge about the customary regulation of natural resource use and management by Aboriginal peoples. Secondly, scholarly research in the field is only in its infancy in dealing with what are complex systems of Aboriginal resource management. Further, non-Aboriginal society still knows little about how Aboriginal custom can promote the development of valuable ecological knowledge and influence resource management practice amongst local users who have simultaneous access to different resources within the same local territory. Thirdly, there is no reason why lawyers concerned with Aboriginal customary law and native rights issues cannot engage in this type of research. Few do. Perhaps this study might encourage others to engage in it - especially those who represent Aboriginal peoples in conflicts over issues involving Aboriginal rights to natural resources.

I want to sound a brief caution here. It concerns the use of the analytical categories in this study which have been outlined in the foregoing paragraphs. Throughout this study, I refer to concepts such as "indigenous resource management systems" and "customary law". I wish to put this terminology into context. By using the term "indigenous resource management systems" I mean to describe systems for the allocation and management of renewable natural resources utilized by Aboriginal communities to maintain the abundance and diversity of the resource base in their customary territories in accordance with customary normative cultural values. "Customary law" refers to the specific regulatory practices of resource harvesting and management and the normative principles which underlay them. It is true that this study makes reference to a multitude of what can be termed Aboriginal resource management functions. It refers to numerous harvesting regulations and customary norms. Taken as a whole, these functions and regulatory contexts take on the character of systems. But Anishinaabe harvesters with whom I work have cautioned me against losing sight of certain priorities in relation to resource use and conservation that are primary for them. They caution against moving away from the priority of maintaining certain relational norms between people and "resources". These norms are crucial for them in achieving resource conservation and the preservation of biotic diversity. These Anishinaabe people speak of the ecological efficacy of naming individual resources as subjects, relating to them as subjects and respecting all things as subjects. In this light, concepts of resource management and regulation take on a different texture and hue in Aboriginal settings that are the focus of this study. At times, cross-cultural difficulties in communication between Aboriginal harvesters and State resource managers, in settings where I have been present, have made mutual understanding on these matters very difficult. Indeed, given the focus of this study I have bowed to non-Aboriginal conceptual constraints which have been thrown up by the challenge of cross-cultural communications. However, it is my hope that the Anishinaabe worldview, as it pertains to the normative relationships of human beings to the "natural" world about them, does not suffer too much injustice in this study.

The study, then, develops perspectives concerning Aboriginal territoriality that could be utilized to argue for the legal recognition and acceptance of indigenous resource management systems by the State. It is now increasingly recognized that:

> An important incentive that affects the type of rules that users devise and monitor, is whether the communal or community property rights of the users are acknowledged, accepted and protected.[13]

This applies in the relationship of the State to Aboriginal peoples no less than it does amongst their own constituencies. The question for the purposes of this study then, must turn to an examination of why it remains so difficult for Canadian lawmaking institutions to accept and protect effective forms of indigenous resource management. To answer this question I propose to analyze the origins, development and current status of the judicial treatment of Aboriginal territorial rights in Canadian law in relation to the perspective set out in Chapter Two of this study. The picture that emerges from this analysis is sometimes positive but more often both distressing and frustrating for Aboriginal peoples and others who support the principle of recognizing and accepting Aboriginal forms of resource use and management in State law. As I have already stated, the Canadian law on this issue remains permeated with ethnocentric biases. I propose to show how these biases have led to the drawing of legal distinctions between the categories of subsistence and commercial resource use as a categorical tool to constrain the territorial rights of Aboriginal peoples in Canada. Further, it should also become apparent that the indigenous management of natural resources that is possible as a result of Canadian law, which Aboriginal groups still practice, is itself largely an unintended

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[13] Ibid, at p. 3.

result of judicial limitations imposed on non-Aboriginal governments to control Aboriginal subsistence harvesting activities. It does not represent a positive affirmation in State law of customary Aboriginal resource management.

Simply put, the legal basis in Canada on which non-Aboriginal State control over indigenous resource use and management rests, is grounded in the ethnocentric "discovery" principle. The act of discovery by European powers of the lands that are now Canada is held to justify non-Aboriginal jurisdiction over a host of natural resource uses in Aboriginal territories. I hope to show that the discriminatory basis of this reasoning and its persistence is unavoidable. While courts may not be able to change it, they should at least be able to admit to it. In terms of its impact on Aboriginal resource management I believe that this legal state of affairs remains the primary prism through which judicial (and legislative) reasoning on Aboriginal territorial rights issues continues to be mostly refracted. This situation may be changing but it is changing in a painstakingly slow fashion.

In this study, I am not proposing specific strategies to resolve the problems thrown up by the application of this law. The development of these strategies seems best left to Aboriginal peoples, dealing with the issues as they are affected by them, working in conjunction with their own experts. But the principles underlying the description of Aboriginal title in Canadian law are worth reconsidering in light of a deeper appreciation of Aboriginal relationships to the land and its natural resources.

IV. A CAVEAT

Before I develop my analysis in this study, I wish to point out the limitations that any non-Aboriginal researcher must cope with in trying to come to terms with the issues involved. These limitations exist regardless of the fact that one might be sympathetic to Aboriginal perspectives on the issues. I wish to state them at this point because they relate to problems of ideological bias in the law respecting these issues which I deal with throughout this study. They relate to the fact that "...Scientists [and this should include social scientists] are creatures of the culture which nurtures them..."[14] It should not come as a surprise that many ideas about indigenous peoples and the character of their relationships to the resources of the ecosystems they inhabit are laden with out-dated and prejudicial assumptions. Henry Lewis, in a revealing study of the indigenous uses of fire as an ecosystems management tool in the boreal region of western Canada has lamented the general lack of anthropological awareness about indigenous management of ecosystem resources.[15] While anthropologists did repudiate concepts of environmental determinism "...[they] did not, however, maintain that band or tribal societies played any significant roles in shaping environments. Although it was, and is, a fundamental postulate of ecology that every organism both affects, and is affected by, its environment, anthropologists [have] continued to ignore questions regarding the former."[16]

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[14] Infra 15, at p. 3.

[15] Henry T. Lewis. A Time for Burning: Traditional Indian Uses of Fire in the Western Canadian Boreal Forest (University of Alberta, Edmonton: Boreal Institute for Northern Studies, Occasional Publication No. 17, November 1982), at p. 3.

[16] Ibid, at p. 4.

> The contemporary folklore of primitive man paints the picture of a "noble savage", a kind of salutary conservationist dependent on the bounty of nature for survival. With the emergence of ecology, or at least popularized views of ecology, hunter-gatherers have been presented by some writers as representing a type of "ecological hero", intimately and passively co-existing with nature. [emphasis added][17]

Even recent scholarship on the subject has not been immune from this ideological prejudice. Plog, Jolly and Bates wrote in 1980 that:

> Hunting - gathering involves subsisting primarily on wild plants and animals. Unlike agriculture, hunting - gathering does not involve efforts to regulate the growth and reproduction of the life forms on which people depend. Thus for hunter-gatherers, more than for any others, diet is determined by habitat. [18]

Lewis has noted that: "Foragers [in this view] are not responsible for the presence of the food on which they subsist; they collect and hunt food that is made available by natural forces."[19]

A generalization such as this can be easily linked to "...ideas which picture the emergence of plant and animal domestication as being 'revolutionary.'"[20] The grand sweep of history is one where we:

> ...gradually...begin to see the buildup toward the first basic change in human life.... This change amounted to a revolution just as important as the industrial revolution. In it people first learned to domesticate plants and animals. They began producing their food instead of simply gathering or collecting it.... Professor [V. Gordon]

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[17] Ibid., at p. 5.

[18] Fred Plog, Clifford J. Jolly and Daniel G. Bates. Anthropology: Decisions Adaptation and Evolution (2nd Edition) (New York: Alfred A. Knopf, 1980), at p.210.

[19] Yehudi A. Cohen (Ed.). Man in Adaptation: The Bio-Social Backgrounds (Chicago: Aldine, 1974), at p.394.

[20] Lewis, supra 15.

> Childe had good reason to speak of the "food producing revolution", for it was indeed a revolution. [emphasis added][21]

Marshall Sahlins has commented on the implications of this analysis for tribal peoples:

> ...The traditional dismal view of the hunters' fix...[is one of having to] enjoin continuous work just to survive, affording him neither respite nor surplus, hence not even the "leisure" to "build culture"...
>
> ...[This view] is ... both preanthropological and extra - anthropological, at once historical and referable to the larger economic context in which anthropology operates. It goes back to the time Adam Smith was writing, and probably to a time before anyone was writing.
>
> Probably it was one of the first distinctly neolithic prejudices, an ideological appreciation of the hunter's capacity to exploit the earth's resources most congenial to the historic task of depriving him of the same.[22]

The pervasive application of these prejudices to indigenous peoples has continued right up to the present time. A common and persistent presumption about Aboriginal resource use and management is that its forms can only be of limited value in "modern" contexts. Aboriginal resource management systems, if they have existed, cannot be relevant today; it is presumed that they have been historically developed by "primitive" societies living at "low entropy states"[23] using essentially palaeolithic

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[21]Robert J. Braidwood. Prehistoric Men (8th Ed.) (Glenview, Illinois: Scott, Forseman, 1975), at pp. 92-93.

[22]Marshall Sahlins, Stone Age Economics (Chicago: Aldine Press, 1972), at p. 3. For a direct statement of this premise in recent Canadian Jurisprudence see: Delgamuukw v. B.C., [1991] 5 C.N.L.R. 1 (B.C.S.C.), at pp. 11 and 21. (See Chapter 3).

[23]R. Ellen. Environment Subsistence and System: The Ecology of Small - Scale Social Formations (Cambridge: Cambridge University Press, 1982), at p. 55.

technology.[24]

There is also the widespread preassumption that Aboriginal societies either have been or are being fundamentally transformed by modern society which must render their "traditional" systems of resource use obsolete. We might, according to the presumption, stand to gain from exploiting the traditional ecological knowledge of indigenous peoples to find pharmaceuticals, for example. But the presumption implies that there would be nothing substantial to be gained from efforts to comprehend the systemic character of Aboriginal resource management that have given rise to this knowledge.

That State resource development and management policy has been afflicted by many prejudices concerning Aboriginal resource use and management is beyond question as this study will show. Given that these prejudices are to be found throughout the scholarly literature, it is not surprising that they are also deeply embedded in the judicial articulation of the territorial rights of indigenous peoples in Canada. As recently as 1986, even lawyers sympathetic to Aboriginal concerns on native rights issues could write, for example, that:

> The Indians inhabiting the plains and the north had not developed cultivation, and consequently much of their energies were focused on food gathering. They did not have the time or people power to develop more elaborate social and political structures.[25]

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[24]A. Testart, "Some Major Problems in Social Anthropology of Hunter - Gatherers," in 29 Current Anthropology 1, at p. 12.

[25]Donald Purich. Our Land: Native Rights in Canada (Toronto: James Lorimer and Company, 1986), at pp. 23-24.

The challenge that Canadian legal institutions will have to face is coming to terms with the extent to which ethnocentric bias continues to serve as the framework for resolving conflicts with Aboriginal peoples over resource management issues.

In this study I have attempted to avoid falling prey to these kinds of assumptions and the ideology in which they are grounded. One way I have attempted to do this is to presume the legitimacy of an inherent and substantial Aboriginal authority to manage natural resources within their customary territories.[26] This includes presuming the right of Aboriginal communities to undertake resource management consistent with customary norms and practices where they decide this. Non-Aboriginal involvement in resource use and management should be exercised on a consensual basis with the Aboriginal groups concerned. I have presumed the legitimacy of the Aboriginal assertion of these rights even though they remain largely unrecognized in Canadian law. In the context of this study, these presumptions tend to direct the analysis to confront persistent prejudices about Aboriginal relationships to natural resources.

While much more remains to be learned by non-Aboriginal societies about indigenous resource management, I believe that what we now understand can facilitate a more sophisticated approach to

[26]This approach is becoming more common amongst scholars engaged in the study of aboriginal peoples and resource management issues. See, for example, the statement of Greg Michalenko and Lucian Marcogliese in "The Subsistence Lake Sturgeon (Acipensen Fulescens) Fishery of the Indian Village of Muskrat Dam in Northern Ontario, Canada" (Environmental and Resource Studies, University of Waterloo, Waterloo, Canada) (paper presented to the First International Conference on Sturgeon, Bordeaux, France, 1989 (unpublished), at p. 2: "The information offered in this paper..., is provided in a context that: (1) recognizes the legitimacy of the concept of aboriginal rights; (2) accepts native entitlement to land and resources as expressed by the community in question; (3) admits the validity of spiritual interpretations of relationships to nature and landscape; (4) seeks to include indigenous wisdom and knowledge about wildlife and ecology along with conventional western science; and (5) emphasizes the potential of community management or comanagement of renewable resources."

this study than would have been previously possible. It would now, for example, be unacceptable simply to equate tools with Aboriginal ecological and technological knowledge concerning resource management. It would also be a mistake to conclude that Aboriginal interaction with industrial society or that the adoption of particular tools from that society leads inevitably to the demise of customary resource management systems. I ask that the reader bears this in mind throughout this study. Lewis has emphasized that "[...t]echnological knowledge underlying the use of tools, regardless of the fact that tools have changed, can remain reasonably coherent in terms of what people understand about environmental processes and the effects that they have upon them.... [Furthermore, n]umerous studies of hunting and gathering societies have shown [that]... despite changed circumstances, foragers continue to maintain detailed understandings of how to exploit natural systems as well as the effects, the ecological impacts, [that] their activities have on a range of natural systems."[27]

Anishinaabe people have been proactive in their relationships with the ecosystems in which they live. Their presence has been reflected in the landscape. The Wabigoon Anishinaabe people, for example, maintain that they have possessed the power to abuse the resources of their lands in an unsustainable way both in the past as well as more recently with their adoption of tools from non-Aboriginal society. But the ecological diversity that has co-existed with this presence is also apparent. Like many other indigenous groups it can be said of these people that, as one group within a people forming a community of "...modern indigenous peoples who depend on, manage, and use the resources of anthropogenic [landscapes, they] display an adaptive orientation towards past

[27]Henry T. Lewis, "Ecological and Technological Knowledge of Fire: Aborigines Versus Park Rangers in Northern Australia" in 91 American Anthropologist 940 (1990), at p. 955.

[Anishinaabe culture]..., not merely towards [the] nature [in which they live].[28]

The conserved biotic wealth of the Wabigoon River location that I travelled in 1986 became a reference point for me as I began to work more closely with Wabigoon Aboriginal "harvesters" on the issues which are the focus of this study. The relationships between their culture and the resource diversity of their lands propelled efforts, for example, to establish commercial relationships between them and non-Aboriginal people with respect to their Manomin resource that would be more respectful of their resource management culture. In saying this, I mean to point out that there are more than legal aspects to the questions of Aboriginal resource use than might otherwise seem apparent in this study. But questions of law remain crucial as I hope to illustrate. So it is worthwhile devoting considerable energy in an effort to understand Aboriginal concepts and principles of property rights as well as normative principles and practices of resource management. This is so even though such a process might initially prove to be bewildering and complex for a non-Aboriginal person. To sort these issues out in relation to non-Aboriginal law in this field can be even more arduous but still none the less fruitful. At any rate, the relationship to the land that I found to have endured amongst local Anishinaabe people relying on their resource base in Northwestern Ontario, in the face of the history they have endured, sometimes made me wonder about the wider implications of their relationship to non-Aboriginal society.[29] My hope is that enough of their

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[28]William Balee, "The Culture of Amazonian Forests", in Posey & Balee (eds), supra 9, at p. 2.

[29]See for example: Alvin M. Josephy Jr., (Editor). America in 1492 (New York: A. A. Knopf, 1992). Indeed, the imagination of scholars working in various fields involving the study of aboriginal cultures and the imagination of the public generally has been ignited on this issue in light of the quincentennial anniversary of the first Columbus Voyage. See, for example: Washington D.C.: Newsweek Inc., "When Worlds Collide: How Columbus's Voyages Transformed Both East and West (A Joint Project of Newsweek with the Smithsonian's Natural History Exhibit Seeds of Change)", Newsweek Special Issue (Fall/Winter 1991).

culture is reflected in this study to indicates that the vitality of their still living traditions does perhaps compensate for this history.

CHAPTER TWO

THE LAST STAND: MANOMIN (WILD RICE) AND THE WABIGOON ANISHINAABE PEOPLE (WHEN STATE AND ABORIGINAL RESOURCE MANAGEMENT AUTHORITY COLLIDES)

I. BACKGROUND/STATEMENT OF PURPOSE

This section of Chapter Two focuses on the evolution of an indigenous community-based system governing the management of the Manomin (wild rice) resource of the Wabigoon Anishinaabe people. It then sets out a comparative analysis between the Aboriginal regime and the provincial system for the allocation and management of the resource in Northwestern Ontario. The analysis firstly focuses on the results of my efforts to develop a general understanding of the evolution of indigenous rules, customs, and normative standards governing the indigenous Manomin management regime practiced by the Wabigoon Anishinaabe (northern Ojibwa) people. In referring to the Wabigoon Anishinaabe people, I am including the Native people who live in the settlement of the Wabigoon Indian Reserve #27, the village of Dinorwic and the village of Wabigoon. This includes those Aboriginals who possess status pursuant to the Indian Act[1] and those who do not. Those Aboriginals who do not have status are connected by kinship bonds to those who do. Indeed, many Aboriginal residents of the "off-reserve" villages of Wabigoon and Dinorwic themselves possess Indian Status in accordance with the provisions of the Indian Act. While some Manomin harvest areas may be allocated so that they are harvested mainly by members of one community, all Aboriginals from these settlements participate in the same management system for the resource.

The findings pertaining to the Manomin management regime at Wabigoon are then compared to the wild rice legislative and regulatory framework of the Government of Ontario. Next, a

[1] Indian Act R.S.C. 1985, c. I-5.

comparative analysis outlines the conflicts between the two systems seeking to control the management of Manomin. Many categories and terms used in comparing the Wabigoon indigenous management system for Manomin to that of the non-Aboriginal state were originally described by Usher[2] in 1987. It has been described as the "...best general description... [of indigenous resource] management systems [that]...incorporate...collection[s] of unwritten rules or social norms that govern activities such as hunting, fishing or trapping"[3]. I have taken this approach because there is a striking similarity of factors at play influencing management of wildlife resources in northern Aboriginal communities as found by Usher and those that I have found to be operative for the Manomin resource in the territories of the Wabigoon Aboriginals. The Wabigoon Aboriginal people wish to be accorded full recognition of self-management of Manomin within a customary framework. This objective conflicts with proposals by the Government of Ontario for increased legislative and regulatory control over the resource. It is this conflict which has given rise to this study.

Much has been written about the Aboriginal management of wildlife resources relating to subsistence. I believe, however, it is also urgent to show how indigenous resource management generally applies beyond the wildlife context. Further, it is even more important to show how Aboriginal resource management cannot be separated into distinct subsistence and commercial categories amenable to separate treatment on questions of access and management rights. In this chapter, I hope to set down an analysis that emphasizes how this type of legal framework can only damage the culture of

[2]Peter J. Usher, "Indigenous Management Systems and the Conservation of Wildlife in the Canadian North" in 14(1) Alternatives 3 (1987), pp. 3-10.

[3]R. Kapashesit and M. Klippenstein, "Aboriginal Group Rights and Environmental Protection "in (1991), 36 (3) McGill Law Journal 925, at p. 932.

northern Aboriginal communities. I know of no better way to do this than to begin with an analysis of the indigenous management of a renewable natural resource which is of primary commercial interest to the Aboriginal people involved.

The analysis of customary law in this light sets down the standard against which to measure the historical development of judicially articulated Aboriginal land rights law in Canada from its colonial origins, through the nineteenth century to the St. Catherines' Milling[4] precedent, and on to the landmark Guerin[5] decision of 1984. The development of Aboriginal rights jurisprudence since 1984 can be placed into a clear focus in relation to this historical framework. Setting out the legal analysis this way helps to expose the destructive impact of State law on Aboriginal resource management which is the result of its aggressive ethnocentrism that is so evident in the early cases. Further, in spite of changes in judicial rhetoric, the analysis indicates how this ethnocentrism still drives the case law to this day. It is now appropriate to deal briefly with the cultural setting on this study.

Elder May Pitchenese from the Wabigoon Indian Reserve #27 related the story of the origins of her Manomin culture to me that:

> A great Ojibway leader from Wabigoon named Mis-Koona-Queb was paddling on Rice Lake for some particular purpose. Located on the north end of the lake are sacred rock paintings. In the southwest corner of the lake is a large cliff. From a space in that cliff close to the water came a voice calling Mis-Koona-Queb to come over with his canoe. The figure had long hair, and was dressed in a moosehide breech cloth. When Mis-Koona-Queb paddled his canoe over, the figure told him to turn

[4] R.v. St. Catherine's Milling and Lumber Company (1885), 10 O.R. 196, pp. 229-30.

[5] Guerin et al v. The Queen and National Indian Brotherhood, [1985] 1 C.N.L.R. 120 (S.C.C.).

the canoe around.

The figure was Nanabozho. There was only one paddle in the canoe. Nanabozho told Mis-Koona-Queb, sitting in the front of the canoe, to paddle and to be careful not to look back. Mis-Koona-Queb was given precise directions as to how he was to work the canoe around the lake. Going through the plants as he was directed to, Mis-Koona-Queb heard sticks working behind him. He didn't dare look back. At the end of the travelling Mis-Koona-Queb was told to turn around and look into the canoe. The canoe was made of birch bark. Mis-koona-Queb asked what was in the canoe. Nanabozho said "This is Anishinaabe Manomin. This is medicine and it will support you and give you nourishment."

Nanabozho then showed Mis-Koona-Queb how to process the Manomin that was in the canoe and told him to use a birch bark dish for winnowing the manomin in the wind. Mis-Koona-Queb then tasted the manomin after this process and it tasted very good. Nanabozho then cooked it in Anishinaabe cooking pottery with water in it over a fire. Mis-Koona-Queb was then told for each and every year from then on when to begin to harvest the Anishinaabe Manomin and was told that he and his people must first pick some manomin and have a feast. The rules of the feast were then given.

During this time Mis-Koona-Queb was also told how the harvest must be organized and how the Anishinaabe Manomin must be respected. Nanabozho showed him all of this.

During this time Nanabozho also taught Mis-Koona-Queb many other things including how to harvest, preserve and care for blueberries. Finally after teaching many things Nanabozho made a swing. He swung on this large swing four times in the four directions and after swinging himself in the fourth direction he disappeared from our Anishinaabe people.[5]

Rice Lake is a lake containing superb wild rice. It is situated within the traditional harvest territories of the Wabigoon Anishinaabe people. The pictographs are still to be found on the rocks at the north end of the lake. Certain Elders from the community can still read them.

[5]Paraphrased from an interview conducted with Elder May Pitchenese July 9, 1988, at the Wabigoon Lake Ojibway Nation Community.

Non-Aboriginal scholars working in the field usually maintain that wild rice has existed in the region for some several thousands of years[6] and was first utilized as a human food by the people of the Laurel culture about 1,000 years ago through the development of a form of "incipient agriculture". The deepest truth is, however, that Anishinaabe wild rice culture and agriculture has, in the "oral tradition" of the people of Wabigoon, been with the Anishinaabe people since "time immemorial." That is, the oral tradition recollects wild rice, or "Manomin" as it is called, as ultimately being given to the Anishinaabe by the Creator together with the knowledge for its nurturing and propagation.

Research by Dr. Wayne Moodie of the Department of Geography at the University of Manitoba found that "[i]n one of the stories of the Courte Oreille Ojibwa of Wisconsin concerning the origins of Manomin..., Nanabozho and his grandmother sowed the grain in another lake immediately after its discovery".[7] This reflects the important subsistence and commercial value placed on the crop by the Anishinaabe people. The economy, culture and agriculture of wild rice flowing out of this heritage remains well established in the practice and, indeed, the spirituality of the Anishinaabe people from Wabigoon.

Also embedded within this culture and agriculture of the plant, which is central to the identity of the Wabigoon Anishinaabe people, are the accepted rules, customs and standards which constitute the normative aspects of the community-based indigenous management system for Manomin. These

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[6]See for example: Peter Ferguson Lee. Summary Report: The Agriculture of Wild Rice (Thunder Bay: Lakehead University, 1986), at p. 1.

[7]D. Wayne Moodie, "Manomin: Historical Geographical Perspectives on the Objibwa Production of Wild Rice", in K. Abel and J. Friesen (eds.). Aboriginal Resource Use in Canada: Historical and Legal Aspects (Winnipeg: University of Manitoba Press, 1991), at p. 75.

include not only the accepted standards for the care and propagation of the plant but also those for its allocation among the people of the community for their economic benefit. It is within the oral tradition of the Wabigoon Anishinaabe people, a tradition which still penetrates to the core of the identity of this community, that the system of practice governing the care and propagation of the wild rice has developed.

In an effort to preserve their historical relationship to Manomin, Wabigoon Anishinaabe people have struggled continuously against the external imposition of control over the resource. The Anishinaabe management regime for a significant portion of territory bearing the Manomin resource of the Wabigoon people has retained an essential distinctive character as a common or community-based property system. In their efforts to retain an indigenous management regime for Manomin, Wabigoon Aboriginals have pursued a strategy to build on the authority still left to them and to reclaim management authority over the resource in those territories where it has been unilaterally appropriated from them by the State. One of the most important elements of this strategy has included the establishment of an efficient Manomin processing facility on the Wabigoon Lake #27 Reserve. In taking advantage of greater efficiencies of scale, those Aboriginals working with the resource can now cost-effectively process it themselves. This activity that had been lost to them when non-Aboriginals with access to capital that had not been available to Aboriginal people during the 1960's gained control over the value added processing of the resource with technology that increased processing efficiency. By establishing their own processing capacity, Wabigoon Aboriginals have found that they are better able to work within the customary rule-making framework of the community itself which regulates the utilization of the resource. In this way, they hope to provide a counter-balance to provincial pressure to fully centralize and bureaucratize management control over Manomin.

II. NOTE ON THE RESEARCH

Based on participation in community-based meetings on issues relating to Manomin and through my on-going work with Anishinaabe harvesters and managers of the resource, I have been able to develop some understanding of how it is managed as a common property resource. An appreciation was also developed as to how the management regime has adapted to externally induced Euro-Canadian stresses. I first became involved in community-based meetings concerning issues related to Manomin during the summer months (when these meetings are usually held) of 1986. Additionally, I interviewed a majority of Wabigoon Anishinaabe Elders (some of them a number of times) in order to obtain a greater understanding of the historical evolution of their indigenous wild rice management system. Finally, I have attended meetings with members of Kagiwiosa Manomin Inc., the processing initiative operated along customary lines begun by Wabigoon Aboriginals, on a regular basis since June of 1986.

In other words, the structure of my field research which was undertaken for this analysis was dictated by an active involvement with Wabigoon Anishinaabe people on issues that have arisen because of the persistence of their customary Manomin culture and agriculture. By following the approach of developing an on-going praxis with the community, I have been able to garner particular perspective on the workings of its indigenous management regime for Manomin. It is information acquired in this context that forms the background of the analysis which follows on the relationship between Wabigoon Aboriginals and their Manomin resource. A research methodology is attached to this thesis as Appendix A.

III. THE MANOMIN MANAGEMENT SYSTEM OF THE WABIGOON ANISHINAABE PEOPLE

(i) The Normative Context - Historical Element of the Oral Tradition

Earlier in this chapter, I paraphrased Elder May Pitchenese, from the Wabigoon Lake Ojibway Nation, on her knowledge of the origins of Manomin. The legend of the gift of Manomin to the Aboriginal people of Wabigoon, and the knowledge of how to propagate it, is part of the oral tradition of her Anishinaabe society. That history details in symbolic form the many do's and don'ts in relation to how the plant and its harvest and management should be handled.

In Anishinaabe legends, Manomin is treated as a sacred plant. It is part of a creation filled with life and spiritual power. Harvested wild rice is not to be wasted. When Ojibway harvest wild rice there are not to be any conflicts. Elders in the Wabigoon community still have a great role in determining the organization and allocation of the harvest in the effort to minimize conflicts in this activity. This comes out of the oral tradition.

Anishinaabe standards and rules pertaining to wild rice propagation, harvesting and processing are encoded within the larger oral tradition of the people. Erik Havelock, a prominent scholar in issues surrounding literacy noted recently that:

> Whereas with us, poetry has become entertainment and uplift, the role of poetry for an oral society is functional. Its role is to conserve the tradition, and it does so indirectly. It doesn't say what that tradition is, it tells you what it is all the time by the kind of stories that it narrates.[8]

Anishinaabe oral teachings function in this way. Indeed, the oral tradition embodied in the knowledge of the Elders of Wabigoon are a form of poetic presentation full of metaphorical and symbolic beauty.

Within the Wabigoon Anishinaabe community, the oral tradition pertaining to the care, propagation and allocation of Manomin serves much the same purpose. Manomin is viewed as "medicine". Proper treatment and respect must be accorded to it. For instance, if harvesters quarrel over Manomin, it is generally accepted that the resource will not propagate itself but will instead tend towards diminution. The oral tradition gives powerful statements against the wrong treatment of this plant.

One sees the reflection of this oral tradition in the normative values concerning the Manomin management system of the Wabigoon Anishinaabe people. Although this indigenous resource management regime, and the knowledge of it pertaining to Manomin, is functionally related to the oral traditions of the Wabigoon Anishinaabe people and is integral to the cultural identity and much of the social cohesion of the community, this fact, in itself tells us little about its sophistication. It is apparent that there should necessarily be a tremendous codification of historical experience and "life space" knowledge of the Wabigoon Anishinaabe people within this dynamic oral tradition whose

[8] Erik Havelock quoted from: David Cayley. Literacy: The Medium and the Message (Toronto: Canadian Broadcasting Corporation, February 1 and 8, 1988) (A transcript of the CBC radio program "Ideas"), at p. 2.

praxis is found in the indigenous management regime for the plant. It would be discriminating to think that, because the basic normative values and standards of the Wabigoon Manomin indigenous management system have their origins in an oral society that the regime must be somehow archaic and outmoded.

The Wabigoon indigenous Manomin management regime is, while possessing a set of substantive rules, a dynamic evolving process. It is an adaptive regime. But its value and stability rests on its Anishinaabe identity, distinct history of that identity and the structure of economic activity which flows out of it.

The belief that Manomin is in essence "alive" or, as many scientists now would maintain, "part of a world now...[thought] to actually possess the capacity to organize itself into a sequence of greater wholeness and sentience,"[9] has profound significance for the treatment of the environment and the ecology surrounding this crop.[10] More importantly, for the purposes of this study, the indigenous history and experience with Manomin by the people of Wabigoon as expressed in the indigenous management regime of the plant forms one of the key elements of their distinct socio-economic identity. To destroy it or forcibly alter it from outside is, therefore, highly destructive to the customary rules, norms and practices pertaining to Manomin management by the community. It is also highly destructive to the cultural fabric of the community as a whole.

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[9]Arthur Fabel, "The Dynamics of the Self Organizing Universe" in XXXVII (2 and 3) Cross Currents 168 (Fall, 1987), at p. 169.

[10]Ibid., at p. 168. See also, for example: R. Artigiani, "Cultural Evolution" in 23(1) World Futures 1987, and W.I. Thompson (ed.). Gaia: A Way of Knowing (Hudson, N.Y.: Lindisfarne Press, 1987).

(ii) Customary Law Content of the Indigenous Management System: Historical Practice

(a) Propagation

Elders from Wabigoon relate that, historically, Manomin was propagated by those wildlife and natural resource harvesters in the society who had an interest in its management. As well, these people had a sound base of recognized knowledge concerning wild rice propagation. When a harvester saw that a particular body of water within his or her customary fishing, hunting, or trapping land use territory might be suitable for producing wild rice it was his or her responsibility to match the new body of water with a seed source - an already Manomin producing body of water - similar to the one discerned. This knowledge was learned by youth through practice and experience with familial harvesters within the territory and later on through additional personal and shared experience with other community members. The wintertime re-telling of oral history put these experiences into symbolic contact with the deeper past experiences of the people pertaining to the resource and set the normative bounds of rights of shared access and use by all community members to wild rice. After harvest, or in the early spring (with the rice being stored for the winter), the new body of water would be seeded by the territorial harvester and the development of the crop would be carefully observed. When the crop was plentiful enough after several years of nurturing and allowing for self-seeding, the harvesting regime would come into play.

This is how the upper portions of Dinorwic Lake including Kagiwiosa Bay and Tobacco Creek were seeded. This seeding was in response to the flooding of Wabigoon Lake in the early part of the century for purposes of hydro-electric generation for the pulp and paper mill in Dryden, Ontario.

This flooding had reduced the Manomin crop downstream in much of Wabigoon Lake. An Indian with the surname of McIver transplanted stands into the newly flooded portions of the headwaters of Wabigoon Lake. Manomin still grows and is harvested today amidst the flooded stumps and trees that were not removed before the dam was built at Dryden.

Harvesters seeded lakes out of a combination of motivating factors which included: familial responsibilities with respect to the provision of food, personal pride and the potential for economic gain within a communal setting. This context was based on relations of reciprocity and interdependence.

(b) Harvesting

The harvesting regime for Manomin was based on these relations. As the seasonal harvest period approached, Elders had the power and responsibility to determine when it would begin. The feast or annual wild rice thanksgiving had to be held before either the commercial or subsistence harvest got under way in earnest. The harvest field "bosses" would be appointed through a general community meeting process. Field bosses were often Elders and were often those Elders who had taken up the task of developing the Manomin stands. It is necessary to bear in mind that Aboriginal Manomin agriculture is a dynamic form of agriculture. Wabigoon Aboriginals were always on the lookout for new bodies of water with seeding potential. This was due in part to increasing commercial and subsistence demand for the crop and because Manomin producing water bodies changed in accordance with natural cycles in the biotic evolution of lakes.

Because of the shattering nature of Manomin, where the grains mature at different times on the stem, its harvesting had to be carefully coordinated and regulated so as to obtain the maximum harvest from the crop. This is one of the more important reasons why the field boss would set up a harvest cycle for the stand under his or her control and would determine the areas to be harvested on each harvest day. In the morning, harvesters would line up on the shoreline of the harvest area for that day. The harvest area for the day would be demarcated by the field boss and the field boss would give the go-ahead for harvesters to begin and would maintain order throughout the harvesting effort.

Harvesting was thus a communal activity. In such areas as Rice Lake as many as fifty canoes might be harvesting at any given time. All were obligated to follow the harvest program established by the field boss. Harvesters had to begin harvesting together and they had to end at the same time. On each successive day the harvest would move in a cyclical fashion around the harvest area with order being maintained by the field boss.

Historically, among the Anishinaabe people of Minnesota, the practice had been somewhat different. Frances Densmore, in her classic study of Chippewa customs, noted that:

> Each group of relatives had its share of the rice field as it had its share of the sugar bush, and this right was never disputed. The women established it each year by going to the rice field and tying a small portion of the rice in little sheaves. The border of each tract was defined by stakes, but this action showed that the field was to be harvested that year.[11]

This custom differed from the rules and procedures of the harvest among the Wabigoon Aboriginals

[11] Frances Densmore. Chippewa Customs (Minneapolis: Minnesota Historical Society Press, 1979) (First published in 1929 by the Smithsonian Institution Bureau of American Ethnology as Bulletin 86), at p. 128.

as outlined above. At the same time, in their own way the Wabigoon regulations on harvesting allowed for an orderly, equitable harvest which, perhaps most importantly, ensured that the Manomin crop was not wasted through headlong competition which would have resulted from haphazard, unorganized and unstructured harvesting methods. If disputes arose, they were adjudged by the field boss and the party found to be in violation of consensual standards in accordance with customary practice, would be excluded from participating in the harvest for a period of time if he or she did not fall into line.

Children were not allowed to harvest. This is in part a reflection of the onerous work of paddling and poling canoes through fields of Manomin. But it is a recognition of the goal of maximum utilization of the crop during harvest. It also had cultural and spiritual significance. Young people were not allowed to harvest until they had entered and passed through puberty into adulthood and undergone the ceremonial initiation associated with the achievement of maturity. Young men could enter the canoe at age sixteen but could only have the job of poling it through the Manomin stands. Harvesting was conducted with the traditional harvest sticks in which the Manomin was bent over the canoe with one stick while another gently knocked the mature grains off the plants.

This regulated organization of the harvest ensured that, in each of the harvest areas, there would be an equitable distribution of the Manomin harvest which would in turn meet the subsistence needs of the harvesters and their families. Harvested Manomin was hand-processed as an extended family activity in the evening or during days when the rice field was set aside to mature further before the next harvest cycle began to harvest later ripening grains on the wild rice stems. Each familial harvesting unit was free to sell its surplus processed Manomin. Sales were normally contracted with officials from companies like the Hudson Bay Company.

Before the Block Area wild rice harvest boundaries were established by the Government of Ontario in 1959, there was a system of inter-community reciprocity with respect to Manomin harvests. In any given year, if the harvest was excellent in Rice Lake and poor in other areas perhaps due to high water levels or resulting from inclement weather such as hail storms, members from other Anishinaabe communities would travel to Rice Lake to participate in the harvest there. At the harvest the field bosses would be chosen from the Wabigoon Anishinaabe people in accordance with its customary norms. This selection took place through a community meeting process. These people would, in the manner noted above, regulate harvesting activities in accordance to custom. Control over regulating the harvest remained in the hands of members of the Wabigoon Anishinaabe people. In the last thirty years since the establishment of the provincial Block Area system, which forced the bands in the region to secure annual licences from the Ontario Ministry of Natural Resources to harvest Manomin within their block areas, the practice of other Aboriginals travelling to zones of abundant harvests quickly diminished. But the regulation of this practice is still remembered in detail by many Wabigoon Aboriginals. Further, there are signs of inter-community cooperation with respect to the harvest of Manomin that are developing now which may be signalling a re-emergence of this custom. One of the most important of these is the co-ordination of efforts to bring freshly harvested Manomin to the Aboriginal processing facility located on the Wabigoon Reserve #27.

Post harvest Manomin management revolved around stand management techniques designed to maintain and/or enhance production levels of the resource. Each particular Manomin field had its own management requirements necessary to maintain its productivity. These were in turn related to particular ecological characteristics at the local level - that is at the level of each Manomin field. In those Manomin fields where, for example, water flows were not optimal for the "suppression" of "weed" growth or where the balance of aquatic flora was present in a certain configuration, specific stand management techniques, including weeding operations, would be performed. At other sites, the removal of Manomin stocks in certain years was a requirement where ice action was generally not sufficient to accomplish this without human intervention. Knowledge of which sites required which operations and at which times of the year was passed down from generation to generation between harvesters. Post harvest operations were coordinated and regulated by older experienced harvesters with younger people having to assume the role of undertaking those tasks requiring heavy physical labour. Through the development and careful implementation of post harvest stand management techniques, the productivity of Manomin stands was maintained. Uncertainty as to management control has been one of the key factors which has reduced these practices to minimal levels by the 1980's. At the same time with the increased confidence that has accompanied the emergence of the Kagiwiosa Manomin processing initiative has there been considerable attention paid to revitalizing them.

(iii) Customary Law Content of the Indigenous Management System: Current Practice

The need to harvest Manomin for survival is no longer required by the Wabigoon Anishinaabe people. It has, however, remained important as a domestic food. But since the end of the Second

World War, the commercial potential of Manomin has taken on increased importance in indigenous communities across Northwestern Ontario generally. Yet in spite of this commercialization and in spite of the rapid introduction of mechanized technology to Manomin harvesting and processing, the indigenous management system for the resource has remained intact. It has remained intact because of political resistance to an imposed jurisdiction over the resource by the Government of Ontario, the ultimate intention of which appears to be the entrenchment of management of the resource along Euro-Canadian lines. At any rate, the Aboriginal management system for Manomin has adapted to increased mechanization.

Amongst the Wabigoon Anishinaabe people, experienced harvesters still have responsibility over the management of Manomin including its propagation, the nurturing of its abundance and its harvesting. Indigenous knowledge is much more relied upon in this process than non-Aboriginal "scientific" knowledge about the resource. This does not mean that there is an automatic rejection of this knowledge when it is consonant with Aboriginal experience on the ground. Wabigoon Anishinaabe people have adapted the management of their Manomin resource to many changed circumstances and have taken advantage of some of them even though they have been induced or even imposed from the outside.[12] But the community-based approach to the Manomin, treating

[12]For instance, in the southerly portion of the present Wabigoon wild rice Block Harvest Area, a camp was built on Eltrut Lake during World War II for military purposes. The inmates were put to work cutting logs for the local mills. A small dam was built at the southerly portion of Eltrut Lake to hold back the spring run-off for the annual log run down to Fort Frances. Members of the Wabigoon Lake Ojibway Nation seeing the newly flooded flatlands above the dam took advantage of this flooding and worked to propagate the wild rice into this area. Much of the propagation was accomplished, by natural re-seeding from rice which spread into the flooded areas from neighbouring established wild rice stands. Within a few years the area wild rice was sizeably enlarged. When the log run was finished in late spring the water would have been drained out of the marsh area. But by the time this run was complete the wild rice stands for the year would already be well established and would continue growing in the marshy, but no longer flooded, areas. The Wabigoon Lake Ojibway Nation harvesters who travelled to this area to harvest the rice developed a dryland method of harvesting the wild rice whereby they designed large baskets held by straps over their shoulders which extended out

it as a common property resource, still provides the normative context for its harvesting and management.

The foregoing should be set against the historical scholarship on land tenure amongst Northern Anishinaabe groups. Some scholars, including Charles Bishop have concluded that, increasing relations with non-Aboriginal institutions such as occurred in the fur industry "... led to individualism in regard to property, especially fur bearers."[13] In her anthropological study of Ojibwa sociology, which was undertaken in the 1930's amongst the Rainy River Ojibwa, Ruth Landes concluded that: "All property, with one slight exception [it referred to personal property] is held by individuals, not by groups. Society can only ascertain the legality of the acquisition. Beyond that, society has no voice. Indeed, the individual is urged to the farthest to do as he likes...[Nothing can be] ...compared with the valuation placed on ruthless individualism."[14] Landes noted that trapping grounds, for example, were often inherited though they could be passed on to other individuals by their owner under various circumstances.[15] More recently, however, the scholarship on the issue has

in front of their bodies. The harvesters would walk over dry land with their harvesting sticks harvesting the wild rice into these home-made baskets. From here the processing would be accomplished in the traditional manner or the rice would be sold as freshly harvested green wild rice to non-Indian processors. When the camp closed the dam remained and logs were run through the watershed for some years. But in the 1970's, when mechanized log transport overshadowed river runs, the Ministry of Natural Resources blew out the small dam when it was no longer required for watershed management purposes in support of the timber industry in spite of the fact that the aboriginals wanted it retained. The annual harvest shrunk back accordingly.

[13]Charles A. Bishop. The Northern Ojibwa and The Fur Trade: An Historical and Ecological Study (Toronto: Holt, Rinehart and Winston of Canada Limited, 1974), at p. 13.

[14]Ruth Landes. Ojibwa Sociology (New York: AMS Press, 1969 (Re-printed with the permission of Columbia University Press from the 1937 Edition.)), at p. 87.

[15]Ibid, at p. 89.

tended toward the view that "[c]loser attention to a more representative array of productive processes demonstrates that the Algonquian institution of "territories" with individual "owners" is hardly restricted to commercially-oriented production and that the institution is misrepresented by the application of property concepts more appropriately attributed to capitalism".[16]

The management system for Manomin production amongst the Wabigoon Anishinaabe people maintains access to the resource for all members of the group who wish to participate in it. The management authority of harvest bosses is exercised to ensure that this access harmonizes with the goal of maintaining the abundance of the resource. The overall system, however, remains fundamentally distinguished from the State approach to resource tenure rights in the region which is characterized by an emphasis on competition and exclusive proprietary rights.

Wabigoon Aboriginals who harvest Manomin with airboats, operate within the customary framework for managing the resource. Because the introduction of mechanized harvesting equipment is now entrenched amongst the Wabigoon Anishinaabe people, certain areas are set aside through the community meeting process for airboat harvesters. Machine harvesters are allowed to harvest Manomin stands under either or both of the following conditions:

(a) By the community granting the allocation of designated harvest areas for them (often these areas are fairly recently seeded and in more remote areas that have been brought into production);

(b) By allowing machine harvesters to enter into canoe harvest areas only

[16] Colin Scott, "Hunting Territories, Hunting Bosses and Communal Production Amongst Coastal James Bay Cree", in XXVIII (1-2) Anthropologica 163 (1986), at p. 164.

> after canoe harvesters have exercised their rights to the extent decided upon by community consensus.

Machine harvesters among the Wabigoon Anishinaabe people are responsible for organizing their own harvest in their allocated harvest areas. This includes the responsibility to ensure that the Manomin fields harvested by machine are not over-harvested. Over-harvesting can result more easily using machine technology because of its increased harvesting efficiency. Wabigoon Aboriginals who are machine harvesters self-regulate their own harvest by working closely together in order to ensure continuation of Manomin crop abundance for future years. Because Manomin is an annual plant, reseeding is accomplished in established fields by leaving a certain portion of the crop to fall back into the water after the harvest period. Wabigoon Anishinaabe harvesters, whether they use canoes or airboats, take care to ensure that sufficient quantities of wild rice are allowed to fall back into the fields so that re-seeding is accomplished and so that enough is left for food for migratory birds passing through this region.

There are certain harvest locations such as Rice Lake where mechanized harvesting is discouraged. Violations of these norms is usually not tolerated. This is not to say that machine harvesters are never allocated harvesting rights in lakes which are harvested by canoe by hand. But canoe harvesters must designate when they are finished their harvesting activities and the community as a whole would then give permission for supplementary mechanized harvesting in these lakes. As an example, in 1987, four different machine harvesters entered into the Rice Lake harvesting area without proper authorization in the form of a community consensus to do so. In 1988, at the community harvest meetings, the situation from the previous year was thoroughly reviewed. The ban on machine harvesting was reiterated and, when it was broken by one machine harvester, he was subsequently denied harvesting rights in Rice Lake for the remainder of the 1988 harvesting season.

The canoe harvest of Manomin has been regulated in recent times in the same manner as has been practiced historically by the Wabigoon Anishinaabe people. Each canoe harvest area, especially larger and important ones, has a field boss assigned to it through community consensus where the number of harvesters warrant it. The field boss regulates the harvest cycle according to customary practice. The field boss is also the arbitrator in harvesting disputes which arise. In 1987, at one location a canoe harvester was grounded for breaching harvesting rules. The person had to sit out the harvest and, as one community member stated, "... relearn the Indian way by sitting on the shore and watching."

In keeping with the historical practice already noted, youth are not allowed to harvest until they reach a certain age. By the time a youth is sixteen years old it is permissible to pole a canoe. When that person is eighteen years old it is permissible to harvest in a canoe. These rules are still enforced in the Manomin fields. Again, they help to ensure that the harvest is not wasted. The practice still exists that young women, before they begin harvesting activities, will first go through their ceremonial initiation to adulthood. Young men, if they engage in the practice, go through their own initiation ritual. Some of the younger Aboriginal mothers in the community are now practicing these customs with their daughters using Anishinaabe approaches.

The post harvest management regime for Manomin fields held by the Wabigoon Anishinaabe people went into serious decline in the 1960's. It was also at about this same time that non-Aboriginal interests acquired most of the control over the processing of Manomin for commercial sale. As well, the 1965 Canada/Ontario General Welfare Agreement, in establishing a comprehensive structure of government transfer payments programs relating to social assistance, is said by many Wabigoon Aboriginals to have had a dramatic effect on this decline. Rather than establishing government social assistance programs to supplement economic activities of importance to Anishinaabe people, these social assistance programs penalize them when they become involved in the activities.

More importantly, in terms of this analysis presented in this study, the encroachment of Euro-Canadian management control over the Manomin territories of the Wabigoon Aboriginals has contributed as much as any other factor to the decline of Aboriginal management practice with respect to the resource. Uncertainty to access and authority rights have accompanied this decline. These issues are examined in the next section of this chapter. It should also be noted, however, that because Manomin has been one of a series of cyclical economic activities conducted by Wabigoon Anishinaabe people throughout the year, it has formed part of a matrix of economic activities used by them to generate income. State law, including legislation and court cases, legitimated a host of new limitations over resource management harvesting and management practices of Wabigoon Anishinaabe people. This has resulted in a situation where many of the Aboriginal people involved simply cannot generate an adequate income from what has been left to them, including Manomin. This lack of security of custom has acted as a disincentive to undertake stand management practices for the resource. Wabigoon Aboriginals have either had to spend more time in outside work or rely on social assistance payments to generate income for their families. However, the development of their own commercial indigenous processing capability for Manomin, in creating greater levels of employment, has led to a renewed interest in customary stand management practices amongst the Wabigoon Anishinaabe people. While some management strategies would now utilize newer technology, they are all based on indigenous knowledge.

Additionally, Wabigoon Aboriginals have developed proposals for small scale water control projects which they maintain would enhance wild rice productivity without adverse environmental consequences. But there will be numerous problems in implementing them as approvals for any of them must be obtained from different provincial bureaucracies who manage the implementation of legislative and regulatory objectives pertaining to these types of developments on unoccupied Crown lands. These objectives are applied to Euro-Canadians and Aboriginals alike without any regard to customary indigenous Manomin management.

(iv) The Provincial Wild Rice Management System

The Province of Ontario has never recognized any binding Aboriginal or treaty right to harvest Manomin for food or any other purpose as an exclusive access right. The Wabigoon Aboriginals maintain that they possess a treaty right to wild rice which gives them an exclusive right of access to the resource. But if such a right exists in Canadian law, non-Aboriginal governments maintain that it was never expressly stated in the official version of Treaty #3 of the Government of Canada.[17] Anishinaabe people claim that their exclusive rights to the resource for both subsistence and

[17] Treaty No. 3 Between Her Majesty the Queen and the Saulteaux Tribe of the Ojibway Indians at the Northwest Angle on the Lake of the Woods with Adhesions (Ottawa: Queen's Printer, Reprinted 1966), at p. 5.

commercial use purposes formed part of the treaty relationship that was reached in the negotiation of the agreement. They cite a document known as the Paypom Treaty as evidence of this. The Paypom Treaty is held by Anishinaabe people to be a written record of oral undertakings made on behalf of the federal Crown to the Aboriginal people of the region during the treaty negotiation process. This document reads in part: "11...The Indians will be free as by the past for their hunting and wild rice harvest".[18] No litigation has ever been initiated with respect to this document. It remains the case, therefore, that no formal State recognition has ever been accorded to the indigenous Manomin management regime of the Wabigoon Anishinaabe people or to any other Aboriginal community in the Treaty #3 region of Northwestern Ontario for that matter. Indeed the potential of indigenous management of Manomin as a tool that would encourage self-sufficiency amongst the Aboriginals of the region has probably never been considered by the Government of Ontario.

When widespread commercialization of Manomin began in the late 1950's, so called "public user groups" were only marginally regulated by the Government of Ontario. Like all other individuals or parties interested in the commercial potential of Manomin, which involved the issue of access rights to the crop, indigenous communities were seen as public user groups. Until the 1950's, Aboriginals harvested in their customary areas without much interference. Major problems included flooding of Manomin fields in hydro reservoirs but did not extend to conflicts on access to the resource. Up to this time, Manomin was seen to be a "traditional Indian" crop.

Heightened commercial demand changed all this and non-Aboriginals began to see great potential

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[18] The Paypom Treaty (Kenora, Ont: Grand Council Treaty #3 (undated)).

in the mass commercialization of the wild rice industry. The Department of Lands and Forests of the time (now the Ontario Ministry of Natural Resources) then began to encounter "... many difficulties in administering and regulating this increasingly valuable natural resource."[19] The Ministry of Natural Resources still maintains that, as a result of consultation with "all" public user groups in the 1960's, at least a majority indicated "...preference for government management of harvesting, resident harvesting only, designated harvesting areas, and issuance of harvesting and buyers licences."[20] Aboriginal lobbying did extract a commitment from Ontario, however, to set aside harvesting areas for Indian Bands around the Lake of the Woods and along the English River in the Northwestern part of the province.

A provincial Wild Rice Harvesting Act was subsequently enacted in 1960. It provided the framework for the "orderly management" of Manomin by the Province of Ontario on the provincial land base. Section #2 of the Act states that:

> "the administration of this Act is under the control and direction of the Minister."[21]

Section 3 of the Act mandates a licensing regime for Manomin under the authority of the Minister. By it, non-residents have been excluded from being able to possess harvesting licences. As well, section 3(3) states specifically that:

> "the Minister shall control the issuance of licences and may give directions relating thereto

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[19] Wild Rice Report 1986: Northwestern Region of Ontario (Toronto, Ontario: Ministry of Natural Resources, May 1987) (prepared by Shawn Stevenson).

[20] Ibid.

[21] Wild Rice Harvesting Act, R.S.O. 1980, Ch. 532.

and to the cancellation thereof and may prescribe terms and conditions of licences." [emphasis added][22]

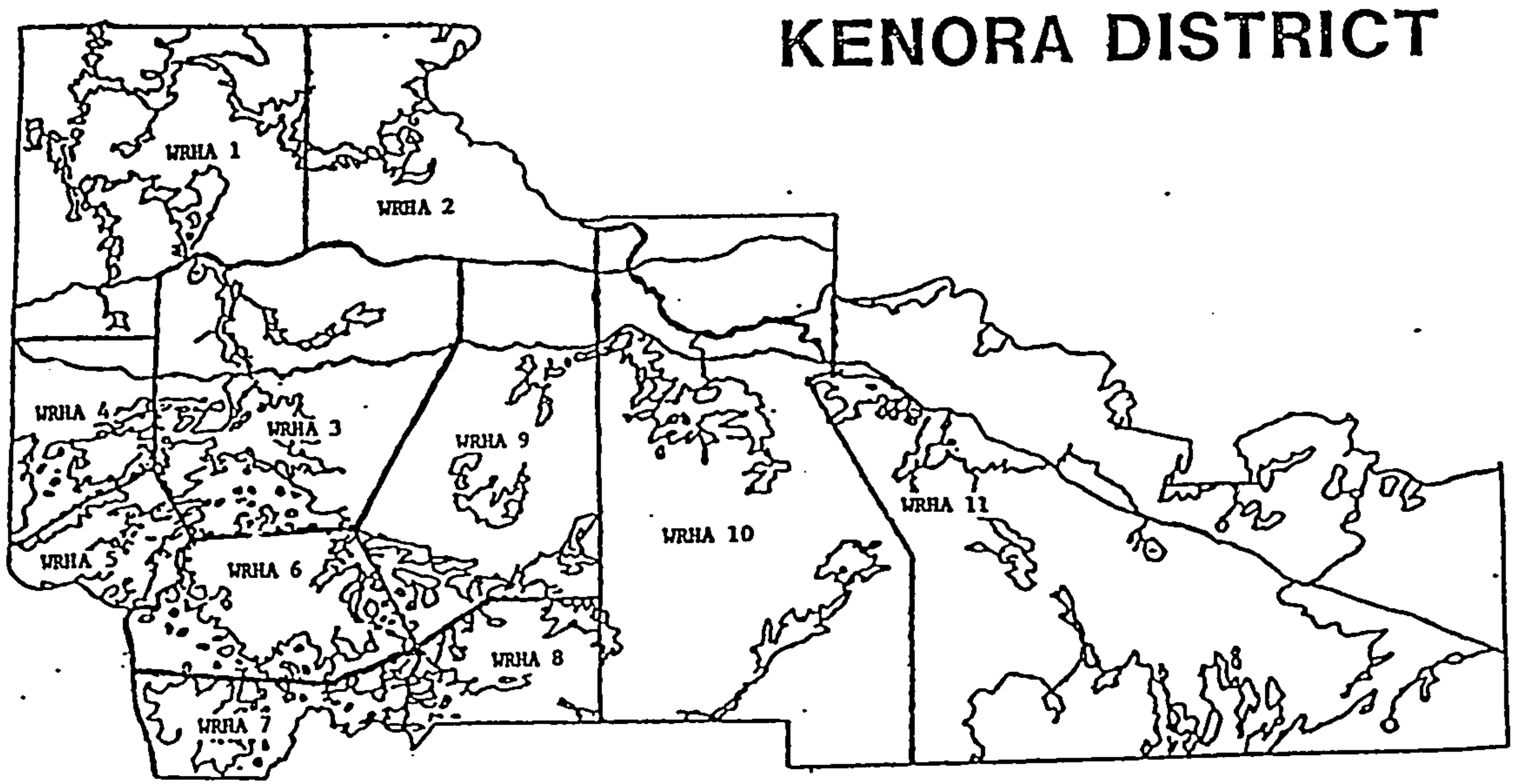
The Act and its regulations grant sweeping powers to the Ministry of Natural Resources with respect to the management of Manomin. The only requirement of the Ministry with respect to its harvesting licences, including licences granted to Indian Bands, is that an Officer of the Ministry of Natural Resources is obligated to hold a hearing pertaining to any such cancellation at which the licensee is entitled to be present as a party. Any final appeals are to the Minister and are left to his discretion.[23] Though such discretion is bound by principles of administrative law, this has little bearing on the issue of customary management rights.

In 1959, the Manomin harvest area allocated by Ministry of Natural Resources officials to the Wabigoon Indian Reserve #27 included most of the customary harvest territories of the Wabigoon Anishinaabe people from the reserve and the nearby villages. These stretched from the westerly portion of Wabigoon Lake east beyond the southeasterly headwaters of the English River. This area is denoted as area #11 in figure #1.

After the passage into law of the Wild Rice Harvesting Act and the implementation of the regulations pursuant to the Act in 1960, twenty-five Manomin harvest areas were registered, many of them for Anishinaabe communities. Ten of these were block areas within the newly drawn boundaries of the Kenora and Dryden districts (see figure #2). They replaced the eleven block areas which had existed

[22]Ibid.

[23]Ibid, s. 3(9).



WRHA 1 – Islington Band of Indians
WRHA 2 – Grassy Narrows Band of Indians
WRHA 3 – Rat Portage Band of Indians
WRHA 4 – Shoal Lake Band of Indians
WRHA 5 – Northwest Angle Band of Indians
WRHA 6 – Big Island Band of Indians
WRHA 7– Horson Band of Indians
WRHA 8– Assabaska Band of Indians
WRHA 9– Whitefish Bay Band of Indians
WRHA 10– Eagle Lake Band of Indians
WRHA 11– Wabigoon Band of Indians

FIGURE 1: Original Wild Rice Har st Area Boundaries (1959) and the Bands to which they are Licensed

Source: Ontario Ministry of Natural Resources. Wild Rice Report: 1986 (Ontario: Queen's Printer for Ontario, May 1987).

REGISTERED WILD RICE HARVESTING
AREAS IN NORTHWESTERN REGION

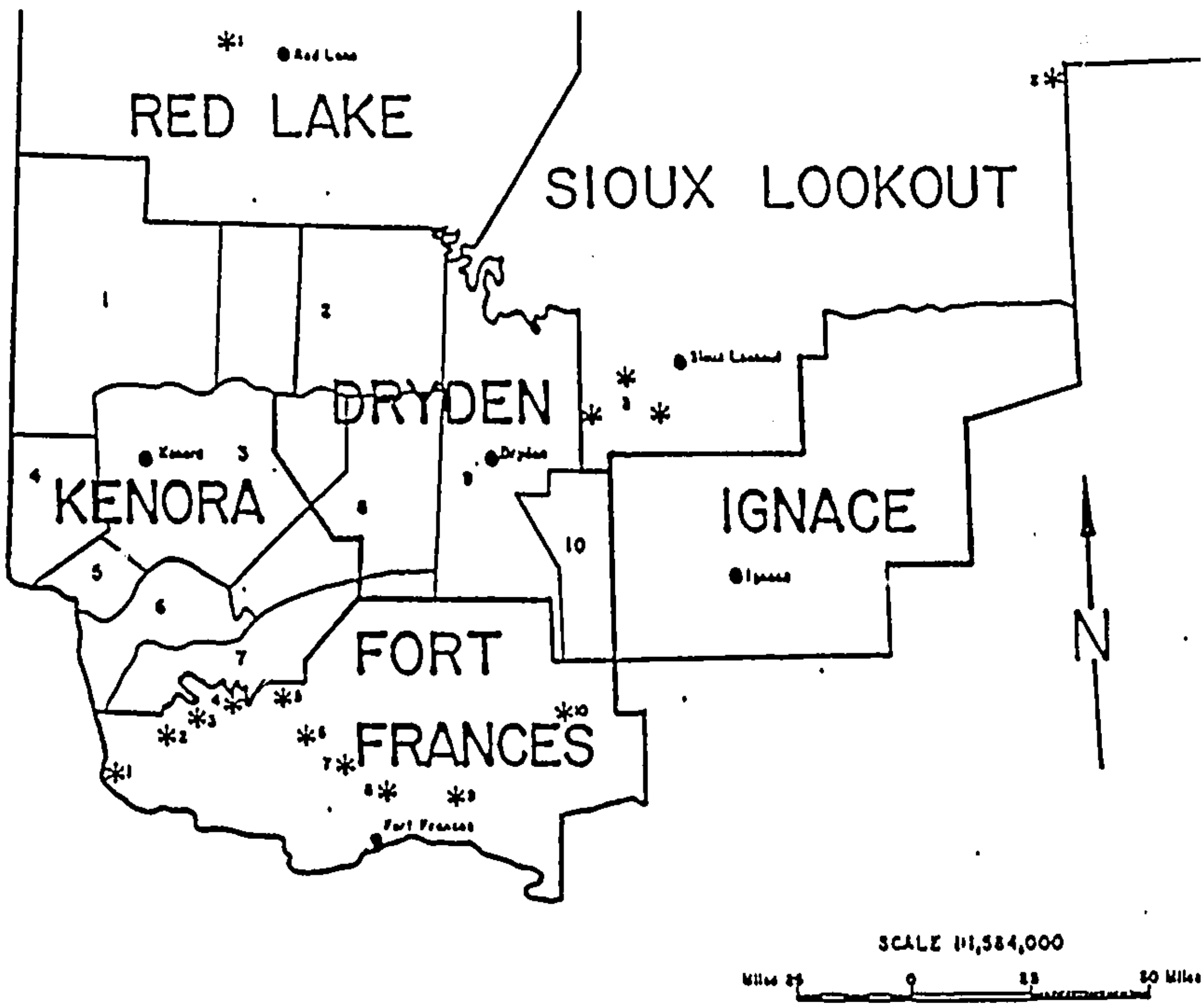


FIGURE 2: Registered Wild Rice Harvest Areas in Northwestern Ontario

Source: Ontario Ministry of Natural Resources. Wild Rice Report: 1986 (Ontario: Queen's Printer for Ontario, May 1987).

TABLE 1

REGISTERED WILD RICE HARVEST AREAS AND THE BANDS TO WHICH THEY ARE LICENCED

REGISTERED WILD RICE HARVEST AREA	MINISTRY OF NATURAL RESOURCES DISTRICT	BAND
WRHA 1	Kenora	Islington (Whitedog)
2	Kenora	Grassy Narrows
3	Kenora	Rat Portage, Dalles, Washagamis
4	Kenora	Shoal Lake #39 & #40
5	Kenora	Northwest Angle #33 & #37
6	Kenora	Big Island
7	Kenora	Grassy & Onegaming
8	Kenora	Whitefish Bay
9	Kenora	Eagle Lake
10	Kenora	Wabigoon
WRFF now		
WRHA 1	Fort Frances	Rainy River
2	Fort Frances	Rainy River
3	Fort Frances	Big Grassy
4	Fort Frances	Rainy River
5	Fort Frances	Rainy River
6	Fort Frances	Naicatchewanin (Northwest Bay)
7	Fort Frances	Naicatchewanin
8	Fort Frances	Stangecoming
9	Fort Frances	Couchiching
10	Fort Frances	Couchiching
11	Fort Frances	(no rice)
WPRA 1	Thunder Bay	Seine River & Nicickousemenecaning (Red Gut)
WRSL 1	Red Lake	Pikangikum
2	Sioux Lookout	Osnaburgh
3	Sioux Lookout	Allocated to traditional users, whether Metis, Native non-Native

* See Figure 2

Source: Ontario Ministry of Natural Resources. Wild Rice Report:1986 (Ontario: Queen's Printer for Ontario, May 1987).

prior to the Act. The communities had little or no input into the definition of these new boundaries for the ten new block harvest areas. In the new harvest block areas defined pursuant to powers granted to the Minister of Natural Resources under the Wild Rice Harvesting Act, the easterly three-quarters of the Wabigoon customary Manomin harvesting territories were removed. The Wabigoon Reserve #27 was given a block area license denoted as area #10 in figure #2. It does not extend easterly into the customary harvest territories of Wabigoon Aboriginals which lie in the Ignace District.

As a measure of the extent of the Aboriginal unawareness of these boundary changes, the Wabigoon Anishinaabe people continued to harvest Manomin in many of the lakes east of the Dryden/Ignace district boundary into the 1970's. Licences for these lakes had not yet been granted to individuals under the statutory regime for the resource. The Ministry of Natural Resources largely left the Wabigoon Aboriginals alone with their Manomin. At Oval Lake (a fertile Manomin producing body of water close to the westerly boundary of the Ignace District), it took the non-Aboriginal person who had been granted a licence for the lake, to tell the harvesters they were trespassing on the lake and to get off. Yet the knowledge of the Manomin fields in Oval Lake and in a score of other aquatic systems remains intact amongst Elders and younger Wabigoon Aboriginals. Some Elders have passed on to younger people such information as, for example, where the historical sites for hand-processing at Oval Lake are located, for example. As well, the quality of Manomin that has grown in particular bodies of water remains known to many community members. The Wabigoon Anishinaabe people are still intent on recovering management control over these customary Manomin harvesting territories appropriated from them, and as well, holding on to those that remain in their control. As Elder May Pitchenese noted in a newspaper interview on this issue:

> "The government is trying to take all of these areas away from us. But we're just going to hang on to it."[24]

The Aboriginal people of Wabigoon are fortunate in that, unlike many other Anishinaabe communities in Northwestern Ontario, they retain control over a Manomin harvesting area that is still politically recognized by the Government of Ontario. Additionally, they are perhaps even more lucky still because their harvest area is one of the least susceptible of all of the Aboriginal Block Harvest Areas in Northwestern Ontario to detrimental fluctuations in water levels caused by hydroelectric dams. Consequently, their wild rice indigenous management regime remains more firmly entrenched than in many other Anishinaabe communities in the region.

To see how non-Aboriginal control over the management of Manomin can be destructive to the customary management of the resource, one need only look at the case of Lac Seul. The Lac Seul First Nation is located just north of the northeasterly portion of the Dryden District on Lac Seul. Its resource lands lie in the Sioux Lookout administrative district of the Ontario Ministry of Natural Resources. Lac Seul itself is a large lake which stretches more than one hundred kilometres in the southerly portion of the MNR Districts of Sioux Lookout and Red Lake (see figure #3). When the Ear Falls hydroelectric power dam was built on the westerly end of Lac Seul in the first third of the twentieth century, all of the Lac Seul Manomin producing areas on the lake were flooded. Fluctuations in water levels have since prevented the re-establishment of reliable Manomin crops in the lake. Additionally, the Lac Seul community was not assigned a block harvest area to the

[24]Wilma Derksen, "The Family Behind the Wild Rice Production" in 18(4) Mennonite Reporter 2 (1988), at p. 2 (February 15, 1988).

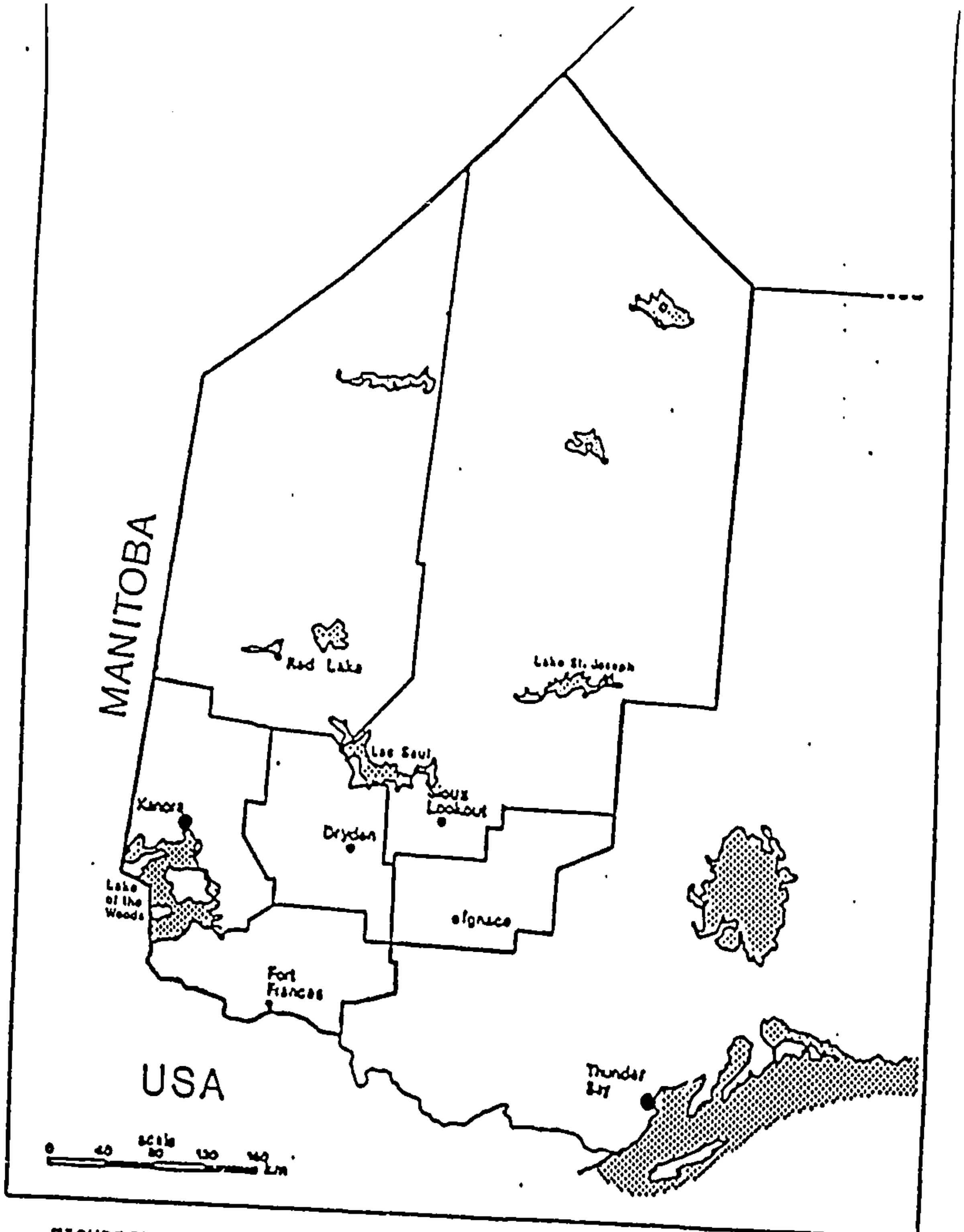


FIGURE 3: Districts in the Northwestern Administrative Region of the Ministry of Natural Resources

Source: Ontario Ministry of Natural Resources. Wild Rice Report: 1986 (Ontario: Queen's Printer for Ontario, May 1987).

northwest of Lac Seul in the districts of Sioux Lookout and Red Lake. This region contains much of their customary territorial base. The block harvest areas for Manomin were established only in the Kenora and Dryden districts. Non-Aboriginals assumed control over many Manomin bearing lakes in this territory in accordance with provincial guidelines. The customary indigenous management of the resource in this region has suffered accordingly. Only a few licences in districts other than the Kenora and Dryden administrative districts of the Ministry of Natural Resources are held by Aboriginal communities, and they are lake specific.[25]

In the years since 1960, there has been intense pressure placed on the Ministry by non-Aboriginals to abolish even the block Manomin harvest areas in the Kenora and Dryden Districts. They want to open them up to competition under a licensing regime designed to promote their development

[25] Thomas Pawlick, "Ben and Leo: A Curious Relationship", III(7) Harrowsmith 48 (1979), at pp. 48-50. Of interesting note, the Wabigoon Anishinaabe people are somewhat suspicious about the holder of the licence to Oval Lake and other bodies of water within their customary harvest areas which lie in the Ignace district and have been taken from their control. The current holder, about the time that he was granted the licences, was the election campaign manager for the then Minister of Natural Resources for Ontario, Leo Bernier. When experiments with synthetic chemical inputs were concluded at Oval Lake, which included the herbicide 24-D, the Wabigoon Aboriginals did not even receive notification. Presumably the non-Aboriginal licence holder of the lake did and gave approval for the experimentation under his proprietary rights granted by the Ontario Ministry of Natural Resources. This research was sponsored by the Ontario Ministry of Northern Affairs. Because of the synthetic inputs involved, a federal research permit was granted. While the Ontario Ministry of the Environment became aware of this program no public input was sought from the Wabigoon Aboriginals by that Ministry. The Ontario Ministry of the Environment took the position that only if the synthetics involved were registered for use in an aquatic environment pursuant to federal legislation, would an aquatic use approval have to be considered by the MOE. (See: Peter F. Lee. The Aqua Culture of Wildrice: Progress Year 4 (Thunder Bay: Lakehead University (Undated - 1985)), at pp. 57-64). Until this situation arose the government bureaucracies involved felt that notice to local Aboriginal communities was required. The end result was to create a situation to which the Wabigoon Anishinaabe people took great offense. Their spirituality and resource management philosophy rejects this type of manipulation of the resources in these types of resources. Given the level of frustration which exists in many Anishinaabe communities as a result of the situation it would not be fool hearty to predict increased levels of civil disobedience on the part of Aboriginal people to make themselves heard on the issues. When all of the above is added to statements by high level provincial government officials involved in natural resources issues to the effect that: "...Northwestern Ontario native groups refused to harvest ...[wild]rice on a commercial basis because of religious and cultural beliefs. (See: Scott Colby, "Wildrice - Native Tradition vs. Commercial Potential", in Thunder Bay Times News, March 28, 1990, at p. 3 (Thunder Bay, Ontario)), Aboriginal frustration on these issues becomes even more understandable.

by individual entrepreneurs. Ministry of Natural Resources officials themselves are convinced that the implementation of provincial regulatory control over all Manomin producing areas in Northwestern Ontario under Ministry jurisdiction would significantly increase harvest yields in the region. The Ministry has, in fact, attempted on several occasions to do away with the present block area system. However, due to political pressures on the part of the communities, these administrative initiatives have stalled.

This does not mean that the push for change has diminished. In its 1986 Wild Rice Report, the Ontario Ministry of Natural Resources noted that

> ...little or no gains have been made in increasing the average annual harvest. It is therefore recommended that the Ministry:
>
> 1. Promote the development and implementation of a new wild rice policy to improve management and development of wild rice in Ontario.
>
> 2. Following the acceptance of the new wild rice policy, prepare a general management plan to provide direction for regional and district wild rice programs.
>
> 3. Develop and promote a legislative framework for a licensing system that will regulate [this implies that local Anishinaabe communities have never done this] seeding, cultivating, harvesting, buying and processing wild rice. The licensing system should provide appropriate authority for the licensee and a reasonable return to the Crown for the utilization of Crown lands.
>
> 4. Develop and promote a mechanism for multi-year licenses for growers to allow for continuity, and the development of business equity. The licensing system should include an annual application for renewal. For convenience in reporting the renewal application should include licence transferring notification, a harvest report, and development proposals for the subsequent year.[26]

These recommendations, amongst others, would, solidify provincial regulation of the Manomin

[26] Wild Rice Report: 1986, Supra 19, at pp. 40-41.

resource in Northwestern Ontario including the customary harvest areas of the Wabigoon Anishinaabe people. To date, only political pressure, as I have noted, has prevented the collapse of the Block Area System through which indigenous groups including the Wabigoon Aboriginals have retained their customary management of Manomin.

IV. THE INDIGENOUS RESOURCE MANAGEMENT SYSTEM AND THE STATE SYSTEM COMPARED

(i) Preliminary Notes

Manomin continues to be important to the economy of the Wabigoon Anishinaabe people. It currently brings more money into their local economy than any other economic activity save for State transfer payments. To date, political efforts on the part of Anishinaabe communities in Northwestern Ontario have resulted only in slowing the encroachment of non-Aboriginal jurisdiction. Concessions have been obtained from the Government of Ontario that are related only to its policies concerning access to the resource. However, as I noted in the introductory chapter to this study "...the maintenance of the Native economy...depends on precisely the security of access and tenure that [Aboriginal]... management rights would provide."[27]

Concern has been raised by non-Aboriginals over the so called 'lack of development of the wild rice resource by Aboriginal communities in Northwestern Ontario.' But the Wabigoon Anishinaabe

[27]Peter J. Usher, "Indigenous Management Systems and the Conservation of Wildlife in the Canadian North", in 14(1) Alternatives 3 (February 1987), at p. 3.

people maintain that, without secure recognition of their right to undertake their own management of their resource, its potential value for their economy cannot be realized. They hold that protracted conflicts over jurisdiction over the resource will only result in further political stalemate. Then there are additional Aboriginal concerns regarding the conservation of Manomin which also have ramifications with respect to its economic potential. Aboriginal concerns have ranged from the flooding of Manomin fields as well as the further alienation of unoccupied Crown lands surrounding Manomin bearing water bodies to non-Aboriginal users for non-Aboriginal development.

(ii) The Paradigm Models of Resource Management Compared

(a) Common Elements

> [T]hroughout much of [the period]..... [where indigenous wildlife management systems have interacted with the state system], the state system has failed to recognize even the existence of an indigenous system,[28] and has assumed itself simply to be filling a void.
>
> Obviously the state system has prevailed because of its constitutional authority and the power of its legal sanctions. It has done so because practically all of its information base is obtained, organized, and legitimated under its technical paradigm, since it alone has the authority to set the research agenda and allocate the resources necessary to pursue it.
>
> The indigenous system has responded by going underground...until, in recent years, being revealed by social scientists and reasserted (largely in the context of native claims) by Native harvesters themselves. [emphasis added][29]

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[28] See for example: D. Gottesman, "Native Hunting and the Migratory Birds Convention Act: Historical, Political and Ideological Perspectives", in 18(3) Journal of Canadian Studies, at pp. 67-89, (1983).

[29] Peter Usher, "supra 27, at p. 7. Usher also refers his readers to: F. Berkes, "Fishery Resource Use in a Sub-Arctic Indian Community", 5 Human Ecology 289 (1977).

The research pertaining to indigenous wildlife management systems in northern Aboriginal communities indicates a mosaic of diversity which points to the vitality and adaptive nature of indigenous wildlife management systems generally. It also highlights the fact that they share the same basic theme: "Communal resource-management institutions with access control".[30] Berkes has noted that the cultural diversity which surrounds this theme "may be closely related to and essential for the conservation of biological diversity inextricably linking social concerns in resource use with ecological concerns."[31]

Peter Usher has proposed ideal models or paradigms of wildlife resource management for each of the indigenous and Euro-Canadian state regimes. Each of these models contain certain basic common elements:

> An information base and a paradigm or set of mental constructs that organizes and interprets it into useful knowledge; a set of practitioners with a distinctive worldview or culture that includes both this paradigm and certain normative values; a system of rules, norms, and customs concerning rights and responsibilities that are intended to govern the behaviour of all who partake in...[harvesting] and its benefits; and an overall set of objectives which are embedded in the institutions and ideology of the society as a whole."[32]

Usher's State and Aboriginal resource management typologies fit well into the Manomin context for the Wabigoon Anishinaabe people. This is because Manomin management by Wabigoon Aboriginals

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[30] Fikret Berkes, "Co-operation From the Perspective of Human Ecology", in F. Berkes (ed.). Common Property Resources: Ecology and Community-Based Sustainable Development (London: Belhaven Press, 1989), at p. 75.

[31] Ibid.

[32] Supra 27, at p. 2.

carries the essential features of a communal resource management system for a resource which is of primary commercial importance for them.

(b) The Provincial Management System Typology

Usher has distinguished each of the Aboriginal and State systems for resource management on the Crown land base in Northern Canada into "ideal types". In the State system, whether the resource is considered as amenable to private ownership, or whether it should be in the public domain giving all citizens of the state "equal" access to it,

> ...its [m]anagement is the exclusive prerogative of the state....The state manages for certain levels of abundance on a technical basis, and then allocates shares of this abundance to users on an economic and political basis. The system of knowledge [for management] is based upon a scientific accumulation, organization, and interpretation of data, and management problems are resolved in a technical, ahistorical framework.
>
> This system of management is bureaucratic, which is to say, hierarchically organized and vertically compartmentalized. Managers become distinct from harvesters, authority becomes centralized and flows from the top down. The environment is reduced to conceptually discrete components which are managed separately. As the separate management units take on a life of their own, management objectives diverge and become focused on specialized objectives... [emphasis added][33]

Specialized objectives emerging from these normative characteristics may include utilizing bodies of water which produce Manomin as reservoirs for hydroelectric purposes or allocating them to individual users to generate maximum Manomin production potential with State resource managers focusing only on that resource. They can be specialized to the degree that special licences are issued

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[33]Ibid, at p. 6.

to scientists (usually financially supported by the State) to experiment with the use of herbicides and chemical fertilizers for Manomin production where local communities who have relied on the resource in these lakes are not even notified. Supported by its own paradigm, the provincial management regime has allowed for experimental applications of the herbicide 2-4D amine in Manomin stands which grow in water systems from which the Wabigoon Lake Reserve #27 community takes its drinking water.[33]

Underlying the state system for the management of resources such as Manomin is the "tragedy of the commons" paradigm. It is assumed that unless individual users are allocated exclusive use rights to Manomin water bodies controlled by the state, the resource will only be degraded by Aboriginals harvesting it in an ad hoc, uncontrolled and unscientific manner. As Usher notes, the widespread basic tenets underlying the state paradigms

> ...can be shown to be of limited rather than general application, and in some cases simply fallacious,[34]

Further, Usher points out that:

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[33]See: Peter Ferguson Lee, Department of Biology, Lakehead University, Thunder Bay, Ontario - The Wild Rice Resource Unit [in The Aquaculture of Wild Rice - Progress Report - Year 4] sponsored by the Ontario Ministry of Northern Affairs at pp. 57-60., which section is entitled "Control of Spikerush, (*Eleocharis* spp.) Dr. Peter Lee conducted experiments in Oval Lake on herbicide trials to control the spikerush weed using 50% 2-4D Amine. Oval Lake is a lake which was customarily harvested by the Wabigoon Lake Ojibway Nation Anishinaabeg but which was taken away from them by the Government of Ontario in the early 1960's and allocated to a non-indigenous harvester/processor, Ben Ratuski - the owner of Shoal Lake Wild Rice Limited in Kenora, Ontario in the early 1970's. The Lake was placed into the Wild Rice Research Program at Lakehead University for scientific experimentation and has been lost to the rice harvesters of the Wabigoon Lake Ojibway Nation. It was one of the most important Manomin producing bodies of water that the Wabigoon Lake Ojibway Nation Anishinaabeg had under their control in the past.

[34]Usher, supra 27 at p. 6 with references to other literature including: P. Usher, "Property Rights: The Basis of Wildlife Management" in National and Regional Interests in the North (Ottawa: Canadian Arctic Resources Committee, 1984), pp. 389-415.

> What is omitted from [the "Tragedy of the Commons" paradigm]... of rational individuals acting in their self interest is precisely the social arrangements constraining individualism that have characterized practically all known communal property systems....
>
> The commons without law, restraint, or responsibility is thus a metaphor not for Aboriginal tenure systems but rather for laissez-faire industrial capitalism and the imperial frontier.... [emphasis added][35]

This is, for example, precisely the historical context of the sturgeon fishery in the Lake of the Woods and Winnipeg River systems around the turn of the century[36], where the fishery was decimated through massive overfishing by non-Aboriginal American and Canadian fishing companies.[37]

The Aboriginals from Wabigoon practice a management system for Manomin that is highly developed with established customary laws regulating communal social arrangements in a manner which can ensure the conservation and further propagation of the wild rice resource. It is not unlike

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[35]Ibid, p. 6.

[36]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 on the Lake of the Woods", in 6(1) Native Studies Review 31 (1990).

[37]Ron Truman, "In Search of Sturgeon" in 5(1) Landmarks 23 (Winter 1986-87), at p. 22. The author notes through quoting a biologist that "Ontario's total harvest of sturgeon was at its highest about 100 years ago when the Great Lakes had plenty. The collapse began in 1892. At the peak, the commercial harvest was over 800,000 kg of sturgeon. In 1984 we were only allowed to take 7,940 kg of sturgeon. The fish are still in demand; it is just they are not there to be caught.... [Sturgeon] habitat has been damaged by dam construction and pollution." It is little wonder that the Wabigoon Lake Ojibway Nation Anishinaabe people ar cynical about trusting the management of their wild rice to the Ontario Ministry of Natural Resources when the management of the sturgeon resource up to 1984 has resulted in its virtual decimation. This is in spite of the fact that a valuable economic activity for the aboriginal peoples of the region for centuries has been illegal for decades now. The management for sturgeon like the management of wild rice by the Ministry of Natural Resources represents a remarkable working example of the destructive effects of the compartmentalization of resource management where the "environment is reduced to conceptually discrete components". Now because of power dams on the Winnipeg River and Lake of the Woods watersheds it is doubtful whether the sturgeon or even wild rice will ever come back in their former quantities to the region.

many indigenous common property resource management systems that are now being more closely examined in scholarly literature. "Judging by the literature... common-property resource tragedies in the [sense proposed by Garrett] Hardin... seem not to be the rule but the exception. [Where these tragedies have occurred, they seem]... to be related to the breakdown of existing commons systems due to disruptions that have originated externally to the community."[38]

Assessing the rapidly expanding body of scholarly research in the field, Fikret Berkes has concluded - and his conclusion is worthy of consideration by State lawmakers - that the

> ...use of commons for long-term sustainable yields is relatively more likely in the case of people living in small groups with tight communal control over the resource base and over social behaviour. Not being familiar with such societies, many Western-trained, urban-based resource managers and scientists overlook possibilities for sustainable management of commons in such situations.[39]

Berkes emphasizes that the sustainable use of common property resources can be achieved through cooperative rather than competitive group behaviour. He identifies three mechanisms from reference to research through which this behaviour can be expressed: kin selection, reciprocity and group selection. "[A]ll three can act in concert when human populations live in territorial, extended kin groups - the situation with many hunter-gatherers and shifting cultivators, as also with Indian rural society,... Pacific island societies... and others."[40]

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[38] F. Berkes, "Cooperation from the Perspective of Human Ecology", supra 30, at p. 71.

[39] Ibid.

[40] Ibid. at p. 73.

In Canada, the diversity of Aboriginal common property resource use and management arrangements (usually non-formal in the Western sense) is striking. Yet all of this diversity represents "...many variations of the same basic theme (communal resource-management institutions with access control).... This cultural diversity, in turn may be closely related to and essential for the conservation of biological diversity, inextricably linking social concerns in resource use with ecological concerns."[41]

(c) The Indigenous Management System Typology

Indigenous management systems for wildlife resources in the Canadian north have been found to possess the following normative characteristics:

> The indigenous system rests on communal property arrangements in which the local harvesting group is responsible for management by consensus. Specific property arrangements have varied widely in northern Canada but some basic principles are common to all. Specific lands and waters, which may be tens of thousands of square kilometres in extent are held by a specific group of indigenous people. The boundaries are known to both the members of the land holding group, and to their neighbours. Use without permission is trespass. Formal arrangements between groups can be made, for example, upon mutual agreement of each others' needs and surpluses but require adherence to rules of conservation and harvesting behaviour. Members of the group either have equal access to the communal lands, or are assigned places within them in an ordered basis.[42]

These characteristics generally describe the indigenous Manomin management regime of the Wabigoon Anishinaabe people described earlier. In my analysis I have also emphasized the proactive

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[41] Ibid, at p. 75.

[42] Usher, supra 27, at p. 6.

nature of Manomin management. Wabigoon Aboriginals have not simply "idled" away this time waiting for Manomin to become abundant without any human interaction with it on their part. Their management of the resource is characterized by a code of customary law regulating human interaction with Manomin that is adapted to changing circumstances by the group. Mechanisms constraining individualism include the authority granted to the wild rice field bosses at harvest time to ensure equity of access to the resource and its conservation.

One might add and Usher notes that:

> The connection between the land and the group lies in knowledge, naming, travel, "foraging" [this is really an inappropriate term because the management of Manomin includes planting, stand tending, harvesting and processing] and residence, the first two being the cultural and symbolic expression of the last three.[43]

Usher also maintains that:

> In the indigenous management system, all members of the group are involved in management [decisions] as well as with harvesting, but leadership and authority within the [community] are based on the greatest acquisition of knowledge and the demonstrated ability to use it effectively. As well, significant management data include not only immediate observations of direct cause and effect, but also accumulated historical experience and a long range conception of the future.
>
> Management and harvesting are conceptually and practically inseparable. Knowledge or information comes from two sources. The first is the everyday experience of each aspect of harvesting [with respect to Manomin it includes the various aspects of the propagation and stand management of the resource]...Information in this form is accumulated by every individual, and shared intimately and constantly within the household, family or whatever is the social unit of production. The second is the oral culture, which is shared and exchanged within the larger society, and handed down in the form of stories from one generation to the next. In sum, these observations,

[43] Ibid.

> like those of the state's become coded and organized by a paradigm or set of paradigms that provide a comprehensive interpretation of them. The knowledge so produced becomes the cultural heritage of these societies, just as what we call science is part of ours.[44]

The management system for Manomin is a core feature of the Wabigoon Anishinaabe people and their culture. As such, it is "...intimately linked with their values, ethics, and cosmology, which are generally based on an integrated, non-compartmentalized view of the environment."[45]

Though a resource may be held in common, with access available to all members of an Aboriginal community, resource managers, who could include Elders and senior experienced harvesters ensure that the customary regulation of the harvest is preserved. Usher has stated that:

> There is crucial distinction between common property in the state system, and communal property in the indigenous system, which is most readily illustrated by Hardin's "tragedy of the commons" paradigm.[46] What is omitted from his scenario of rational individuals acting in their self interest is precisely the social arrangements constraining individualism that have characterized practically all known communal property systems, whether Aboriginal or feudal.
>
> In the indigenous system, all members of the group are involved with management as well as with harvesting, but leadership and authority within the group are based upon the greatest acquisition of knowledge and the demonstrated ability to use it effectively. As well, significant management data not only include immediate observations of direct cause and effect, but also accumulated historical experience and a long range conception of the future. The indigenous system of management is a core feature of all northern Native cultures, and is therefore intimately linked with their values, ethics, and cosmology, which are generally based on an integrated, non-

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[44] Ibid, at p. 7.

[45] Ibid.

[46] G. Hardin, "The Tragedy of the Commons", 162 Science 1243 (1968). This article provides the "locus classicus" description of the "Tragedy of the Commons" paradigm.

compartmentalized view of the environment. [emphasis added][47]

The customary tenure regime relating to the Manomin resource practiced by the Wabigoon Anishinaabe people is "...based upon systematic use and occupancy."[48] Manomin fields have never been considered "... a commodity that could be alienated to exclusive private [ownership or] possession".[49] For the Wabigoon Aboriginals, the system of Manomin field management and harvesting involves "... allocation within the group"[50] implemented in accordance with community consensus. The authority of field bosses, which flows from that consensus, to deny harvesting privileges because of wrong behaviour, for example, is an expression of this consensus.[51]

This indigenous management regime does not allow for the "tragedy of the commons" paradigm. At Wabigoon, harvesters, being wild rice resource managers at the same time, are constrained as individuals by their social context of living in a communitarian culture. This is evident in the allocation of the Manomin harvest.

For the Wabigoon Anishinaabe people the harvest and management of Manomin, including its

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[47]Usher, supra 27, at pp. 6-7.

[48]Ibid.

[49]Ibid.

[50]Ibid.

[51]Ibid.

allocation amongst the members of the group are "...conceptually and practically inseparable."[52] The knowledge for the indigenous management of this resource comes from the everyday experience of people interacting with the resource and from the historical oral culture which is still alive amongst them. The handing down of oral culture has sometimes taken on new approaches at the Wabigoon Reserve #27 community. For example, regular meetings for youth have been held at the school where Elders recount the oral tradition for a younger generation which includes their grandchildren. This tradition still exerts the major influence on Manomin management amongst Wabigoon Aboriginals. Even teenagers respect the constraints flowing from the management of Manomin in return for the social, cultural and economic benefits it provides. Amongst Wabigoon Aboriginals, there remains a keen sense of the land as "Anishinaabe aaki" or "the peoples' land." Harvesters often have told me that they have no place else to go; their ancestral homeland is where they live. Consequently, it must be taken care of and preserved for future generations.

In this chapter I have tried to highlight the flexibility of the aboriginal resource management system that I examined. It can adjust to changing circumstances. The "...[u]se of common property resources may change over time.... [T]here may be cycles in the structure and dynamics of resource-use systems."[53] Not only can these common property systems pro-actively interact with natural factors impacting on resource abundance over time,[54] they can also adapt to changing priorities

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[52] Ibid.

[53] Berkes, supra 30 at p. 79.

[54] Ibid.

regarding the commercial use of resources in Aboriginal communities. They are also resilient enough to be able to recover from externally induced disruptions to them.[55] Given the continuing existence of Aboriginals common property resource management, this is to be expected as externally induced disruptions of Aboriginal resource use have been common throughout Canadian history. As Berkes has noted: "disruption has always served imperialism - 'divide et impera' as a special case. In this regard, creation of private property [by the state] may be a means of dividing a community internally to make it subservient to an external market".[56] It is even possible to propose that state resource management bureaucracies may introduce disruptions to customary Aboriginal common property management simply as a means of increasing state control over the resources in question. This control is then justified in the name of conservation in order to improve the prospects of survival for bureaucratic establishments.[57]

An awareness of the indigenous management of Manomin by the Wabigoon Anishinaabe people highlights the differences between Aboriginal and State management control over the resource. We can see how the substantive regulatory content, as the legal expression of the organization of each of the two systems, differs. The mechanisms ensuring compliance with the normative standards and specific customary rules of the indigenous system are different from its State counterpart. The sources of law for the two systems are different. Their interaction continues to create conflict. Social

[55]Ibid., at p. 80.

[56]Ibid.

[57]Milton M. R. Freeman, "Graphs and Gaffs: A Cautionary Tail in the Common-Property Resources Debate", in Berkes (ed.), supra 30, at pp. 95-97, 101.

dislocation is the result of this conflict for the Wabigoon Aboriginals because of their relative disadvantage in terms of political strength within the state system.

Because of this, the Aboriginal management of Manomin of the Wabigoon Anishinaabe people and its attendant customary law is under stress. Should it be protected? The answer, assuming an endorsement of the objective of preserving economic, social and cultural diversity, is yes. What does Canadian Aboriginal rights law have to say about this objective? That is the central question which is considered in chapter three of this study. But before undertaking, a general analysis of this issue. I want to set out a particular legal case study concerning the Manomin resource in Eastern Manitoba. It underscores the fragility of Aboriginal natural resources management in Canadian law.

V. A CAUTION: MANOMIN AND THE ANISHINAABE PEOPLE OF EASTERN MANITOBA - THE FRAGILITY OF POSSESSION

For the Wabigoon Anishinaabe people, protection of the unique achievements of their Manomin management system is an urgent priority. The current status of the Aboriginal management system for Manomin in Wabigoon territories remains precarious. On this issue government policy and regulation as well as the judicial process are like loose cannons on a ship. Developments in this area are being rocked by conflicting interests that involve the protection of constitutionally entrenched individual liberties in Canada and the need to come to terms with Aboriginal rights questions. In large part these forces are at play in the case of Manomin because it is of primary importance to

Wabigoon Anishinaabe people as a resource with significant commercial value.

The State itself does not recognize any treaty rights to Manomin even for subsistence purposes. Aboriginal people in the region are reluctant to pursue this issue in Canadian courts. There are good reasons for this as I will show in Chapter Three of this study. At this point, however, it is worth setting out a caution on this issue through reference to the disheartening experience of those Anishinaabe people who live in what is now the Manitoba portion of the Treaty #3 territory. As in Ontario, the Manomin resource is central to the livelihood as well as the culture of many modern Aboriginal people in Manitoba who still live a significant portion of their lives practicing land-based livelihood pursuits. The analysis which follows is relevant to any Aboriginal resource harvesting for commercial purposes.

Those lands traditionally described as the Manomin bearing lands of the Anishinaabe people of the Treaty 3 territory include "...the lands lying to the East of Lake Winnipeg."[58] Manomin bearing lakes immediately to the east of Lake Winnipeg lie in what is now the Province of Manitoba. The resource was customarily managed by Anishinaabe people in this area in a "wildrice culture" that was first described by Allanson Skinner in 1912.[59] The basic form of Manomin management practice in this area is shared with Anishinaabe communities in Northwestern Ontario. Indeed, Manomin harvesting and field management activities in and proximate to what is now the Whiteshell region

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[58] D. Wayne Moody, supra 7, at p. 75.

[59] Allanson B. Skinner, "Notes on the Eastern Cree and Northern Saulteaux", in 9(1) Anthropological Papers of the American Museum of Natural History (1912), at pp. 137-138.

of Manitoba as well as in much of the Ontario portion of the Winnipeg River watershed were customarily undertaken in common by Aboriginal people from Anishinaabe communities in both the Ontario and the Manitoba portions of the Treaty #3 territory.

As the Government of Manitoba assumed an increasing role in the management of the Manomin resource throughout the province, Aboriginal concerns began to loom large. These concerns paralleled increasing non-Aboriginal activity with respect to the resource. In response to pressure from the Indian Wildrice Producers Association, which was active in the Manitoba portion of Treaty #3 territory, the Government of Manitoba updated its policy for Manomin management in the region. The result was that within this new policy,[60] the Manitoba Department of Natural Resources "...developed a program giving preference to people with native backgrounds in the issuing of new wildrice licences."[61]

The objectives of the new program were clear enough. They should, however, be borne in mind in relation to the sophistication of the Manomin management regime of the Wabigoon Aboriginal people described earlier in this study. The objectives were as follows:

> a) The government wishes to see Native people achieve a leading role in the industry, <u>within a context of community guidance</u> wherever possible.
>
> b) The prime thrust of the Department of Natural Resources will be to aid in this process through identifying opportunities, assisting and training, encouraging good

[60] Manitoba Department of Natural Resources. Policy - Wildrice Management (Winnipeg, Manitoba June 30, 1982).

[61] Manitoba Rice Farmers Association v. Human Rights Commission (Man.), [1988] 3 C.N.L.R. 53 (M.C.Q.B.), at p. 54.

husbandry etc. [emphasis added][62]

A specific strategy was developed by the Manitoba Department of Natural Resources to implement these objectives:

> a) Within the general area of operations of the members of the Indian Wildrice Producers Association, new leases will not be provided except after consultation with the Indian Wildrice Producers Association.
>
> b) All applicants outside the Indian Wildrice Producers area will be offered a one year harvest permit which states specifically that there is no right of renewal and the permit is not an exclusive right, i.e. other permits may be issued for a given lake depending on the estimated capability of the resource.
>
> c) Future allocation of leases will be carried out in deep consultation with and possible control by local communities. [emphasis added][63]

For the Aboriginal people who were to be affected by this policy, the element of a community-based context of local control for their Manomin resource was paramount. This would minimize conflict with the customary allocation and management of the resource. These Aboriginal people expected that the policy objectives and the strategy developed to implement them by the Government of Manitoba would continue to allow their customary management of the resource, including its allocation, to be practiced by them. Like the Manomin Management system of the Wabigoon Anishinaabe people, the customary Aboriginal Manomin management was regulated within a framework of long-standing common property arrangements.

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[62] "Policy - Wildrice Management", Quoted from: Manitoba Rice Farmers Association v. Human Rights Commission (Man.), ibid, at p. 55.

[63] Ibid.

In 1983, the year after its wild rice policy was initially developed, the Manitoba Department of Natural Resources produced a framework to implement the policy. It is worthy of note that Manitoba did not give recognition to the customary management system for Manomin by these Aboriginal people. However, in order to give priority to Aboriginal people who wished to continue to be involved with the Manomin resource, a specific management framework was set down. Its central elements were as follows:

1. A series of designated zones were to be used from which to encourage Aboriginal participation in the utilizing of the resource;[64] and, for certain zones, an affirmative action program was established which granted Aboriginal people first options on licences for Manomin bearing lakes;

2. This allocation regime, while employing an affirmative action program, nonetheless involved a licensing system through which Manomin bearing lakes would become formally commodified by the State and thereby amendable to purchase and sale amongst individual licence holders through a regime managed by the province;

3. While licences would be issued for a period of up to 10 years, their renewal in the hands of the holder would be subject to conditions set down in them by the Manitoba Department of Natural Resources;

[64]These zones were created under the provincial Wild Rice Act, S.M. 1982-83-84, C. 60 and its regulations.

4. A maximum limit of production areas or licences would be imposed by the province on individual licence holders.[65]

Although the affirmative action program was to be based on a system of individually held licences, Aboriginal communities with status as Indian Bands under the Indian Act were to be allowed a certain period of time to apply for and acquire licences for individual Manomin bearing lakes within the designated zones. These licences would cover harvest areas that would then be made available to all members of the community holding the licences.

Within this set of arrangements, the Aboriginal communities involved would be given a limited period of time to secure some lakes within the Manomin bearing territories customarily harvested by their members. These lakes could then be retained and managed in accordance with customary community-based tenure and management arrangements. This would create a narrow window of opportunity for certain Aboriginal communities affected by the policy in that they would be able to move to protect as much of their customary Manomin harvest territories as would be permitted under the program.

At the end of this policy and program developmental process, the Manitoba Department of Natural Resources submitted an application to the Human Rights Commission of Manitoba for approval of its proposed affirmative action program for allocating the Manomin resource. For the purpose of

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[65] Supra 62, at pp. 55-56.

this analysis, the relevant zone "...was described as the natural zone (Nopiming Unit) [here the description implies the belief that these Manomin stands were naturally occurring and not the result of Aboriginal labour] generally east of Lake Winnipeg to the Ontario boarder with a northern boundary near the Bloodvein River and the southern boundary along the Whiteshell Provincial Park encompassing Lac Du Bonnet, Pointe Du Bois and Pinawa."[66] This zone included those Manomin bearing territories of the Manitoba portion of Treaty #3 territory customarily managed by Anishinaabe people save and excepting that portion lying within the boundaries of the Whiteshell Provincial Park. Provincial management of Manomin within the Whiteshell Provincial Park area is governed by a separate regime. The lakes in this region have been set aside for Manomin harvesting by Aboriginal people only. However, in the Whiteshell area, the Province of Manitoba has created its own regulations on allowable harvesting periods and permissable harvesting technologies.

The affirmative action program proposed by the Manitoba Department of Natural Resources for the "natural" zone was immediately attacked by the Manitoba Rice Farmers Association. The Manitoba Rice Farmers Association was representing non-Aboriginal people with interests in obtaining secure access to the Manomin resource in the region. They held the position that access to the resource should be based on principles of open competition for Manomin bearing lakes within a licensing system creating individually held exclusive proprietary rights for the resource in these lakes.

In spite of this non-Aboriginal intervention, the general thrust of the affirmative action program

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[66]Ibid, at p. 57.

developed for the Manomin resource in Eastern Manitoba was approved by the provincial Human Rights Commission. The approval itself was immediately attacked by the Manitoba Rice Farmers Association in court. The program was attacked on the grounds that it violated the equality rights provisions of the Canadian Charter of Rights and Freedoms. Section 15 of the Charter holds that:

> (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, nationality or ethnic origin, colour, religion, sex, age, mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, nationality or ethnic origin, colour, religion, sex, age or mental or physical disability.[67]

In its deliberations, the Manitoba Court of Queen's Bench had to determine the validity of the proposed affirmative action program for Manomin in Eastern Manitoba that was put forward by the provincial government for Aboriginal people. Most "harvesters" in the region were unaware of the nature of the strategy of Manitoba to secure priority access rights for them to Manomin. In the judicial proceedings, Manitoba did not advance any argument that there was a treaty or Aboriginal right to the resource inhering in the Aboriginal people involved. None is believed to exist by the provincial government. Given this situation, it is fairly self-explanatory that questions of management rights or Aboriginal rights concerning the commercial harvesting of the resource would also not be considered. Additionally, while the case affected the rights of Aboriginal people, no Aboriginal people were formally involved in the proceedings. This is much as the situation that transpired in

[67] The Canadian Constitution 1981 (Ottawa: Minister of Supply and Services Canada, 1981) (Part One, Section B), at p. 7.

the context of the landmark St. Catherine's Milling case a century before.[68]

Set in this light, it is inevitable that the allocation of a resource of great historical and economic significance to Anishinaabe people in Eastern Manitoba and the allocation of rights flowing therefrom would be made in reference to a resource management paradigm that was foreign to the Aboriginal people involved. The process did not concern equitable access to a resource from within a recognized and accepted community-based common property management system. Rather, it dealt with the legitimacy of provisions that gave preference to Aboriginal people within a formal non-Aboriginal State regulatory system for allocating and managing the resource. Rather than assessing the legitimacy of Aboriginal rights relating to long-standing community-based resource management regimes, the case was brought forward implicitly recognizing the full authority of State management institutions over Aboriginal people involved. The Government of Manitoba was simply acting in accordance with its position on this matter and exercising what it sees as its mandate to manage commercial resource harvesting, both for Aboriginals and non-Aboriginals, throughout the province.

Right from the start, these were the problems in the process leading to the affirmative action program. The Manitoba Department of Natural Resources probably bowed to community-based pressure in structuring the program such that only Indian Bands could apply for Manomin harvesting licences during the first year of the program. Nonetheless, in essence the overall policy was

[68]See Chapter three of this study.

"...intended to promote native entrepreneurs"[69] in the development of the resource within a State system oriented to granting exclusive proprietary rights for individual lakes bearing Manomin to individual licence holders.

The result of the judicial proceedings concerning the affirmative action program on the 1982 Manitoba Wild Rice Policy was that the Manitoba Court of Queen's Bench held the following:

> There had always been equality of opportunity amongst all groups to receive wildrice permits or licences. The disadvantage of the target group did not arise from inability to obtain wildrice licences or discrimination in the granting of wildrice permits or licences, but rather the disadvantage lay in the target groups lack of resources to take advantage of the opportunities available in the industry.[70]

The court could not see that the disadvantage to the Aboriginal people arose from the suppression of their regimes for managing the Manomin resource. For the court, the disadvantage was financial. It could be ameliorated through "...capital and management assistance."[71] This type of thinking implicity confirms old prejudices concerning the relationship of Aboriginal people to their lands noted in Part One of this study.

The result of this litigation was that the affirmative action program was struck down as being in violation of Section 15 of the Charter of Rights and Freedoms as it "...unnecessarily denie[d] the

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[69] Manitoba Rice Farmers Association v. Human Rights Commission, supra 62, at p. 59.

[70] Ibid., at p. 65.

[71] Ibid.

existing rights of the non-target group."[72] The effect of the decision was to further entrench the suppression of the customary common property management system for the Manomin resource in the relevant area by the Anishinaabe people in question. Further, it meant that a score of Manomin bearing lakes planted and nurtured by Aboriginal people in the region were lost to them. Certainly, there was no consideration that compensation should be forthcoming to the people of the communities that were affected by this process.

I began working with Anishinaabe harvesters from Eastern Manitoba about the time that the Manitoba Wild Rice Farmers decision was handed down. They would agree with the reasoning in the Report of the Aboriginal Justice Inquiry of Manitoba on Aboriginal and treaty rights relating to the Manomin resource. In that report the Commissioners argued that:

> Even where treaties are silent on the issue of wild rice, it is possible to demonstrate that the parties expected traditional economic pursuits to continue. It would be in keeping with recent court rulings to assume that references to hunting and fishing could extend to include other traditional economic pursuits such as the harvesting of wild rice.[73]

But the Commissioners of Manitoba Justice Inquiry also noted the following:

> The issue of wild rice harvesting has never been described by the government of Manitoba as an Aboriginal or treaty right. Although the Wild Rice Act does refer to these rights, it does so only in the context of saying that the Act is not intended to derogate from those rights. This is not the same thing as accepting that such rights

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[72] Ibid.

[73] A. C. Hamilton and C. M. Sinclair (Commissioners). Report of the Aboriginal Justice Inquiry of Manitoba: (Volume 1): The Justice System and Aboriginal People (Winnipeg, Manitoba: The Queen's Printer, 1991), at p. 190.

exist in relation to wild rice and that provincial jurisdiction is restrained.[74]

The provincial allocation and management system for the Manomin resource in Manitoba has continued pursuant to updated legislation governing the resource.

It is no wonder that some Anishinaabe people in Manitoba have acquiesced to participation in the State Manomin management regime by acquiring individual licences for Manomin bearing lakes. For them, it was not only that the Government of Manitoba might devise a system of permits that would be "...reasonably required to ameliorate the conditions of hardship of the target group."[75] More than this, government institutions and State law completely failed to even recognize the existence of an Aboriginal management system for the resource in question. This left little room for Aboriginal harvesters to manoeuvre when it came to participating in the harvesting of Manomin. So in spite of tensions that might arise in their communities as a result of their participation in the provincial management system, it is understandable that some would feel compelled to do so.

Throughout this incident, no recognition was accorded to the many generations of work by Anishinaabe people that were required to nurture and maintain the abundance of Manomin in eastern Manitoba. With recognition and acceptance, this culture could have continued to spread north and west across the province within a community-based Aboriginal management framework. Now, the benefits of past Aboriginal labour put into the Manomin resource in eastern Manitoba are

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[74] Ibid.

[75] Ibid, at p. 66.

presently accruing to non-Aboriginal entrepreneurs who asserted a legal right of "equal" access to the resource.

Since this case was decided, the Government of Manitoba has provided significant amounts of capital to assist Aboriginal organizations promoting Aboriginal involvement with the Manomin resource under its provincial management system. But under this system, the commodification of Manomin bearing lakes has meant that the costs of such participation have rapidly escalated. A "good rice lake" now sells for more than $100,000.00.[76] Further, the fact remains that, under the provincial system, few Aboriginals continue to be involved with the resource.[77] The reasons for this go beyond factors involving government financial support for Aboriginal people notwithstanding that these are important.

Anishinaabe people from Wabigoon or Eastern Manitoba could argue in a Canadian court that they possess an inherent right to harvest Manomin for commercial purposes and to exercise their customary indigenous management system for the resource. This approach would be fraught with danger, however, especially for the Wabigoon Aboriginals. It would be dangerous in that, if the Aboriginals could not overcome some of the foundational principles of the jurisprudence set down in Canada on the question of Aboriginal title and the nature of treaty rights, it would give the Government of Ontario further political justification to claim the legal management authority for

[76] Harry Thurston, "The Rush to Rice" in 62 Equinox 24 (1992), at p. 24.

[77] Ibid., at p. 32.

Manomin. The province would come under even greater political pressure than it now faces to fully impose a provincial regime for the management of the Manomin resource in the harvest territories that remain in the control of the Wabigoon Anishinaabe people.

In its decision in the Sparrow[78] case, which concerned Aboriginal fishing rights in British Columbia, the provincial Court of Appeal made a statement worth noting here. The Court wrote that:

> The world has changed. The [Aboriginal] right [to fish] must now exist in the context of a parliamentary system of government and a federal division of powers. It cannot be defined as if the ...band had continued to be a self governing entity or as if its members were not members of Canada and residents of British Columbia. Any definition of the existing right must take into account that it exists in the context of an industrial society with all of its complexities and competing interests. [emphasis added][79]

It is true that, on certain issues, the Supreme Court of Canada went significantly beyond the British Columbia Court of Appeal on Aboriginal rights questions in the Sparrow case.[80] Nonetheless, to seek judicial recognition and acceptance of the validity and authority of an indigenous management regime for a resource such as Manomin, especially where it involves the central role of the resource as a source of commercially derived wealth, is fraught with ambiguity and even danger. The recent experience of the Gitksan and Wet'suwet'en people from British Columbia attests to this.[81] I will briefly note some of the salient aspects of these problems in relation to the analysis in Part Three of

[78] Sparrow v. R., [1987] 1 C.N.L.R. 145. (B.C.C.A.).

[79] Ibid., at p. 172.

[80] See Chapter Three of this study.

[81] Delgamuukw (Muldoe) et al. v. R. in Right of British Columbia and Attorney General of Canada, [1991] 5 C.N.L.R. 1 (B.C.S.C.).

this study and present a comprehensive analysis of them in Part Four. I need only say here that recent judicial precedent on these matters continues to affirm a descriptive character for Aboriginal rights based on principles inherent to the doctrine of discovery. The focus of Chapter Three of this study is to draw out the biases against Aboriginal arguments on their rights relating to natural resources that are inherent to this approach to defining Aboriginal rights.

It is now possible to briefly summarize Chapter Two of this study. The character of Aboriginal resource management analyzed in the preceding pages means that its suppression through the imposition of State management authority results in profoundly distressing effects both on Aboriginal resource management itself and on the Aboriginal communities that rely on natural resources. This applies whether the resources involved are important for subsistence or commercial use purposes. It is necessary, therefore, to move beyond questions of harvesting access rights alone and deal with issues that include management authority and livelihood in the late twentieth century context. Otherwise, the conflictual tendencies which characterize State/Aboriginal relationships over natural resources use and management issues will rapidly escalate. This is especially so as the environmental crisis we find ourselves in intensifies.

CHAPTER THREE

ABORIGINAL RIGHTS TO RESOURCES IN CANADIAN LAW:

LEGAL CHARACTERIZATIONS OF INFERIORITY

I. THE PROBLEM

Conservation; is it to become the next frontier of conflict over natural resources between Aboriginal communities and state governments worldwide? The trend seems to be as evident in Canada as it is for any other country. One group of Aboriginals risks penalties[1] in order to protect resources in their ancestral territories.[2] The courts in turn say that the priority of conservation is the responsibility of the State for it to exercise on behalf of all Canadians including Aboriginal peoples.[3] The dissonance between divergent State and Aboriginal paradigms employed in grappling with these issues is pervasive. The situation is especially frustrating to Aboriginal communities where their members continue to rely on customary resource stewardship practices. It is also especially frustrating given that the efficacy of this resource stewardship is now achieving wider recognition.

Judicial reasoning justifying the role of the State in resource conservation in relation to Aboriginal harvesting practices is showing itself as functionally entangled with ethnocentric biases about Aboriginal peoples. These biases are also the source of distinctions in judicial reasoning between Aboriginal subsistence and commerce. It reflects the prejudice that aboriginal societies, being "subsistence" societies, have simply relied on "foraging" for natural resources made available to them

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[1] B.C. (A.G.) v. Andrew and Mount Currie Indian Band, [1991] 4 C.N.L.R. 3 (B.C.C.A.).

[2] See: "Five Concerns of the Lil/Wat Nation", in The Phoenix (Fall, 1991) (Toronto, Ontario), at p. 3.

[3] R. v. Sparrow, [1990] 3 C.N.L.R. 160 (S.C.C.).

by the forces of nature. It implies that they have not had the capacity to substantially alter the environments in which they live. They had no capacity to stress the abundance or the diversity of the resource base in their territories. By this reasoning, even the indigenous right to harvest resources to make a livelihood, can only involve "traditional" practices which do not include "purely" commercial purposes."[4] This age old reasoning, as I will show in this chapter, manifests itself in the judicial rationalization of the authority of the Euro-Canadian State over Aboriginal peoples. It rationalizes the principle of the discovery of Aboriginal societies, as 'primitive' societies, by the colonial 'civilized' powers and the assumption of sovereignty over them. In effect, it serves to exclude Aboriginal peoples from exercising any meaningful authority in the management and conservation of resources vital to their lives as they live them in 1992.

Aboriginal and non-Aboriginal societies alike in Canada now recognize the increasing urgency to achieve effective conservation and sound management of natural resources in order to preserve healthy ecological regions. It is at this point, however, that substantial consensus between the State and Aboriginal peoples begins to break down. Yet, mounting environmental problems may become a paradoxically fortuitous development for Aboriginal communities which still rely heavily on the natural resources of their ancestral lands, and who use distinctive systems of resource management to maintain the resource abundance and diversity that provides them with a substantial portion of the livelihood for many of their members. Given the extent of the crown land base in Canada, the paradox is perhaps more evident in this country than it is in many others.

[4]R. v. Horseman, [1990] 3 C.N.L.R. 95 (S.C.C.), at pp. 117-118.

Finally, while the courts have been emphasizing the role of the State in conservation where the exercise of Aboriginal rights is concerned, the adequacy of State responses to a host of basic conservation issues is now being widely questioned.[5] For example, State control of the commercial exploitation of renewable resources from Aboriginal territories has largely failed to consider the value of biodiversity.[6] Many scholars and professionals working in the field underscore the role that non-governmental organizations have played in generating the limited State responses to urgent conservation issues that have been forthcoming.[7] Some respected scholars have gone so far as to question the whole concept of wildlife conservation as it has been constructed within the centralized framework of State policy and action and its attendant philosophical foundations.[8]

Yet, as I will show in this chapter, the "necessity" of State authority in matters of resource conservation has become one of the primary justifications of the Canadian judiciary in sanctioning what amounts to the imposed State displacement of Aboriginal resource management systems - even when subsistence harvesting rights are involved. A serious examination of the issues of management

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[5]See for example: FPC Research Staff, "Does British Columbia Grow More Than it Cuts?", in 7(1) Forest Planning Canada 46 (1990), at pp. 46-47 wherein the authors note that in 1989 cutting rates for timber in British Columbia were nearly three times the annual growth rate.

[6]One of the most serious examples of this problem concerns provincial forest management policies and practices. See, for example: The Canadian Bar Association. Sustainable Development in Canada (Ottawa: Canadian Bar Association, 1991).

[7]See for example: Susan Abbasi, "International Non-Governmental Co-operation" in V. Martin (ed.), For the Conservation of Earth (Golden, Colorado: Fulcrum Inc.; 1988), at pp. 366-368.

[8]See for example: John A. Livingston. The Fallacy of Wildlife Conservation (Toronto: McClelland and Stewart, 1981).

and conservation, as they are lived on the ground, usually reveals a gulf between Aboriginal and state paradigms of natural resource harvesting, management and conservation which often appears to be unbridgeable. This is the crux of the issue. The gulf is not about the necessity of conservation; it is about how resources will be accessed and how conservation will be achieved where Aboriginal peoples are concerned. This chapter, then, is also an attempt to explore the breadth of this gulf and the numerous complex issues that must be faced in light of the reality of Aboriginal resource management if it is to be bridged.

At least some Canadian judges have been forthright enough to expressly state the presumption for State authority to manage the renewable resource base of Aboriginal lands. In the land claim case which concerned the Gitksan Wet'suwet'en Aboriginal people, the trial court found that:

> "The evidence suggests that the Indians of the territory were, by historical standards, a primitive people....[9]
>
> ...[T]o quote Hobbes, ...Aboriginal life in the territory was, at best, "nasty, brutish and short."[10]

Could this ideological presumption be more subtly re-stated to conceal its ideological content?

> [An Aboriginal right cannot]... promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated and where resources need protection and management. [emphasis added][11]

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[9] Delgamuukw (Munroe) et. al. v. R. in Right of British Columbia and Attorney General of Canada, [1991] 5 C.N.L.R. 1, at p. 21.

[10] Ibid, at p. 11.

[11] R v. Sparrow, supra 3, at p. 181.

The inference of this type of statement seems quite clear. In our complex modern society, resources need to be protected and managed. The corollary is that resources have not historically been managed by relatively "primitive" Aboriginal societies.

The tragedy of this reasoning relates not only to the right of cultures to survive. It also relates to the fact that Euro-Canadian law on Aboriginal territorial rights has flowed from the application of discriminatory assumptions about Aboriginal peoples. It has thereby thrown up serious obstacles against recognizing and accepting the sophistication of Aboriginal resource management. The fact is that Aboriginal societies have historically been able to over-exploit natural resources in their lands. At the same time, they have developed sophisticated and efficient (mostly non-formal) institutional arrangements through which the harvesting of renewable resources has been effectively regulated. Indeed, these arrangements have been key in the nurturing of resource abundance within societies where the value of biologically diverse ecosystems is prized.[12]

Euro-Canadian resource management institutions have prevailed over their non-formal Aboriginal counterparts.[13] But in so doing, they have failed to develop a pluralistic legal framework and practice for the allocation, management and conservation of natural resources that recognizes and accepts the distinctiveness and considerable potential of Aboriginal ecological knowledge and resource

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[12]See for example: Milton M.R. Freeman and Ludwig N. Carbyn (eds). Traditional Knowledge and Renewable Resource Management in Northern Regions (Edmonton: Boreal Institute for Northern Studies, 1988).

[13]Peter J. Usher, "Indigenous Management Systems and the Conservation of Wildlife in the Canadian North", 14(1) Alternatives 3 (1987), at p. 7.

management practice. This situation is changing little in spite of the fact that there is an increasing consensus about the value, complexity and importance of Aboriginal ecological knowledge and resource management practice at the level of scholarly research,[14] as well as at the level of popular discourse.[15]

II. HISTORICAL DEVELOPMENT

(i) Defining Aboriginal Title - Origins

Set within the context of colonialist economic expansion in Canada, the judicial development of the concept of Aboriginal title has been from the beginning, enmeshed with eurocentric notions concerning indigenous peoples and their relationships to the land. Indeed, this has been true in State judicial attitudes concerning Aboriginal peoples throughout the colonial world. As Professor Howard Berman has noted, for example, the development of Aboriginal title in the United States gradually evolved into a patchwork of "...ad hoc, self-serving"[16] qualifications and limitations on Aboriginal title that would require a virtual archaeology to unravel. At the same time, certain leading United States nineteenth century cases on the issue were themselves seized upon by Canadian courts and applied

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[14]See, for example, Fikret Berkes (Ed.), Common Property Resources: Ecology and Community-Based Sustainable Development (London: Belhaven Press, 1989).

[15]"Lost Tribes, Lost Knowledge: When Native Cultures Disappear, So Does a Trove of Scientific and Medical Wisdom", in 138(12) TIME 44 (1991), at p. 46.

[16]H. Berman, "The Concept of Aboriginal Rights in the Early Legal History of the United States", in 27 Buffalo Law Rev. 637, at p. 637.

in an even more austere manner in this country. To the detriment of customary Aboriginal resource management, these cases still constitute the legal foundation of Aboriginal title in Canada. Therefore, any successful effort by Canadian courts to align current concepts of Aboriginal title to conform with emerging human rights standards, that also accounts for the aspirations of Aboriginal peoples in Canada to control their own interaction with the resources of their environments, is not going to occur overnight.

At least the Supreme Canada has noted that, with respect to Aboriginal rights, the traditional judicial language describing Aboriginal peoples will not suffice any longer. In the Simon v. R. case which dealt with Aboriginal treaty rights, the Supreme Court quoted the following passage from the R. v. Syliboy case:

> Treaties are unconstrained Acts of independent powers. But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty, even of ownership, were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it. [emphasis added][17]

The Supreme Court in Simon commented on this terminology:

> It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With regard to the substance of Judge Patterson's words, leaving aside for the moment the question of whether treaties are

[17] R. v. Syliboy, [1929] 1 D.L.R. 307 (S.C.C.), at pp. 313-314, quoted in Simon v. R., [1986] 1 C.N.L.R. 153 (S.C.C.), at p. 164.

> international-type documents, his conclusions on [the Indians'] capability [to enter into a treaty] are not convincing.[18]

The inferior and anomalous status assigned to Indians, as against the superior European civilization, was responsible for the language of Judge Patterson. It served as the basis for concluding that Aboriginal peoples, by virtue of their being discovered, could not possess any status in international law. Thus were the treaties signed with Aboriginal peoples found to be of a sui generis category. Yet Chief Justice Dickson, in spite of recognizing the biases and prejudices of another age, went on to accept a substantive legal principle that has been derived from the biases that led to the terminology in the Syliboy case in the first place, namely that the Treaty of 1752 with the Micmacs could not be regarded as a document possessing international legal status. If the international legal doctrine of inter-temporal law (see accompanying text at note 19) was employed to apply the principle of self-determination to the Micmacs, such a conclusion would be precluded.[19] Words notwithstanding these biases now constitute a tradition in Canadian jurisprudence on the Aboriginal title. This tradition is as old as euro-centrism itself.

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[18] Simon v. R., [1986] C.N.L.R. 153, at p. 165.

[19] With respect to the concept of inter-temporal law, Judge Gros of the World Court in 1953 stated the following: "A legal fact that must be viewed in the light contemporaneous with it...When the legal system by virtue of which the title has been validly created disappears, the right can no longer be claimed under the new legal system unless it conforms to the conditions required by the system" (I.C.J. Pleadings. The Minquiers and Ecrenos Case (United Kingdom/France), 1953 Vol. II, at p. 375).

(ii) The Pre-Colonial Period[20]

The renaissance Spaniard Juan Jines de Sepulveda, a contemporary of Bartolome de Las Casas who himself became renowned for his defence of Indians in the "new" world, "...believed (relying on Aristotle's Politics) that some men are born to slavery. By this reasoning, the Europeans, a superior race, were justified in subjugating the Indians, an inferior race".[21] Sepulveda and Las Casas joined in bitter debate over the issue during 1550 and 1551. Las Casas, distressed at the lack of political will by the Spanish Crown to respect the Indians in the Americas, continued to denounce Spain long after this particular debate was over. He prophesied in his will of March 17, 1564, that: "Surely God will wreak his fury and anger against Spain some day for the unjust wars waged against the American Indians."[22]

This debate on Aboriginal capacity was already well established by 1550. As early as 1532 Francisco de Vitoria, one of the founders of international law, had delivered his treaties on the rights of indigenous peoples under international law. Though he relied partly on the writings of Aristotle, whose natural law theories were synthesized with Christian hierocratic theology by Aquinas, Vitoria

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[20] This sub-section is adapted in from A. Chapeskie. This Land is Whose Land? Aboriginal Territories, Aboriginal Development and the Canadian State (M. A. Thesis (Int'l. Affairs), Carleton University, 1986).

[21] T. Berger. Indigenous Peoples and the Industrial System: The Canadian experience (address to the Conference: Native Resource Control and the Multinational Corporate Challenge, Carnegie Institution of Washington, Washington, D.C., Oct. 12, 1982).

[22] Quoted in: L. Hanke. Aristotle and the American Indians (Bloomington: Indian University Press, 1959), at p. 84.

could still forcefully argue that the Aboriginal peoples of the Americas were imbued with humanity. Further, he found that they possessed social, economic, political, legal and cultural traditions such that they could assert rights to sovereignty under the Law of Nations equal to any European sovereign power.[23]

Vitoria admitted that others were arguing that jurisdiction over the Indians could be imposed over them because of their allegedly uncivilized nature. He even accepted that, if the Indians were found to be "so wanting in intelligence" with no cultural, political or legal institutions, such a course of action would not only be permissable but necessary.[24] However, Vitoria concluded that "the true state of the case is that they are not of unsound mind but have the use of reason. This is clear because there is a certain [i.e. distinct] politics which are orderly arranged and they have definite marriage and magistrates, overlords, laws and workshops and a system of exchange, all of which call for the use of reason; they also have a kind of religion..."[25]

At the same time, according to Vitoria, international law placed obligations, in addition to conferring rights, on the Aboriginal peoples of the Americas as it did with all nations. The Indians had to allow Europeans to sojourn and travel in their territories just as Europeans had to do with each other; the Spaniards could peaceably proselytize among the Indians; they could use their resources if the Indians

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[23]F. de Vitoria, De Indis et de Iure Belli Reflectiones (E. Nys, ed.) (Washington: The Carnegie Institution of Washington, 1971) (1st Relictio, 3rd Edition, Titles 21, 23, 24 (esp. tit. 24)), at p. 128.

[24]Ibid, at pp. 160-161.

[25]Ibid, at p. 127.

had given other nations access to them. The same applied to goods of common use if the Indians had allowed other foreigners to have such access to them. All of this was permissable provided that no harm was done to the Indians.[26]

According to Vitoria, because the Indians of the Americas were nations, they were subject to the universal character of the Law of Nations. It was "...clearly capable of conferring rights and creating obligations [when reached through the] consensus of the greater part of the whole world [emphasis added]."[27] The problem with his conclusion, however, is that Vitoria's Law of Nations had not been reached through the consensus of the greater part of the whole world. Rather, it reflected what he found to be the practices of the greater part of the European World! Yet, in spite of these shortcomings, many of Vitoria's ideas were adopted by subsequent writers of classical international legal texts. They provided a consistent and substantive alternative to the application of self-serving policies in different parts of the world by colonial empires and their successor colonial and post-colonial governments. Though these practices were argued in cases in other jurisdictions (the analysis in the following section of this study deals with the relevant cases from the United States) which profoundly influenced the development of Aboriginal title in Canada, they were never applied on more than an ad hoc basis. As a result, States have developed a jurisprudential tradition on Aboriginal land rights which have created what Thomas Berger has termed "a long and terrible

[26]Ibid, at pp. 151-56.

[27]Ibid, at p. 162.

shadow."[28] In turn, this has had deleterious effects on Aboriginal societies and their relationships to their lands. At the same time, Berger has found that encouraging signs may have appeared which indicate that this legacy of discrimination may be drawing to a close.[29]

I believe, however, that the signs which have appeared thus far from Canadian courts are much more ambiguous when the case law is measured up against the reality of contemporary indigenous resource management. Indeed, in my analysis of the emerging content and substance of Canadian Aboriginal rights law which is set out in the following sections, I hope to draw out the perils that new trends in the development of this law is presenting to the reality of Aboriginal resource management today.

(iii) From St. Catherine's to Guerin

The early nineteenth century marked a period of intense activity by the Supreme Court of the United States on questions of Aboriginal title. As early as 1810, the Supreme Court of the United States held that the "occupancy" right of Indians in that country "...until it is legally extinguished, is not such as to be absolutely repugnant to the seisin in fee [i.e., the underlying superior title] on the part of the state."[30] The most important of the U.S. cases, however, in relation to the Canadian jurisprudence on Aboriginal title was issued in 1823. As former Justice Hall stated in the Calder

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[28]Thomas R. Berger. A Long and Terrible Shadow: White Values, Native Rights in the Americas 1492 - 1992. (Vancouver: Douglas and McIntyre, 1991).

[29]Ibid, at pp. 154-156.

[30]Fletcher v. Peck 1810, 10 U.S. (8 Wheat) 543 (U.S.S.C.), at pp. 573-574.

decision:

> The case most frequently quoted with approval dealing with the nature of Aboriginal rights is Johnson v. McIntosh. It is the 'locus classicus' of the principles governing Aboriginal title.[31]

In the case of Johnson v. McIntosh, the U.S. Supreme Court held that non-Aboriginal title to North American lands was based upon the principle of discovery:

> The principle was, that discovery gave title to the government by whose subjects, or whose authority, it was made, against all other European Governments, which title might be consummated by possession.
>
> The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it...It was a right which all asserted for themselves. The rights thus acquired being exclusive, no other power could interpose between them.
>
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they please, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[32]

This finding of the United States Supreme Court was to become critical in the Canadian Aboriginal territorial rights context. Not only did it form the basis of nineteenth century Canadian jurisprudence on Aboriginal title but, except for the first sentence, these words were quoted exactly

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[31] Calder et al. v. Attorney General of British Columbia, [1973] S.C.R. 313 (S.C.C.), at p. 3.

[32] Johnson v. McIntosh (1823), 21 U.S. (8 Wheat) 543 (U.S.S.C.), at pp. 573-574.

by the Supreme Court of Canada in its landmark 1984 re-statement of Aboriginal title in the "Musqueam" case.[33]

Howard Berman has concluded that the Johnson case stands as a "...centrepiece for the judicial diminution..of native rights."[34] He also wrote:

> It is strange that Marshall should analyze the Indian-European relationship under the rights adhering to discovery. An extensive literature on the law of nations existed concerning the rights on non-European peoples. It cannot be assumed that Marshall was ignorant of the law of nations as it had been conceived up to this time. The writings of classical publicists as Vattel, Grotius, Puffendorf, and others were introduced in the pleadings of Fletcher v. Peck and Johnson v. McIntosh to argue the validity of Indian sovereignty. Moreover, these writings were well known to legal scholars of his day. It is clear that this omission was by deliberate choice and reflected his intention to base his analysis on other grounds.[35]

Vitoria, for example, had written about the application of "discovery" to the Americas that:

> Not much...need be said about this title of ours, because, as proved above, the barbarians [for Europeans like Vitoria all non-Christian, non-Europeans were barbarians] were true-owners both from the public and from the private standpoint. Now the rule of the law of nations is that what belongs to nobody is granted to the first occupant... And so as the object in question was not without an owner, it does not fall under the title which we are discussing...[B]y itself, it gives no support to a seizure to the aborigines any more than if it had been they who discovered us. [emphasis added][36]

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[33]Guerin et al. v. The Queen and National Indian Brotherhood [1985], 1 C.N.L.R. 120 (S.C.C.), p. 133. See also: Reg. v. Sec. State for Foreign and Commonwealth Affairs, Ex Parte Indian Assoc. of Alberta, (1982) 2 W.L.R. 641, at pp. 650-653 for a more recent application of the same principle by Lord Denning of the Court of Appeal in England.

[34]Berman, supra 16.

[35]Ibid, at p. 646; see also: Johnson, supra 17, at pp. 567-568.

[36]Vitoria, supra 21, at pp. 138-139.

The writings of the Vitoria have reverberated through history in other writers of classical texts of international law. Following in the footsteps of Vitoria, Hugo Grotius wrote in The Rights of War and Peace, on the rights of Indians to ownership of their territories that

> ...for the exercise of ownership, neither moral nor religious virtue nor intellectual exercise is a requirement[37].

In his text, the Freedom of the Seas, Grotius wrote that it was heresy

> [t]o believe that infidels are not masters of their own property, consequently to take from them their possessions on account of their religious beliefs [and it] is no less theft and robbery than it would be in the case of Christians.... In fact I know of no law against such believers as regards to their temporal positions. Against them no King, no Emperor not even the Roman Church, can declare war for the purpose of occupying their lands or subjecting them to temporal sway[38].

Samuel Puffendorf, who was a contemporary of Grotius, wrote in his De Jure Naturae Et Gentium that Grotius and Vitoria should have held that Aboriginal peoples were not even required to accept foreign visitors amongst themselves. Further, aboriginal peoples according to Puffendorf, were at liberty to prescribe limitations on who could travel amongst them by giving consideration to the purpose of such sojourning and the length of time that it would involve.[39] Puffendorf held that these rights derived out of the status of the Indians as property "holders".

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[37] Hugo Grotius. The Rights of War and Peace (London, 1738), Volume 2, at p. 550.

[38] Hugo Grotius. The Freedom of the Seas (New York: Oxford University Press, 1916), at pp.13, 19.

[39] Samuel Puffendorf. De Jure Naturae Et Gentium in J. B. Scott, De Jure Naturae Et Gentium Libri Octo, Carnegie Classics of International Law, Volume 2, (Oxford: The Clarendon Press, 1934), at pp. 364-66.

In the 18th century, Christian Wolff and Emmerich de Vattel wrote tracts on the law of nations. Wolff, often considered the pre-eminent international jurist of the 18th century, deliberately considered the issue of nomadic groups. He held that even a small group of nomadic people who had

> ...no settled abode, but wander through the uncultivated wilds...they are understood to have tacitly agreed that the lands in that territory in which they change their abodes as they please, are held in common, subject to the use of individuals, and it is not to be doubted but that it is their intention that they should not be deprived of that use by outsiders. Therefore, they are supposed to have occupied that territory as far as concerns the lands subject to their use, and consequently, to have jointly acquired ownership of these lands, so that the use of them belongs to all without distinctions. [emphasis added][40]

Wolff further declared that:

> Ownership is not lost by non-use. And if separate families wander through uncultivated places, they intend a use of the places only in alteration, a thing which is readily evident, if only you turn your attention to the reason which impels them to wander through uncultivated places.[41]

Wolff recognized in the 18th Century that Aboriginal people were not living in a "state of nature" but utilized distinct forms of common property land tenure which gave them rights of ownership to lands from which they could not be dispossessed. This was a remarkable perception that land tenure could be organized within social contexts radically different from those of most of Europe at that time.

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[40]Christian Wolff. Ius Gentium [The Law of Nations] (Oxford The Clarendon Press, 1934) at p. 157.

[41]Ibid. at p. 160.

For Emmerich de Vattel, however, the question of pressures leading to colonization had to be considered. He wrote on the law of nations that

> every nation... is ...obliged by the law of the nations to cultivate the land that has fallen to its share.... There are others who, to avoid labour, choose to live only by hunting and their flocks. Those who still pursue this idle mode of life have ... no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands. Thus, though the conquest of the civilized empires of Peru and Mexico were a notorious usurpation, the establishment of many colonies on the continent of North America might, on their confining themselves within just bounds be extremely lawful. [emphasis added][42]

This type of reasoning is still implicitly being employed by Canadian Courts to justify the discovery principle. In the Gitksan Wet'suwet'en case the court went further to both liberally and explicitly rely on it while ignoring much of what has been written contrary to it.[43]

But even Vattel also wrote that

> every nation that governs itself, under any form [what]soever ...is a sovereign State.... To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent, that is, that it govern itself by its own authority and laws. [emphasis added][44]

Further, Vattel had gone so far as to follow Wolff's argument about "nomadic" peoples by stating that:

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[42]E. de Vattel, The Law of Nations (J. Chitty trans., 1852) (Philadelphia: T. and J.W. Johnson, Law Book sellers, 1852), bk 1-81, at pp. 35-6.

[43]Delgamuukw (Muldoe) et al v. R. in Right of British Columbia and Attorney general of Canada, [1991] 5 C.N.L.R. 1 (B.C.S.C.), at pp. 68-69.

[44]E. de Vattel, supra 42, bk-1-4, at p. 2.

> Families wandering in a country, as the nations of shepherds who pass over it, according as their wants require, possess it in common, it belongs to them exclusively of all other nations and we cannot without injustice deprive them of the countries which are appropriated to their use.... No other nation has a right to reduce the bounds, unless it be under an absolute want of land. For, in fine, they possess their country, they make use of it after, their manner, they reap from it an advantage suitable to their manner of life, and in which they receive laws from no one. [emphasis added][45]

In relation to the Johnson v. McIntosh case, Berman has noted how, the description of Aboriginal title by the United States Supreme Court clearly reflected the ethnocentric bias of the court:

> [The court's] formulation of Indian land tenure in terms of "occupancy" rights was conceptually identical to [John] Locke's description of land holding in the state of nature as a "tenancy in common". The implication of Locke's phrase is that the actual property right is inchoate and only arises at the point at which individual possession with a right of exclusion is acknowledged. The reality of a sophisticated nation or community inhabiting territory cooperatively, with land usages rooted in principles other than exclusivity [eg: private property or state regulated lands where resources are made available to private users on a competitive basis], was apparently beyond the scope of 17th century English thought. The result is an anglophone legal system with an inherent culture bias that attributes an anomalous and inferior status to non-European form of land tenure.[46]

This is the crux of the matter. Because of it, even today, commentators continue to grapple with the transformation of indigenous peoples from being sovereign to being "...quasi-sovereign entities living under the Crown's protection".[47] The philosophical foundations of this ethnocentrism continue to make rapproachment between Aboriginal and non-Aboriginal paradigms of autonomy

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[45]Ibid.

[46]Berman, supra 16, at p. 644.

[47]Brian Slattery, "First Nations and the Constitution: A Question of Trust", in 71(2) Canadian Bar Review 261 (1992), at p. 272.

extremely difficult.

Brian Slattery has written that there are common principles which relate to the notion of governmental trust in Aboriginal and non-Aboriginal philosophies that have relevance for constitutional development today. He refers to John Locke on this issue who wrote:

> ...Political Power is the Power which every Man, having in the state of Nature, has given up into the hands of the Society, and then to the Governours, whom the Society hath set over it self, with this express or tacit Trust, That it shall be imployed for their good, and the preservation of their property.[48]

Slattery also refers to Professor Oren Lyons, an Aboriginal and peace-keeper with the Six Nations who himself wrote the following on this social trust issue:

> My people, the Iroquois, were very powerful people. They had a coalition of forces that was governed by two fires: the spiritual fire and the political fire. The central fire, of course, was the spiritual fire. The primary law of Indian government is the spiritual law. Spirituality is the highest form of politics, and our spirituality is directly involved in government. As chiefs we are told that our first and most important duty is to see that the spiritual ceremonies are carried out. Without the ceremonies, one does not have a basis to conduct government for the welfare of the people. This is not only for our people but for the good of all living things in general. So we are told first to conduct the ceremonies on time, in the proper manner, and then to sit in council for the welfare of our people and of all life.
>
> There is another fundamental understanding in Indian government, and it is that all life is equal. Whether it is the growing life of trees, plants, or animals, or whether it is human, all life is equal. Furthermore, all human beings, black, red, yellow and white, are equal and of the same family.... It has been the mandate of our people to

[48] J. Locke. Two Treatises of Government (P. Laslett (ed.) (Cambridge: Cambridge University Press, 1965), at p. 409.

look after the welfare of the land and its life.[49]

In light of the preceding analysis on the origins of Aboriginal title, it should be apparent that the problem between Aboriginal and State paradigms of social trust responsibilities for the stewardship of natural resources is not adequately explained by the existence of trust concepts themselves within each of the two paradigms. Rather, the conflict concerns the treatment of "property" and the institutional arrangements that will be required to modify "...the foundations of the current land system"[50] in a way that recognizes the validity of Aboriginal paradigms. Overcoming the ethnocentrism as expressed in Locke's "state of nature" must inevitably be central to this process. Once again the issue of legal pluralism within the State looms large. This issue of pluralism, or the lack of it, is what has determined the current complexion of the concepts of Aboriginal title and rights in Canadian law. Most often the issue has been avoided.

The U.S. Supreme Court, in the Johnson case, said it did not want "...to enter into the controversy, whether agriculturalists, merchants, and manufacturers have a right on abstract principles, to expel hunters from their territory they possess, or to contract their limits".[51] But immediately after stating that it was not deciding the issues on any basis of cultural superiority, the court asserted that it was

[49]O. Lyons, "Spirituality, Equality, and Natural Law", in L. Little Bear, M. Boldt and J.A. Long (eds). Pathways to Self-Determination: Canadian Indians and the Canadian State (Toronto: University of Toronto Press, 1984), at pp. 5-6.

[50]Slattery, supra 47, at p. 264.

[51]Johnson v. McIntosh, supra 32 at p. 588.

obligated to ratify the 'political process' no matter what its ideological origins were.[52]

It is revealing in the Canadian context that, in the Bear Island case, which remains the judicial decision that has dealt most explicitly with the scope of specific Aboriginal rights in a particular Aboriginal setting, Mr. Justice Steele frankly admitted the desirability of legitimating the political basis of past judicial decisions, and by implication the decisions themselves. He remarked on a report of Commissioners made to the Legislative Assembly of Canada in 1845:

> In that report, reference was made to Vattel on the Law of Nations indicating that the Commissioners considered that Indians did not have any proprietary right in the lands [because they were said not to be practising settled agriculture], that the Indian occupation could not be considered as true and legal habitation, and that the Europeans were lawfully entitled to take possession of the land and to settle it with colonies [Vattel had written that such usurpation might be lawful, and in any event, his opinion never gained general acceptance among international legal scholars[53]]. Whether or not this was proper law or a proper view, it was the view in 1845 of persons in what is now Ontario, and it must be borne in mind in interpreting any legislation or contracts or treaties made at that time. [emphasis added][54]

In his judgment, Mr. Justice Steele chose not to follow the Worcester v. Georgia[55] precedent when interpreting the effects of the Royal Proclamation of 1763. Chief Justice Marshall of the U.S. Supreme Court had written in Worcester that the newly independent United States in its early years was (as the British had been before it as was evidenced in the Royal Proclamation), eager to sign

[52] Ibid.

[53] See: Maureen Davies, "Aspects of Aboriginal Rights in International Law" in B. Morse (ed.). Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada (Ottawa: Carleton University Press, 1985), at pp. 23-24.

[54] Attorney General for Ontario v. Bear Island Foundation et al., [1985] 1 C.N.L.R. 1 (S.C.O.), at p. 32.

[55] Worcester v. Georgia (1831), 31 U.S. (6 Peters) 515 (U.S.S.C.).

treaties of peace and assistance with Indian nations. Any language of protection for Indians was perceived by them as confirming that the government would restrain encroachment by settlers onto Indian lands.[56] Although in Johnson, Marshall had held that the basis of conquest lies in the fact of discovery itself,[57] he subsequently repudiated this ruling in the Worcester case.[58] Yet, Justice Steele in the Bear Island case chose to rely on Johnson when he wrote that:

> as a result of conquest [Mr. Justice Steele, in this part of his decision, seems to be affirming the proposition that conquest includes the settlement or even the simple discovery of Aboriginal territories][59], on Proclamation lands Aboriginal title is personal and usufructory, and exists solely at the pleasure of the crown. [emphasis added][60]

Steele arrived at this conclusion by interpreting the meaning of the Royal Proclamation contrary to the Worcester decision:

> To conclude, in 1763, George III, with the advice of his United Kingdom ministers, did not grant ownership of vast tracts of land to Indian bands subject to a limited right of possession by repurchase, surrender or conquest when a war had just been fought [by the English against the French] to acquire those lands. At that time Europeans did not consider Indians Equal to themselves and it is inconceivable that the King would have made such vast grants to undefined bands, thus restricting his European subjects from occupying these lands in the future except at great expense. [emphasis added][61]

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[56]Ibid, at p. 552.

[57]Johnson v. McIntosh, supra 32, p. 591.

[58]Supra 36, at pp. 544-45. Sell also: Cherokee Nation v. Georgia (1831), 30 U.S. (5 Peters) 1, p. at 17; see also is this regard Berman, supra 14, at p. 660: "Worcester stands for the principle of complete sovereign rights of the Cherokee nation, and for the categorical repudiation of the notion of conquest advanced in Johnson."

[59]See Johnson v McIntosh, supra 32.

[60]Supra, 54, at pp. 32-33.

[61]Ibid, at pp. 33-34.

Bear in mind, that, according to most of the classical texts of international law on this matter, the European powers could not even acquire any of those lands without Aboriginal consent. In Worcester, the Marshall court had ruled that it was

> ...difficult to comprehend the proposition that the inhabitants of either quarter of the globe (America....inhabited [by Aboriginal peoples] and independent of the rest of the world, [or]...Europe) could have the rightful original claims of deminion over the inhabitants of the other, or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient predecessors.[62]

This 'discovery', according to Chief Justice Marshall in Worcester only gave the discoverer the right to lawfully purchase territories of Aboriginal peoples when they felt disposed to sell such lands.[63]

Yet, when Aboriginal rights came to receive judicial treatment in Canada in the precedent setting St. Catherine's Milling case, the trial court could nonetheless hold that:

> The relations between the government and the Indians change upon the establishment of reserves. While in the nomadic state...[Indians] may or may not choose to treat with the Crown for the extinction of their primitive right of occupancy. If they refuse ...the government is not hampered, but has perfect liberty to proceed with the settlement and development of the country, and so, sooner or later to depose them.
>
> If however, [Indians] elect to treat they then become, in a special sense, wards of the state and have their rights assured in perpetuity to the usual land . In regard to this the tribe enjoys practically all the advantages and safeguards of private resident proprietors...Before the appropriation of reserves the Indians have no claim except upon the bounty and benevolence of the Crown. After the appropriation, they become invested with a legally recognized tenure of defined lands . [emphasis added][64]

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[62]Worcester, supra 55, at pp. 542-43.

[63]Mitchell v. United States (1835), 34 U.S. (U.S.S.C.) (9 Peters) 711, at p. 745.

[64]R. v. Catherine's Milling and Lumber Company (1885), 10 O.R. 196, at pp. 229-30.

The ethnocentric bias justifying this reasoning is self-evident. It is why the trial court in St. Catherine's Milling could go on to clarify the "primitive right of occupancy" of the Indians:

> Underlying the whole there is an affirmance of the constitutional proposition that the claim of the Indians by virtue of their original occupation is not such as to give any title to the land itself, but only serves to commend them to consideration and liberality of the Government upon their displacement; that the surrender to the Crown by the Indians of any territory adds nothing in law to the strength of the title paramount [of the Crown].[65]

When St. Catherine's reached the Privy Council in England, the inferior status of Aboriginal title became entrenched in the Canadian legal system:

> The policy of these administrations has been all along the same in this respect, that the Indian habitants have been precluded from entering into any transaction with a subject [of the Crown] for the sale of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract [66] duly ratified in a meeting of their chiefs or headmen convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the Royal Proclamation in favour of all tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that in as much as the Proclamation recites that the territories thereby reserved for Indians had never "been ceded to or repurchased by" the Crown, the entire property of the land remained with them. [emphasis added][67]
>
> That inference is, however, at variance with the terms of their [Royal Proclamation], which show that the tenure of the Indians was a personal and usufructuary right,

[65]Ibid, at p. 234.

[66]Here we have the court implying that the treaties with Indians should be viewed as "contracts" even though they were stated to be treaties.

[67]Accepting this proposition would have been tantamount to accepting the validity of some form of Indian sovereignty. This the Privy Council was not willing to do.

> dependent upon the good will of the sovereign. The lands reserved are expressly stated to be "parts of our dominion and territories"; and is declared to be the will and pleasure of the sovereign, that, "for the present", they shall be reserved for the use of the Indians, as their hunting grounds under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian rights, but their Lordships do not consider it necessary to express any opinion on the point[68]. It appears to them that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominion whenever that title was surrendered or otherwise extinguished.
>
> The Crown has all along had a proprietary estate in the land, upon which the Indian title was a mere burden. [emphasis added][69]

In reaching its decision, the Privy Council relied chiefly on the Johnson v. McIntosh decision from the United States where the Supreme Court of that country had initially constructed the application of the doctrines of conquest and discovery to Aboriginal lands. The Privy Council ignored the later case of Worcester v. Georgia. As I have already noted, the Worcester decision had repudiated the conquest doctrine enunciated earlier in Johnson and had affirmed much stronger principles endorsing Aboriginal sovereignty. The above passages from the trial and Privy Council decisions in the St. Catherine's Milling case have been reiterated here because they, and the assumptions concerning Aboriginal peoples that they are based on, have continued to direct judicial reasoning in Canada on the question of Aboriginal title right up to the present.

The upshot of the foregoing is that, in the 1984 Guerin decision of the Supreme Court of Canada,

[68] Leaving the definition of the precise extent of aboriginal rights open would clear the way for legitimating federal, provincial and territorial jurisdiction over aboriginal peoples in Canada.

[69] St. Catherine's Milling and Lumber Co., v. R. (1888), 14 App. Cas. 46 (P.C.), pp. 54-55, 58. cf. the Guerin case, Infra, at note 70, at p. 33.

the "discovery" principle of Johnson v. McIntosh was reaffirmed. It is true that, in Guerin, the Supreme Court of Canada went beyond St. Catherine's Milling to find that Aboriginal title exists independently of the Royal Proclamation. However, the Court did not radically change the personal nature of that title as "... a mere qualification of or burden on the radical or final title of the sovereign".[70] The ethnocentrism inherent in this reasoning remains based on a near total lack of awareness of the sophistication of Aboriginal concepts of land tenure. It belies a primitive understanding of Aboriginal peoples' relationships to their lands and resources. The recognition accorded earlier to Aboriginal societies that practiced their own customs and possessed their own institutions of government and law by most of the writers of classical international law texts, including Vitoria, continues to be systematically distorted or ignored.

This judicial bias has led to a situation in Canada where Aboriginal title has most recently been authoritatively stated in the Guerin case as follows:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is vested in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is it completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee [it appears that the court here is struggling to comprehend the nature of Aboriginal title through analogy to a curious blending of private property concepts and broader notions concerning the "collective" aspect of Aboriginal rights], but it is also true, as will presently appear, that the interest 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...The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is

[70] Guerin et al. v. The Queen and the National Indian Brotherhood, supra 33, at p. 134 (quoting A.G. Que. v. A. G. Can., [1921] 1 A.C. 401 (P.C.), at p. 403 (the 'Star Chrome' case)).

surrendered.[71]

The Supreme Court of Canada was careful to also issue the following caveat in Guerin:

> Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.[72]

As I will indicate in the analysis which follows, the formulation of the concept of Aboriginal title by the Guerin court does little to remove the enduring uncertainties about its content. The consideration of Aboriginal title in the Bear Island case at the trial level was formulated through reference to a description of Aboriginal title that is grounded in the ethnocentric doctrine of 'discovery'. This is the same doctrine that the Supreme Court of Canada relied on to set out its description of Aboriginal title in the Guerin case. The findings of Steele, J. in this regard, for a given case context, simply represent a comprehensive and rationally applied description of Aboriginal title made possible by the doctrine of discovery. It has been no different in the more recent Gitksan Wet'suwet'en case as I will point out in the next section of this chapter.

In R. v. Sparrow the Supreme Court of Canada has held that, in the renewed constitutional framework of Canada, where existing Aboriginal and treaty rights have been recognized and affirmed, those rights may not now be extinguished by legislative means.[73] Federal and provincial governments

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[71] Ibid. at p. 136.

[72] Ibid.

[73] R. v. Sparrow, [1990] 3 C.N.L.R. 160 (S.C.C.), at pp. 171-176.

have been held to have agreed to this by constitutionally recognizing and affirming Aboriginal and Treaty rights. But nowhere does this situation necessarily imply the recognition of autonomy necessary for the free exercise of customary Aboriginal resource management. Indeed, the inherent bias in the judicial description of Aboriginal title has all along and still continues to mitigate against this.

After the Guerin decision of the Supreme Court of Canada, Steele, J. in Bear Island was still able to accept "...the proposition in Kruger and Manuel v. The Queen...that any determination [of Aboriginal rights] should be restricted to the specific area and not be made on a global basis."[74] Then, seizing on the "reserved for them as their hunting grounds" terminology of the Royal Proclamation, as interpreted in the St. Catherine's Milling case by the Privy Council, and referring to the George[75] and Tennisco[76] cases, Steele J. joined a long and still growing line of jurists in stating that he could:

> ...not accept the defendant's argument that a broad and liberal interpretation of the Royal Proclamation gives the Indians the right to use the lands for any purpose that they choose over the succeeding centuries. The essence of aboriginal rights is the right of the Indians to continue to live on their lands as their forefathers lived. It is nothing more and nothing less than that.[77]

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[74]Bear Island, supra 54, at p. 34.

[75]A.G. Can. v. George, [1964] 2 O.R. 429 (O.C.A.), at p. 432.

[76]R. v. Tennisco, [1981] 4 C.N.L.R. 138 (S.C.O.).

[77]Supra 54 at p. 34.

The "liberal interpretative principle" affirmed by the Supreme Court of Canada in the Sparrow case, now means that an Aboriginal right "...may be exercised in a contemporary manner"[78] and "...cannot be read so as to incorporate the specific manner in which it was regulated before 1982."[79] But it does little to change the scope of Aboriginal and treaty rights and, flowing from this, the recognition of Aboriginal autonomy necessary for the exercise of customary resource management. In the context of recognizing and accepting the Manomin management system of the Wabigoon Anishinaabe people, the principle that existing Aboriginal and treaty rights may not now be regulated as they might have been prior to the Proclamation of the Constitution Act, 1982 can only be a starting point.[80] It simply does not, in itself, come to terms with the issues pertaining to the management of resources that are central to the livelihoods of northern Aboriginal people today.

III. RECENT DEVELOPMENTS - DO THEY MAKE A DIFFERENCE?

(i) General Comment

It is worth re-stating a passage that I first quoted in the Introduction to this study:

> Hunting - gathering involves subsisting primarily on wild plants and animals. Unlike agriculture, hunting - gathering does not involve efforts to regulate the growth and

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[78] R. v. Sparrow, supra 73, at p. 175.

[79] Ibid, at p. 170.

[80] Ibid, at pp. 169-171. For a discussion of the protection afforded to Aboriginal peoples by s.35 of the Constitution Act, 1982 from a different perspective see: William Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee", in 22 U.B.C. Law Rev. 207 (1987).

reproduction of the life forms on which people depend.[81]

Statements on Aboriginal territoriality like the above take on special significance in the context of the judicial elaboration of Aboriginal rights in decisions like those of the Bear Island and Delgamuukw cases. In Bear Island, for example, the trial court held that, had the Aboriginal community involved not been a signatory to the Robinson Huron Treaty of 1850, its members would have been able to exercise the following Aboriginal rights today:

1. to hunt all animals for food, clothing and personal use and adornment;

2. to exclusively trap furbearers, which right was enjoyed by the individual family and to sell the furs;

3. to fish;

4. to use herbs, berries, roots, maple sugar and other natural products for foods, medicines and dyes;

5. to use ochre or vermilion for dyes;

6. to use chert, quartzite and stones for tools [eg. tomahawks] and other implements (but not extensive mining);

7. to use clay for pottery, pipes and ornaments;

8. to use trees, bark, and furs for housing (but not lumbering) [eg., using poles for teepee frames, etc.];

9. to use trees and bark for fires, canoes, sleighs and snowshoes.

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[81] Fred Plog, Clifford J. Jolly and Daniel B. Bates. Anthropology: Discussions, Adaptation, and Evolution (New York: Alfred A. Knopf, 1980) (Second edition), at p. 210.

> All of the above are traditional uses for basic survival and personal ornamentation existing as of 1763. [emphasis added][82]

This case, and those which have followed it, make no mention of rights to manage resources. In Bear Island, even the right to sell furs, where it arose, was placed within the context of survival.

When the Bear Island case was considered by the Ontario Court of Appeal, the Court rejected the submissions on Aboriginal title made by the Temagami Anishinaabe people. It affirmed the decision of Steele J. at trial that the Aboriginal people had surrendered their Aboriginal rights by virtue of being signatories to the Robinson-Huron Treaty of 1850. More significantly, however, for the purposes of this analysis, the court also held that:

> We are prepared to assume, without deciding, that the Temagami Indians in 1850 enjoyed Aboriginal rights to at least some part of the Land Claim area and that these rights extended to the use and occupation of the lands in the traditional ways of a Band. [emphasis added][83]

Without examining the specific nature of aboriginal rights in the case, the Supreme Court of Canada affirmed the judgments of the lower courts in the Bear Island case. The court ruled that, in this case, the Aboriginal rights in question "...had been extinguished either by the Robinson Huron Treaty, or by the subsequent adherence to that treaty by the Indians, or because the treaty

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[82] A.G. Ont. v. Bear Island Foundation et al., supra 54, at p. 39.

[83] Ontario (A.G.) v. Bear Island Foundation, [1989] 2. C.N.L.R. 73 (O.C.A.), at p. 78.

constituted a unilateral extinguishment by the sovereign". [emphasis added][84]

If ideological bias about the relationships of Aboriginal peoples to their territories is to be found throughout scholarly literature, we should not be surprised to learn that they have permeated judicial decisions dealing with the territorial rights possessed by indigenous peoples in Canada. Yet distinct forms of Aboriginal resource management are central to the identity of northern indigenous communities and still remains so. The ideological bias in judicial reasoning concerning Aboriginal rights is pervasive. Peter Elias, for example, has noted that:

> The concept of tradition has become central in the adjudication of matters of Aboriginal rights.[85]

As courts continue to adjudicate Aboriginal and treaty rights cases according to the characterization of subsistence it makes sense why communities have noted that Aboriginal and treaty rights may be being relegated to a "...fossilized or primitive state."[86]

In Aboriginal and treaty rights cases, courts continually refer to "[the] traditional Aboriginal use of the lands,"[87] "the traditional...way of life of their ancestors",[88] "lands traditionally reserved...for [the]

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[84]Ontario (A.G.) v. Bear Island Foundation, [1991] 3 C.N.L.R. 79 (S.C.C.), at p. 81.

[85]P.D. Elias, "Rights and Research, The Role of the Social Sciences in the Legal and Political Resolution of Land Claims and Questions of Aboriginal Rights", [1989] 1 C.N.L.R. 1, at p. 24.

[86]Nigel Bankes, "Judicial Attitudes to Aboriginal Resource Rights and Title", 13 Newsletter of the Canadian Institute of Resources Law 1, at pp. 1-4 (Dec. 1985).

[87] Re: Paulette et al. and Registrar of Titles (No. 2) (1974), 42 D. L. R. (3d) 8 (N.W.T.S.C.), at p. 33.

purpose of [hunting and fishing],"[89] "their traditional and historic right to hunt and fish for food," [90] "the traditional hunting grounds of the...Band","[91] and, more recently, "...the use and occupation of the lands in the traditional ways of a Band,[92] "...their traditional way of life"[93] and "...consumption for subsistence..., [and] also ...on ceremonial and social occasions."[94] These descriptions are problematic from the point of view of Aboriginal resource management. They reflect the inferior, anomalous status of Aboriginal territorial rights in the law of the 'discovering sovereign'.

In setting out a new set of principles underlying subsistence Aboriginal harvesting rights in light of constitutional provisions, the Supreme Court of Canada ruled in the Sparrow case that:

> While British policy towards the native population was based on respect for their right to occupy [in common] their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the crown.[95]

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[88] Baker Lake (Hamlet) et al. v. Minister of Indian Affairs and Northern Development, [1979] 3 C.N.L.R. 17 (F.C.T.D.), at p. 30.

[89] R. v. Tennisco, supra 76, at p. 142.

[90] R. v. Taylor and Williams, [1981] 3 C.N.L.R. 114 (O.C.A.), at p. 124.

[91] Dick v. A. G. Canada and A. G. Nova Scotia, [1985] 4 C.N.L.R. 55, at p. 57.

[92] Bear Island, supra 54.

[93] R. v. Horseman, [1990] 3 C.N.L.R. 95 (S.C.C.), at p. 117.

[94] R. v. Sparrow, supra 73, at p. 175.

[95] Ibid, at p. 177.

The next section of this study indicates that the concept of Aboriginal tradition, as an overarching judicial concept used in articulating Aboriginal and treaty rights, reflects a general tendency to deny either the existence of indigenous wildlife management systems or their validity in light of changed circumstances. In failing to recognize these systems, the courts have allowed jurisdictional encroachment into Aboriginal territories by Euro-Canadian governments. This has, as we have seen in the community with which this study concerned itself with earlier, added considerable stress to Aboriginal life in northern communities.

(ii) From Guerin to Sparrow

Since the passage of the Constitution Act, 1982, any discussion of Aboriginal management rights over resources on the Crown land base of Canada has, for the most part, remained absent from Canadian jurisprudence on Aboriginal rights. Judicial deliberations on hunting and fishing rights, whether under Aboriginal or treaty rights categories, have been concerned with questions of access rights for Aboriginal people. Indeed, it is only now that cases are moving through the courts where the scope of Aboriginal rights in particular circumstances is an issue which is forcing itself onto the table. Profound implications for the customary indigenous management of these resources will be the inevitable fallout for these decisions even if they are only implicit. This is why careful scrutiny of judicial developments on these issues is worthwhile.

Within treaty territories, as much as on non-treaty lands, hunting and fishing rights have most often been described as the rights "...of Indians to hunt and fish for food on unoccupied crown lands."[96] Since the validity and even the existence of indigenous wildlife management systems have not traditionally been recognized by Canadian courts, they have tended to compartmentalize concepts of Aboriginal and treaty rights in terms of access to resources and the management of those resources into conceptually discrete categories. Jurisdiction over management has, until the present time, been recognized as accruing to the State. State managers, unless otherwise justified, must manage around Aboriginal access rights and the priorities those access rights for harvesting give to Aboriginal peoples. Aboriginal and treaty rights largely accrue to Aboriginal peoples as access rights to harvest resources for subsistence whether or not they are classified as personal, group or collective rights. [97]

In the Sparrow case, the British Columbia Court of Appeal immersed itself in deliberations upon what eventually became a landmark case on the merits of Aboriginal rights arguments. It paid substantial attention to issues of content and substance, thereby setting the stage for a more thorough treatment of this question in the subsequent decision on the case handed down by the Supreme Court of Canada. One of the most important issues for the Court of Appeal was whether or not the Constitution Act, 1982 protected the Aboriginal food fishery of the Musqueam Band from non-Aboriginal regulation. Another issue concerned the survival of the right in light of the Constitution

[96] R. v. Sikyea (1964), 43 D.L.R. (2d) 150 (S.C.C.), at p. 151.

[97] For a thorough discussion of principles that might ground a theory of group rights for aboriginal peoples, see: Darlene M. Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation", in 2 (1) Canadian Journal of Law and Jurisprudence 19 (January, 1989).

Act, 1982. The case concerned only the Aboriginal right to fish for subsistence purposes. Counsel for the appellant Sparrow argued at the Court of Appeal that:

> Because of their unique relationship to the fish, Indian people throughout the Pacific region have regulated their fishing by their own ceremonies, laws and customs,in order to ensure the survival of the renewable resource which they identify as the basis for their own continued survival. [emphasis added][98]

The Court understood that:

> The gist of the argument [as it pertained to the facts of the Sparrow case]...is that regulation of the method of fishing is an inherent aspect of the Aboriginal right to fish. If the right is to be kept intact, the regulation must be by the possessor of the right, in this case, the Band. [Counsel for the Appellant]...submitted that there would continue to be consultation between the Band and the fisheries authorities. What will be different will be that, where no agreement is reached, the final word will rest with the Band.[99]

The court also understood the importance of the salmon fishery to the Musqueam

community

> ...not only as a source of food for subsistence, but as an integral part of their distinctive culture. The evidence [supported] ...the contention that the traditional Indian fishery has significant social and cultural aspects which make the claims of the Indian people to the fishery different in kind and quality from those of other groups. [emphasis added][100]

Thus, the Court of Appeal in the Sparrow case appeared to have accepted that the "traditional"

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[98] Sparrow v. The Queen et al., [1987] 1 C.N.L.R. 145 (B.C.C.A.), at p.169.

[99] Ibid.

[100] Ibid.

Indian fishery of the Musqueam people represented a fairly sophisticated institution. This recognition, however, was forthcoming only in the context of an issue which dealt with the Indian food fishery of the Musqueam Band.

In the Sparrow case the right to fish and the right to regulate the subsistence fishery according to Aboriginal laws and customs was argued. But the validity and status of such Aboriginal laws was not expressly dealt with by the Court of Appeal. It is not clear from the decision itself whether the appellant argued that the existence of indigenous laws and customs would be put at risk if the indigenous right to regulate the fishery was not expressly found to inhere in the right to fish for subsistence or commercial purposes.

With respect to the rights asserted in the Sparrow case the Court of Appeal held that:

> The right to fish asserted by the Appellant, being one which has already been identified and which can be adequately defined, is one entitled to constitutional protection. [emphasis added] [101]

However, at the same time, the Court of Appeal recognized that the more difficult issue was

> ...whether that protection extends so far as to preclude regulation of the exercise of that right. [emphasis added][102]

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[101] Ibid. at p. 168.

[102] Ibid.

In breaking from the Derriksan[103] pre-Constitution Act, 1982 line of cases, which held that the Aboriginal rights were subject to both regulation and extinguishment, the Court of Appeal in Sparrow went on to hold that:

> The Aboriginal right which the Musqueam had was, subject to conservation measures, the right to take fish for food and for the ceremonial purposes of the Band.
>
> [At the same time] [s]ection 35 (1) of the Constitution Act 1982 does not purport to revoke the power of Parliament to act under Head 12 or 24. The power to regulate fisheries, including Indian access to the fisheries continues, subject only to the new constitutional guarantee that the Aboriginal rights existing on April 17, 1982 may not be taken away.
>
> The right to...take fish for food was in the beginning a regulated, albeit self-regulated right. It continued to be a regulated right, and on April 17, 1982, it was a regulated right. It has never been a fixed right, and it has always taken its form from the circumstances in which it existed. If the interest of the Indians and other Canadians in the fishery are to be protected then reasonable regulations to ensure the proper management and conservation of the resource must be continued. [emphasis added][104]

On the issue of priorities of access and their regulation, these findings of the Court of Appeal were strengthened in favour of Aboriginal peoples by the Supreme Court of Canada when it dealt with the Sparrow case. It is important and I will deal with it later. But for now I wish to state that the above findings reveal several other relevant implications for analysis in this study. On the extinguishment issue, progress was made by the Court of Appeal. It was spurred on by new constitutional provisions. At the same time the fishing rights of the Musqueam community were confirmed as subsistence rights by the Court. Additionally, the court appeared to imply that, because

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[103]R. v. Derriksan (1976) 71 D.L.R. (3d) 159.

[104]Sparrow, supra 57, at p. 177.

the Musqueam regulated their own fishery, regulation of it by non-Aboriginal governments is justified. This does not sufficiently distinguish between the different paradigms under which the Musqueam community and Euro-Canadian governments regulate these types of natural resources.

Perhaps most importantly, in terms of this analysis , the court stated that:

> The Indian right to fish existed in circumstances profoundly different from those prevailing before or in the early years of white settlement when the fishery was thought to be "inexhaustible"[105]. The constitutional recognition of the right to fish cannot entail the restoring the relationship between Indians and salmon as it existed 150 years ago. The world has changed. The right must now exist in the context of a parliamentary system of government and a federal division of powers. It cannot be defined as if the Musqueam had continued to be a self-governing entity, or as if its members were not citizens of Canada and residents of British Columbia. Any definition of the existing right must take into account that it exists in the context of an industrial society with all of its complexities and competing interests. The "existing right" in 1982 was one which had long been subject to regulation by the federal government. It must continue to be so because only government can regulate with due regard to the interest of all.[106]

This reasoning seems to imply a presumption of the inadequacy of local Aboriginal resource management, if it even exists, in "modern", industrial society both on philosophical and circumstantial grounds.[107] This overall presumption remained constant throughout the case from the decision of the British Columbia Court of Appeal to the decision on it by the Supreme Court of Canada. It has indeed remained constant in the case law which has succeeded Sparrow.

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[105]See: Jack v. The Queen, [1979] 2 C.N.L.R. 25 (S.C.C.), at p. 37.

[106]Sparrow, supra 97, at p. 172.

[107]See text infra, at pp. 145-146.

At the same time, perhaps the most ambitious undertaking yet to broaden the scope of Aboriginal title with the litigation of the Gitksan - Wet'suwet'en land claim case is still in judicial process. While I will deal with this case further later in this analysis, I want to state here that there is little doubt that the Aboriginal rights issues concerning the autonomy to regulate natural resource use will have to be dealt with by the Supreme Court of Canada.[108]

Biased presumptions have also persisted in the jurisprudence in the adjudication of hunting, fishing, and trapping rights within the treaty territories of Aboriginal peoples in Canada. In Ontario at least, many of these cases have concerned fishing rights issues where questions of commercial rights were involved. This is not surprising since many of the claims put forward by Aboriginal people in them involve the self-regulation of commercial fishing practices. The freshwater fishing resources of the Crown land base of Canada carry significant potential to improve the livelihoods of Aboriginal people - especially in more remote regions of the country. In these cases, the Aboriginal litigants argue a right to harvest resources for subsistence and commerce without regulatory interference from the State. They argue their capacity to self-manage their own harvesting of the resources in question. The Agawa case is one of the most important of these decisions emanating from the Ontario Court of Appeal where the court sought to put these issues into perspective.

In the Agawa case, the Ontario Court of Appeal held, with respect to the right to fish granted under the provisions of a Treaty, that:

[108]See: Address of the Gitksan and Wet'suwet'en Hereditary to Chief Justice McEachern of the Supreme Court of British Columbia, [1988] 1 C.N.L.R. 17-72.

> ...it is impossible to say that this right does not exist. It has not been extinguished. At most, it has been restricted by the requirement that Indians be licensed before exercising it. What is at stake is not the existence of the Indians' treaty right to fish but whether that right can be properly restricted by the licensing requirement.[109]

The Court of Appeal in Agawa took note that, pursuant to the terms of the Robinson Huron Treaty of 1850, the right of the indigenous people involved to exercise their rights of hunting and fishing in the treaty territory had expressly been made subject to government regulation. This is generally the case in most post-confederation numbered treaties as well as the Robinson-Huron and Robinson-Superior Treaties which cover tracts of land in northern Ontario. At the same time, the court relied on the decision of the Supreme Court of Canada in the Nowegijick case that

> ...treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.[110]

The Court of Appeal in the Agawa case also affirmed its previous ruling in the Taylor and Williams case[111]. The Taylor and Williams court was held to have

> ...emphasized the importance of Indian history and traditions as well as the perceived effect of the treaty at the time of its execution. [The court in Taylor and Williams]...also cautioned against determining Indian rights "in a vacuum". The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. [emphasis added][112]

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[109] R. v. Agawa, [1988] 3 C.N.L.R. 73 (O.C.A.), at p. 89. Leave to appeal the case was denied by the Supreme Court of Canada.

[110] Nowegijick v. the Queen, [1983] 1 S.C.R. 29 (S.C.C.), at p. 36.

[111] R. v. Taylor and Williams, [1981] 3 (C.N.L.R.) 114 (O.C.A.).

[112] Agawa, supra 109, at p. 89.

Given this reasoning, could proof of the existence of customary law and indigenous wildlife management, including management for commercial purposes, secure judicial recognition of rights to manage wildlife resources in a northern indigenous community? The Court of Appeal in Agawa seems to have implied the issue of management authority in the following statement:

> It must be born in mind that not all Indian treaty rights are absolute and immutable. While Indian property rights derived from treaties may remain virtually unqualified, hunting and fishing rights cannot be divorced from the realities of life in present day Canada. Much has changed since the treaty was executed in 1850. At that time, fish and game may have been regarded as limitless resources. They are no longer. Conservation and management of fish and game resources are required if they are to be protected from extinction and preserved for the benefit of Indians as well as other Canadians....[113]

As in the case law examined earlier in the analysis, the Court of Appeal in Agawa implied that indigenous communities either have not managed wildlife resources for abundance in the past, or, if they have managed those resources, they would not be able to do so now. Resources must be managed for the Indians for their benefit as by non-Aboriginal governments. This mirrors the traditions of Indians being treated as wards of the Crown. It appears to mitigate against open discussion concerning the implications of distinct Aboriginal land tenure and resource management systems which are socially and culturally incompatible with their non- Aboriginal counterparts.

Not only are customary systems of Aboriginal resource management distinct, they are central to the cultural character of many Aboriginal communities in Canada. Berkes has emphasized this:

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[113] Ibid, at pp. 89 - 90.

> [C]o-management and self-management are not merely matters of wildlife use. Indeed, self-management is at the core of the social and economic health of many native communities, and is tied to larger questions of self-government. Thus, the co-operative management of resources becomes a key issue (since wildlife has not been so important in the traditional economy) in the implementation of principles of environmentally sustainable, culturally appropriate economic development.[114]

Seen in this light, the line of judicial reasoning on treaty resource rights by the Ontario Court of Appeal in Agawa underscores problems concerning the lack of legal pluralism in States where Aboriginal custom remains strong amongst the indigenous peoples within their borders. The Court of Appeal in Agawa, implicitly dealt with this issue when it held that:

> ...Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interest and values involved in the rights of others.
>
> This test of reasonableness has been applied to Indian treaty and Aboriginal rights. The Saskatchewan Court of Appeal in R. v. Eninew; R. v. Bear[115]...applied the same principle to provisions in Indian treaties, making them subject to governmental regulation. It held that restrictions on hunting and fishing must be shown to be reasonable for the purpose of conservation.[116]

In the Agawa fishing rights case, the Ontario Court of Appeal held that the regulations the Aboriginal people involved were protesting served a valid conservation purpose, and were thus consistent with the provisions of the Constitution Act, 1982. The cultural reality and importance of Aboriginal self-management of resources today, where the case involved commercial harvesting

[114] Fikret Berkes, Peter George and Richard J. Preston, "Co-Management: The Evolution in Theory and Practice of the Joint Administration of Living Resources", in 18(2) Alternatives 12 (1991), at p. 12.

[115] R. v. Eninew; R. v. Bear, [1984] 2 C.N.L.R. (S.C.A.) 126.

[116] Ibid.

activities, was not recognized. These cases, then, only appear to confirm that it is apparent that Canadian courts are going to face difficult challenges in adjudicating Aboriginal resource rights issues if they come up against cases involving commercial harvesting activities where, on the evidence, it is accepted that the denial of indigenous wildlife management autonomy will put Aboriginal identity in jeopardy.

(iii) The Liberal Interpretive Principle in Sparrow in Light of Horseman, Sioui and Delgamuukw

When the Sparrow case reached the Supreme Court of Canada, the court was quick to re-affirm the following:

> The justification of conservation and resource management... is surely uncontroversial.... It is clear that the value of conservation purposes for government legislation and action has long been recognized. Further, the conservation and management of our resources is consistent with Aboriginal beliefs and practices, and, indeed, with the enhancement of Aboriginal rights.[117]

This justification was based on the sovereignty and underlying title and legislative power of the Crown that flows from the application of the doctrine of discovery to the lands in question. Berkes has noted that: "Philosophically, [the] call for a superior force to protect the commons and the common good is similar to the solutions Hobbes proposed a few centuries ago." [emphasis added][118]

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[117] R. v. Sparrow, supra 73, at p. 183.

[118] Fikret Berkes, "Paradigms Lost: Changing Views on the Use of Common Property Resources", in 17(2) Alternatives 48, (1990), at p. 48.

The concept of a superior force is in turn related to social inventions involving exclusive property rights, the promotion of individual interest and competition where access to resources on public lands must be regulated by the sovereign State. Few State resource managers, however, have been willing to admit that common property resources in this context have been imperfectly, and sometimes disastrously managed. This is because "...for reasons of both imperfect information and externalities, needs and consequences are not necessarily either visible or acted upon."[119]

Berkes suggests that proposed

> ...solutions to the commons tragedy and their alternatives may be best appreciated by first examining two related dichotomies. One concerns the source of the rule of law (endogenous or exogenous) and the other deals with whether the natural order is shaped essentially by competitive or co-operative interactions....[120]
>
> In Leviathan,[121] a major work in the history of Western political philosophy, Thomas Hobbes argued for the necessity of a higher authority. Society needed the absolute dominance of a sovereign ruler as the source of law, Hobbes said. People were incapable of collective action towards the common good, and the rule of law, by necessity, had to be imposed exogenously from above.[122]

In this light, it becomes more understandable that indigenous peoples, holding lands and managing resources in common, should be regarded by western non-aboriginal societies living in a "state of nature" and "occupying" lands in the form of a "tenancy in common" as Hobbes' successor John

[119] Usher, supra 13, at p. 7.

[120] Berkes, supra 118, at p. 50.

[121] Thomas Hobbes. Leviathan, or the Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil, H.W. Schneider, ed. (Indianapolis: Bobbs - Merrill, 1958). First Published in 1651.

[122] F.Berkes, "Co-operation from the perspective of Human Ecology", in F. Berkes (ed.). Common property Resources: Ecology and Community-Based Sustainable Development, supra 118 at pp.48 - 50.

Locke had concluded.[123]

The statement of the Supreme Court of Canada from the Sparrow decision quoted earlier seems to reveal several key ideological assumptions embedded in Euro-Canadian paradigms of resource management and conservation that are still common. One of the most important of these is that resource management and conservation functions are conceptually separated from harvesting functions. The court seems not to have grasped the conceptual possibility of natural resource conservation and management co-existing with harvesting functions in self-regulating community-based resource management systems. Had it expressly done so, the Court could have set down a justification mandating the development of cooperative resource management jurisdiction on the Crown land base of Canada. In so doing, the court would have accepted the validity of Aboriginal resource management as a necessary corollary of indigenous cultural survival. Instead, in Sparrow, the Supreme Court of Canada did not indicate that conservation and management of resources are a key feature of Aboriginal beliefs and practices but only that they are merely consistent with those beliefs and practices.

In Sparrow, the Supreme Court of Canada found that the management of natural resources for conservation purposes could validly infringe on Aboriginal harvesting rights under certain conditions, though those rights could no longer be extinguished by the State under new constitutional guarantees

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[123]John Locke. The Second Treatise of Government (P. Laslett ed.) (1st edition, 1690) (London: Cambridge Univ. Press), Ch.1.

protecting them.[124] The court held that, this constitutional recognition was accorded to Aboriginal peoples because:

> Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of Aboriginal rights and interests. By giving Aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that Aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. [emphasis added][125]

At the same time, however, the Court was careful to put this statement into context. It found that the constitutional recognition of Aboriginal rights

> ...gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society, that in the 20th Century, is increasingly more complex, interdependent and sophisticated and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal [or treaty] right protected under s.35(1).[126]

The court was able to hold, therefore, that where conservation needs have been met, Aboriginal peoples have a first claim to specific resources for food and ceremonial purposes:

> The Indians' food requirements must be met first when ... [any] allocation [of the fishery resources in question] is established. The significance of giving the Aboriginal

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[124] R.v. Sparrow, supra 73, at pp. 169-171.

[125] Ibid, at p. 181.

[126] Ibid.

> right to fish for food top priority can be described as follows. If, in any given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing rights. [emphasis added][127]

These priority harvesting rights were affirmed as extending to the "...Aboriginal right to fish for food and social and ceremonial purposes".[128] Also ruling in favour of the appellant Sparrow, the Supreme Court of Canada found that "...it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised."[129] The court did not expressly confirm that there was an Aboriginal right to manage the resource in question in subsistence use contexts. But in stating that regulation could only be imposed on the exercise of the right in question when conservation needs justified it, Aboriginal authority to manage resources, at least in subsistence use contexts, can be exercised by default.

Yet conflicts over Aboriginal resource use rights, in spite of this new articulation of the law, are bound to continue. In R. v. Sparrow the Supreme Court of Canada emphasized not only the importance of context but of the necessity of "...a case by case approach..."[130] to the adjudication of

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[127] Ibid, at p. 185.

[128] Ibid, at p. 176.

[129] Ibid, at p. 182.

[130] Ibid. at p. 181.

Aboriginal rights under the current constitutional framework of Canada. [131] For example, if a fisheries regulation appears to infringe on an Aboriginal right, the group must challenge that particular regulation. It must be borne in mind, however, that Aboriginal resource harvesting, management and conservation systems are often highly complex. They can involve many interconnected community-based practices governing the integrated harvesting and management of a significant range of resources on the same land. The approach of the Supreme Court of Canada in Sparrow, on the other hand, is to narrow the focus of consideration regarding specific allocation rights issues for discrete resources. This is understandable in the context of litigation concerning Aboriginal rights. But it does not force the courts to expressly recognize broader issues relating to unique self-regulating systems of Aboriginal use, management and conservation of resources vital to their distinctive cultures - systems which often seem to be in a state of continual conflict with their state counterparts.

Additionally, the apparent assumption by the Supreme Court of Canada that conservation and sound management is merely 'consistent' with Aboriginal practices and beliefs can also be related to the assumption that the concept of 'subsistence' can be used to characterize 'traditional' Aboriginal economies generally. In the Sparrow case, the Supreme Court of Canada took cognizance of expert testimony with respect to the fish resources in question:

> Between the tribes there was a flow of people, wealth and food. No tribe was

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[131] Disputes over this issue are already being adjudicated by Euro-Canadian courts. For an example of a decision which rejects aboriginal rights to the commercial use of resources see: Delgamuukw v. B.C., [1991] 5 C.N.L.R. 1 (B.C.S.C.), at pp. 214-217 (See text in the next section of this chapter). For an example to the contrary see, R. v. Vanderpeet, [1991] 3 C.N.L.R. 161 (B.C.S.C.).

wholly self-sufficient or occupied its territory to the complete exclusion of others."[132]

In spite of this evidence, the court concluded that "...no commercial fishery existed prior to the arrival of European settlers. [emphasis added]"[133] By this reasoning, it appears that trading relationships outside of Western paradigms of commerce do not have to be construed as commerce.

In Sparrow, the Supreme Court of Canada confined itself to the issue of subsistence rights. But its conclusions on the non-commercial nature of the historical fishery of the Musqueam people are important obiter statements. They conform to the ideological suppositions concerning the nature of Aboriginal societies that are inherent in the discovery doctrine. This ideology fails to recognize how distinct patterns of customary Aboriginal economic activity interact with community-based systems of Aboriginal resource harvesting, management and conservation. In effect, it belies a presumption of the 'undeveloped' character of non-formal community-based Aboriginal social, legal, political and cultural institutions governing Aboriginal trade and commerce as well as resource management. It leaves open the subjection of Aboriginal harvesting of natural resources for trade and commerce to full State control.

Judicial reasoning concerning the 'subsistence' or 'traditional' character, and all of the ideological bias inherent in it, has remained constant throughout recent judicial precedent. In R. v. Horseman, the Supreme Court of Canada was forced to recognize that the hunting rights retained by the Aboriginal

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[132] Ibid, at p. 172.

[133] Ibid, at p. 176.

people in Treaty #8 territories in Western Canada included the right to hunt commercially.[134] Indeed, the court accepted scholarly opinion to the effect that

> ...differentiating domestic hunting from commercial hunting is unrealistic and does not enable one to fully appreciate the complex nature of the native economy following contact.[135]

However, the majority of the court found that pursuant to the provisions of the Alberta Natural Resource Transfer Agreement, 1930 (Alberta), as confirmed by the Constitution Act, 1930, the rights of the Aboriginal people in question had been modified to include harvesting rights for food, thereby making the question of commercial harvesting rights moot. In terms of the purposes of this study, however, the dissenting opinion of the Supreme Court of Canada in R. v. Horseman is particularly noteworthy. The dissenting judges in R. v. Horseman found that, pursuant to the liberal interpretive principles developed in the Nowegijick v. The Queen and Simon v. The Queen cases, Indian treaties

> ...must be given the effect the signatories obviously intended them to have at the time they were entered into....[136]

Consequently, the dissenting judges held that the terms of the Natural Resources Transfer Agreement in question should be construed as affirming the intentions of the parties to the treaty agreement. But then they became engaged in considerable semantic gymnastics concerning the nature of 'commercial' hunting as it should apply to the Indians in question. Writing on behalf of the dissenting judges, Wilson, J., as she then was, wrote the following:

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[134] R. v. Horseman, [1990] 3 C.N.L.R. 95 (S.C.C.), at p. 100.

[135] Ibid., at p. 101.

[136] Ibid., at p. 109.

> Provided the purpose of their hunting is either to consume the meat or to exchange or sell it in order to support themselves and their families, I fail to see why this is precluded by any common sense interpretation of the words "for food" [as contained in the Alberta Natural Resources Transfer Agreement].
>
> In summary, it seems to me that the term hunting "for food" was designed to draw a distinction between traditional hunting practices that the Indian were free to pursue and sport hunting or hunting for purely commercial purposes....[A]ny uncertainties regrading the nature of the boundary between purely commercial or sport hunting and the Indians' traditional hunting practices must be resolved by favouring an interpretation of paragraph 12 of the Transfer Agreement that gives the Province of Alberta to regulate commercial and sport hunting but that leaves traditional Indian hunting practices untouched. [emphasis added][137]

Following this line of reasoning, it seems that, even in those cases where the treaty right of Aboriginal harvesting for commerce was undeniably understood as accruing to Aboriginal people, the concept of tradition is still being employed to narrow the exercise of that right into a 'fossilized' state. The Supreme Court of Canada has found that there are situations where it is might even be necessary to limit the exercise of traditional ritual practices on public lands that have been set aside for a specific use such as a park. At least the court has found that the State does not have unfettered jurisdiction over Aboriginal or treaty rights in these circumstances.[138]

The implications of the application of the assumptions inherent in the discovery doctrine in defining the rights of Aboriginal peoples has been most recently formulated in stark terms by the British Columbia Supreme Court in the Delgamuukw v. B.C. case. In this case, the Aboriginal claimants

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[137] Ibid, at p. 117.

[138] R. v. Sioui, [1990] 3 C.N.L.R. 127, at pp. 150-154.

alleged " ... that they and their ancestors or predecessors, never having surrendered the territory by conquest or treaty, still enjoy aboriginal ownership of and the legal right to govern the territory according to their aboriginal laws which they claim are "paramount" to the law of British Columbia. [emphasis added]"[139] The trial court judge, however, found that there was "much wisdom"[140] in the findings of the Privy Council on the matter of Aboriginal title set down earlier in the century. In Re Southern Rhodesia, the Privy Counsel had ruled that:

> The estimation of the rights of Aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged.[141]

In light of this 'wisdom' Chief Justice McEachern found the following in Delgamuukw:

> I have no doubt life in the territory was extremely difficult, and many of the badges of civilization, as we of European culture understand that term, were indeed absent.[142]

Then, applying the doctrine of discovery, the trial court in Delgamuukw found that the Crown possessed full sovereignty over the territories in question such that any Aboriginal rights that may have previously existed had been validly extinguished.[143] The court found that the province is only obligated

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[139] Delgamuukw v. B.C., [1991] 5 C.N.L.R. 1, at p. 9.

[140] Ibid., at p. 213.

[141] Re Southern Rhodesia, [1919] A.C. 211 (P.C.), at p. 233.

[142] Ibid., at p. 26.

[143] Ibid., at p. 229.

...to permit aboriginal people, but subject to the general law of the province, to use any unoccupied or vacant Crown land for substance purposes until such time as the land is dedicated to another purpose.[144]

Of further note for this analysis, however, the court also wrote the following:

> While the Supreme Court of Canada will ultimately be called upon finally to settle [the]... important question [of commercial aboriginal rights], I am not able to avoid expressing an early judicial opinion. In my view the purpose of aboriginal rights was to sustain existence in an aboriginal society, that is to fish and hunt and collect the products of the lands and waters for the survival of the communal group. There would undoubtedly be some bartering but that would be in sustenance products likewise obtained by aboriginal practices. These aboriginal rights do not include commercial practices. [emphasis added][145]
>
> As I understand the authorities..., the law has protected the right of aboriginal groups to continue to use "traditional" lands for these purposes.[146]

The Gitksan Wet'suwet'en case only seems to reconfirm that Canadian courts seem ill-prepared to deal with increased demands by Aboriginal peoples for greater management autonomy over the resource base of their territories.[147] Resource management, whether under State or informal indigenous systems, must by its very nature take place within a social context. Therefore, if resource management rights (this can also be described as greater territorial autonomy) are ever to be accepted as accruing to Aboriginal peoples, they will have to be dealt with within a conceptual framework that

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[144] Ibid, at p. 233.

[145] Ibid, at p. 215.

[146] Ibid, at p. 215.

[147] The Delgamuukw case generated a storm of negative criticism both in the media (see, for example, B. Morse, "A Shadow over Native Government Relations: Controversial B.C. Decision comes at Worst Possible Time" in The National (May, 1991) (Toronto: Canadian Bar Association), at pp. 7-8) and at the level of scholarly research (see eg. background papers in Conference Program: "Delgamuukw" and the Aboriginal Land Question (Victoria: University of Victoria, Sept. 10-11, 1991).

has not yet been developed by Canadian courts. The structural constraints inherent in existing judicial formulations of Aboriginal harvesting rights, that have been developed in accordance with the logic of the doctrine of discovery, mean that a new approach to the issues will have to be found. Perhaps it will rely on emerging international formulations of indigenous rights to break out of these constraints.

This brings us full circle in this study. Presumptions about the character of Aboriginal societies, which gave rise to the doctrine of discovery in the first place, flow from the commonly held belief that, before and after European contact, wherever resources were not over-exploited by Aboriginal peoples, it was because, as primitives, they did not have the capacity to over-exploit them.[148] This thinking is now widely recognized as being simply fallacious.[149] Yet its continuing prevalence amongst state resource managers and lawmakers, including politicians,[150] is a source of on-going frustration and bitterness for Aboriginal peoples.

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[148]Garrett Hardin, "The Tragedy of the Commons", in 162 Science 1243 (1968).

[149]See references for notes 13, 112 and 116. In particular see: Fikret Berkes, "Cooperation from the Perspective of Human Ecology", in F. Berkes (ed.), supra 14, at pp. 74-76.

[150]See for example: Sir Geoffrey Palmer, "Sustainability - New Zealand's Resource Management Legislation", in 34 Resources: The Newsletter of the Canadian Institute of Resources Law 3, (Spring 1991). Assuming the inevitability of ecological catastrophe that will result from harvesting common property resources where there is the technological capacity to do so, Palmer has framed the presumption as follows: "The Problem... is how to legislate for temperance. [Garrett Hardin] made the point that prohibitions were easy to legislate but temperance much more difficult. The cure lies in mutual coercion and coercion requires legislation (at p. 3)." Palmer, who has spearheaded recent efforts in New Zealand to enact legislation aimed at achieving sustainable resource use is formulating this analysis based on the "Tragedy of the Commons Paradigm" described by Hardin. The result often leads to legislation which imposes State forms of resource management on aboriginal communities without appreciating or often recognizing aboriginal resource use, management and conservation systems.

State laws rarely recognize and respect Aboriginal systems of resource use, management and conservation. Rather the tendency is still for the State to supplant Aboriginal community-based common property systems of resource management and conservation, whether or not they might be effective from an ecological perspective which values sustainability.[151] That Aboriginal peoples might possess sophisticated cultures where commerce has been customarily integrated into effective resource management and conservation, is even less recognized by Euro-Canadian law and policy makers. Again, this is in spite of a rapidly expanding consensus to the contrary which is being expressed in scholarly research and is finding its way into mainstream media.[152]

IV. SUMMARY

From many Aboriginal ecological and economic perspectives, the importance of natural resources to indigenous communities is as crucial today as at any other time in their history. Northern Aboriginal communities, further, keep insisting that their resource harvesting, management and conservation systems can provide valuable information and experience to non-Aboriginal governments. This is in spite of the fact that in non-Aboriginal societies, "[t]he prevailing attitude has been that western science, with its powerful analytical tools, has little to learn from tribal knowledge. The developed

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[151] Ibid.

[152] In the scholarly literature pertaining to the Canadian experience, see, for example, Victor P. Lytwyn, "Ojibwa and Ottawa Fisheries around Manitoulin Island: Historical and Geographical Perspectives on Aboriginal and Treaty Fishing Rights", in 6(1) Native Studies Review 1 (1990), at p. 3. See also: Roger Kennedy. Rediscovering America (Boston, Mass.: Houghton Mifflin, 1990). Jack Weatherford. Indian Givers: How the Indians of the Americas transformed the World (New York: Fawcett Columbine, 1988). For a representative article in the mass distribution print media see Lewis Lord and Sarah Burke, "America Before Columbus: The Untold Story", in 111(2) U.S. News and World Report 22, especially, at pp. 26, 35 (July 8, 1991).

world's disastrous mismanagement of the environment has somewhat humbled this arrogance, however, and some scientists are beginning to recognize that the world is losing an enormous amount of basic research as indigenous peoples lose their culture and traditions".[153] This is relevant for the purposes of this analysis where I have argued judicial precedent continues, in effect, to suppress Aboriginal natural resource use, management and conservation.

The Manomin management system of the Wabigoon Anishinaabe people, for example, intimately connects the resource to the culture of the Aboriginal people who rely on it for both subsistence and commercial purposes. It has been this way with the Anishinaabe (Ojibwa) people for centuries.[154] Whether resources are relied upon to produce subsistence or commercial economic value, in northern communities they are usually still managed within common property arrangements. It would be difficult, if not impossible, to develop an allocation regime for Manomin, even if it were decided by the courts that subsistence rights to the resource should accrue to the Wabigoon Anishinaabe people, if the Aboriginal system for its management and allocation was not recognized and accepted. Restructuring the management of Manomin, even where it is utilized for commercial purposes, into the State system could well prove fatal for the customary management of the resource by the Aboriginals involved. In this, Canadian law continues to leave them frustrated and apprehensive about their Manomin resource.

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[153] "Lost Tribes, Lost Knowledge", supra 15, at p. 46.

[154] See for example: Thomas Vennum, Jr. Wild Rice and the Ojibway People (St. Paul: Minnesota Historical Society Press, 1988).

CHAPTER FOUR

EPILOGUE

In its report, Our Common Future, which was released in 1987, the United Nations World Commission on Environment and Development assessed the potential role that indigenous peoples might play in the search to achieve sustainable development. In the report, the Commission noted that:

> The isolation of many [indigenous peoples]... has meant the preservation of a traditional way of life in close harmony with the natural environment. Their very survival has depended upon their ecological awareness and adaptation....
>
> With the gradual advance of organized development into remote regions these groups are becoming less isolated. Many live in areas rich in valuable resources that planners and developers want to exploit, and this exploitation disrupts the local environment so as to endanger traditional ways of life. The legal and institutional changes that accompany organized development add to such pressures[1].

The report went on to identify the dangers involved in these types of "development processes" for Aboriginal peoples:

> Many groups become dispossessed and marginalized, and their traditional practices disappear. They become the victims of what could be described as cultural extinction.
>
> These communities are the repositories of vast accumulations of traditional knowledge and experience that links humanity with its ancient origins. Their disappearance is a loss for the larger society which could learn a great deal from their traditional skills in sustainably managing complex ecological systems. It is a terrible irony that as formal development reaches more deeply into rain forests, deserts and other isolated environments, it tends to destroy the only cultures able to thrive in these environments[2].

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[1]World Commission on Environment and Development. Our Common Future (Oxford and New York: Oxford University Press, 1987), at p. 114.

[2]Ibid. at pp. 114-115.

The Commission waxes perhaps a bit too eloquently in its description of the "traditional" knowledge of indigenous peoples and other vulnerable groups. However, the field research undertaken for this study, which forms only a small part of a rapidly growing body of research on the question of Aboriginal resource management generally, indicates that the Commission was correct to conclude that "isolated" indigenous communities contain "vast accumulations" of indigenous knowledge which could be of importance to the larger society. This is especially true when one considers how extensively concepts of and arguments for the local control of resource development are finding their way into the literature on development.[3]

More importantly, Aboriginal peoples in Canada, with their distinct cultures, have the right to survival by virtue of their distinctiveness and by virtue of their being indigenous peoples. The United Nations has been wrestling with these issues surrounding the rights of indigenous peoples to autonomy for more than ten years now. More recently, the organization has initiated work aimed at promulgating international standards for the protection of indigenous populations, probably first in the form of a General Assembly resolution. This process, however, has involved a certain degree of tension since it was moved beyond the study level. Earlier studies undertaken by the United

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[3]See for example: Johan Galtung, Roy Preiswerk and Monica Wemegah, "A Concept of Development Centred on the Human Being: Some Western European Perspectives", in 2 (1) Can. J. Dev. Studies 135; G. Hyden. Beyond Ujamaa in Tanzania (Berkeley: University of California Press, 1980); Paul Richards, "Ecological Change and the Politics of African Land Use", in 26 (2) African Studies Review 1; D. B. Knight, "Identity and Territory: Geographical Perspectives on Nationalism and Regionalism", [1985] Annals of the Association of American Geographers 514; Julia Gardner and Mark Roseland, "Acting Locally: Community Strategies for Equitable Sustainable Development", in 16(3) Alternatives 36 (1989).

Nations, such as the Study of the Problem of Discrimination Against Indigenous Populations[4] have, however, produced results and recommendations that were endorsed by many indigenous groups. The recommendations of the study reflect a sensitivity to a growing body of scholarly work on Aboriginal relationships to their lands. As well, they reverberate in recent commentary which suggests that, under international law, indigenous peoples do possess rights to self-determination which would allow them greater control over their customary territories.[5] The study has been influential in U.N. standard setting activities on rights for Aboriginal peoples through the Working Group on Indigenous Populations.[6] In its final conclu[illegible], the Study declared the following:

> It is... essential to increase understanding of the profound sense of deprivation experienced by indigenous populations when the land to which they, as peoples, have been bound for thousands of years has been taken away from them.[7] No one should be permitted to destroy that bond. Systematic violations of the rights of indigenous peoples to lands and its resources should cease....
>
> It must be recognized that indigenous peoples have a natural and inalienable right to retain the territories they possess, to call for the return of lands of which they have been deprived and to be free to decide as to their use and development....
>
> Recognition must be given to the right of all indigenous nations or peoples, as a minimum, to the return and control of sufficient and suitable land to enable them

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[4]Jose R. Martinez Cobo. Study of the Problem of Discrimination Against Indigenous Populations (Final Report (last part) submitted by the special rapporteur, Mr. Jose R. Martinez Cobo), U.N. Doc. E/C.N. 4/Sub. 2/1983/21 Add. 8, 30 Sept. 1983 (third part, Conclusions, Proposals and Recommendations, xxi), at pp. 67-73.

[5]See: R.L. Barsh, "Indigenous North American and Contemporary International Law", in 62 Oregon Law Review 73. See also Maureen Davies, "Aboriginal Rights in International Law: Human Rights", in B. W. Morse (ed). Aboriginal Peoples and the Law: Indian, Metis and Inuit rights in Canada (Ottawa, Carleton University Press, 1985), at pp. 745-793.

[6]United Nations Economic and Social Council, Resolutions 1589 (L) and 1982/34.

[7]For a more recent U.N. study on this matter, see: United Nations Centre on Transnational Corporations. Transnational Investments and Operations on the Land of Indigenous Peoples , U.N. Doc. E/CN. 4/Sub. 2/1991/49. One of the case studies annexed to this report focuses on Hydroelectric Development in Quebec (at pp. 24-25).

> to live an economically viable existence in accordance with their own customs and traditions, and to develop fully at their own pace....
>
> Ownership of indigenous land by respective indigenous populations should be immediately recognized by all States. Land occupied and controlled by indigenous populations should be presumed to be indigenous land.... The natural resources of indigenous land are entirely the property of indigenous communities. Only they should be competent to take the basic decision regarding the manner and sale of those resources. [emphasis added][8]

These land rights recommendations and conclusions should be read in the context of the wider political rights recommendations in the U.N. Study. Among the most important of these are:

> Self-determination in its many forms must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their future....
>
> It must also be recognized that the right of self-determination exists at various levels and includes economic, social, cultural and political factors. In essence, it constitutes the exercise of free choice by indigenous peoples, who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they live and to set themselves up as sovereign entities. This right may, in fact, be expressed in various forms of autonomy within the State including the individual right to be different, as recognized in the statement on race and racial prejudice adopted by UNESCO in 1978....
>
> [Aboriginal peoples] have a right to continue to exist, to defend their lands, to keep and transmit their culture, their languages, their social and legal institutions and systems and their way of life, which have been illegally and unjustifiably attacked.[9]

It is interesting to read the recommendations of this U.N. report in light of the writings on the rights

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[8] Supra 4 (Third Part: Conclusions, Proposal and Recommendations, XXI), at pp. 67-73.

[9] Ibid, at pp. 49, 74-75.

of Aboriginal peoples in the first classical texts of international law. It appears that international law is only now recapturing some of its original vitality on these questions. In any event, the findings of the U.N. Report provide a framework from within which States like Canada could adequately recognize and accept Aboriginal rights to control and manage resources in their territories. The question now is whether or not Canada, through its legislative and/or judicial institutions, can make substantial progress on this issue.

APPENDIX A

METHODOLOGY

The field research on the management of Manomin by the Wabigoon Anishinaabe people that has been used in the thesis, was conducted most intensively from 1986 to 1989, although I have continued to collect ethnographic materials from these people up to the present time. It should be borne in mind that this research was conducted in conjunction with my work in providing assistance to Wabigoon Aboriginals on a wider range of issues concerning access to resources and resources management. I have assisted them, for example, in the preparation of a presentation concerning their customary relationships to Manomin in relation to the centralization of grading standards for the Canadian Wild Rice Council. At other times I have been involved in negotiations through which they have attempted to secure access rights to harvest timber resources in their customary lands. This work, and the field research with the Wabigoon Aboriginals which has accompanied it, has been undertaken in the following areas: Manomin and its management, trapping, hunting, fishing, "wild" berries (harvesting and management), timber harvesting and Aboriginal land use in relation to provincial parks management.

From 1986 to the time that the thesis was written, I gathered research materials for the thesis in accordance with the following methods: Attending meetings with Wabigoon Aboriginals as a participant, participant/observer or observer, including the communal gatherings by which they make decisions with respect to the allocation and management of each annual Manomin harvest; observing Manomin harvesting; interviewing Wabigoon Aboriginals on their customary relationships to Manomin. From June, 1986, until the thesis was prepared, this included the following: I attended sixty-two meetings with Wabigoon Aboriginals; I conducted eleven interviews with Wabigoon people including Elders to gather ethnographic material on their customary relationships to Manomin; I was an observer or participant/observer at six communal gatherings concerning the allocation and management of Manomin (I participated in these meetings when I was asked to provide counsel on non-Aboriginal law and policy concerning the management of the resource); I was an observer or participant/observer on eight other occasions either in the Manomin fields (observing the harvest), at the Wabigoon Lake Ojibway Nation reserve or in the village of Wabigoon when Manomin issues were discussed at group meetings.

Notes from these meetings were used to record relevant information on customary Anishinaabe relationships to Manomin. On most occasions these notes were recorded for reasons beyond a scholarly interest in the subject. They were collected either to support my legal work with Wabigoon Anishinaabe people in their efforts to obtain security of access to their Manomin fields in their customary lands or to support work relating to the establishment of the Manomin processing plant which now exists at the Wabigoon Lake Ojibway Nation reserve. (The material obtained from these meetings was also used to compose field reports which were submitted to Alternative Trading Organizations. They formed part of the field research that is normally used to make decisions on the suitability of establishing "fair trade" relationships with indigenous groups.) Notes from my attendance at community meetings, group meetings or at harvest locations as an observer or participant/observer were maintained and used in the same manner.

The interviews with Wabigoon Anishinaabe people concerning their customary relationships to Manomin were conducted either with individuals or with small groups. I interviewed a total of eight Elders in this research. Eleven other Wabigoon Aboriginals constituted the remainder of the principal informants in the interviews. While the purpose of these interviews was to gather ethnographic data on their relationships to Manomin generally, certain of these interviews were conducted with specific purposes in mind. These included, for example, the objective of gathering information concerning the claim of the Wabigoon Aboriginals to the Oval Lake Manomin fields.

I did not use questionnaires in these interviews. Instead, I prepared myself with interview guide notes and/or maps and other materials which were used in the interviews; these served as guides so the salient points to be discussed were discussed. The interviews were conducted informally as "focus group" sessions (on certain occasions tobacco was given to Elder informants). I followed this approach so that the Anishinaabe people being interviewed, especially the Elders, would be able to move the discussions along at times in ways that they considered important.

The results of the interviews were recorded either by the taking of notes or by using a tape recorder. Where the interviews were tape recorded, they were subsequently transcribed into written form. Certain of the details obtained in these interviews (the thesis, for example, refers to the penalizing of a Manomin harvester on one occasion) were of a personal nature. Where confidentiality was expected, it has been maintained in the thesis.

It should also be noted that, while the above research on Manomin was being conducted, I was also involved in conducting research on customary Anishinaabe relationships to Manomin from Anishinaabe people in other locations. This research was compiled in relation to my work generally on "harvester" issues with Anishinaabe people. In this regard, I conducted ethnographic interviews with Anishinaabe people including Elders in the following places: At the Saugeen Nation (Savant Lake); at the Lac Seul First Nation; at the Wabauskang First Nation; at the Dalles First Nation; at the Shoal Lake #39 First Nation; and at the Northwest Angle #37 First Nation. While these materials have not been used in the thesis in a direct way, they helped to form my perspective of the wider regional issues concerning Anishinaabe access to and management of Manomin.

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