SUSTAINABLE INDIGENOUS LAND MANAGEMENT IN CANADA: A MODEL INSPIRED BY LESSONS FROM BARRIERE LAKE AND HAIDA GWAII

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INTRODUCTION

The purpose of this thesis is the creation of a model of sustainable Indigenous land and resource use management, based on case-studies of two Canadian Indigenous First Nations, the Algonquins of Barriere Lake in Quebec, and the Haida Nation in British Columbia.

In developing the thesis, I intend to highlight the following key intertwined components which underpin such a model.

1. The important role models can play as catalysts for change, if imaginatively conceived, effectively implemented, and so designed as to be replicable.

2. The crucial issue for Indigenous Peoples of their ancestral lands, which constitute the anchor and raison d'etre ensuring their independence of governance, and the inalienable attachment to their cultural roots.

3. The sustainability of these lands and their biodiversity, through respect and practice of the concept known by Indigenous Peoples as the Concept of the Seventh Generation. This implies that decisions and actions taken to-day should in no way affect sustainability seven generations into the future.

   As John Borrows describes it so concisely and clearly: "The Seventh Generation! This generation holds special significance for Indigenous people. Decisions about the future are not supposed to occur without taking them into account".[1]

[1] John Borrows, "Seven Generations, Seven Teachings: Ending the Indian Act" (2008) National Centre for First Nations Governance Research Paper at 2.

In Chapter One of this thesis, I address the issue of Sustainability and of the Concept of the Seventh Generation, as the linchpins supporting the replicable model proposed in the Appendix.

As I reflected on how the concept of sustainability entered firmly into my consciousness, I could not help but recall that fall day three decades ago when the notion of "sustainable development" was introduced at the United Nations by the World Commission on Environment and Development (WCED).

The memory of that day and event left an indelible mark on me. Yet, as I prepared myself to describe how the vibrant and moving pleas for a sustainable world imprinted themselves in my mind, I realized that these calls for action had come from small-island states in the face of ever-rising seas. So it then became logical to ask myself how the ensuing description of climate change and rising seas relates to the body of this thesis, whose purpose is to propose a sustainable land-agreement model involving Canadian Indigenous First Nations.

I concluded that Indigenous communities whose ancestral lands are desecrated by clear-cut logging or uncontrolled mining exploration, far too often without their consent, are innocent sufferers in much the same way as Small-Island States facing rising seas. There are common threads in both cases.

Disrespect for sustainability is a root cause. Indeed, those entities that make light of sustainable practices and their impacts for their own particular purposes, and in total disregard for the common good, not only breach the rules of environmental justice but of elementary and fundamental justice itself.

For at the core, irresponsible environmental behaviour is an affront to the basics tenets of equity and basic justice –of respect of the other. Indeed, rising seas to Small-Island States are the clear-cuts and mining scars that blight Indigenous ancestral lands.

Chapters Two and Three set out a profile of the two First Nations I have selected as case-studies for this thesis.

In Chapter Four, I address the importance of well-structured models with credible examples, as a lead-in to Chapter Five, where I discuss the two case studies supporting a proposed agreement-model of sustainable land and resource use on Indigenous lands.

I am quite conscious, in proposing such an agreement-model, that it should not be seen as a complete and permanent solution to a complex issue. Agreements such as this are not supported by constitutional protection, and are dependent for their effectiveness and durability on the evolving political context and goodwill between governments and Indigenous First Nations. However, as the more detailed discussion in Chapter Five intends to underline, agreements seriously negotiated in mutual goodwill and understanding between governments and First Nations, can constitute realistic, practical, and effective sustainable instruments, with the ability to avoid the important disadvantages of the statutory comprehensive land claim agreement process. While Chapter Four seeks to establish the credibility and value of models as agents of change and sustainable progress, it opens the door to two specific case-studies of current land and resource use agreements and their advantages – as catalysts for the proposal of an agreement template.

Now let me turn to that day three decades ago, when the concept of sustainability was introduced to the world.

The Hall of the General Assembly of the United Nations in New York is an imposing venue. There were no empty seats there on October 19, 1987, when the Chair of the World Commission on Environment and Development (WCED), Mrs. Gro Harlem Brundtland, introduced her ground-breaking report entitled "Our Common Future", now also known as the "Brundtland Report".

The Report summoned the world to adopt the concept of "Sustainable Development", defined as "the kind of development which meets the needs of the present without compromising the ability of future generations to meet their own needs".[2]

In her introductory address, Mrs. Brundtland stressed that the world must change the way it practices development:

"The Commission became collectively convinced that the present development patterns cannot be allowed to continue. While economic and social suffer from national and global imbalances, threats to the environment are becoming global in scope and devastating in scope and effect. The survival of the planet requires that we act now".[3]

Sustainable development also implied, in her view, equity and fair sharing among nations:

> It requires political reform, fair access to knowledge and resources, a more just and equitable distribution among nations. Poor people cannot be condemned to remain in poverty. It is mass poverty which drives millions of people to exploit their soils, overgraze fragile grasslands, and cut yet more of the disappearing tropical forests – these great lungs vital for the global climate and thereby for food production itself.[4]

"Growth", she added, "cannot be based on overexploitation of the resources of third world countries. Growth must be managed to enhance the resource base on which they all depend".[5]

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[2] World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 1,3, Section 27 ["Brundtland Report"].
[3] UNGAOR, 42nd Sess, 41st Mtg, UN Doc A/42/PV.41 (1987) at 9-10 [provisional].
[4] *Ibid* at 11.
[5] *Ibid* at 12.

The lead speaker after Mrs. Brundtland's introduction was Maumoon Abdul Gayoom, the little known President of a Small Island State, the Republic of Maldives.

"We are gathered here today", he said,

> [A]t a time of potential crisis confronting our planet and its population – the crisis of environmental destruction which man has brought upon himself. Man's actions over many centuries have transmuted the natural order of his environment to the point where the whole world is ensnared in the consequences. As the scale of man's intervention in nature has increased, the scope of nature's repercussions has multiplied. Consequences of the actions of individual nations have reverberated globally, and all mankind's present and future generations may suffer the penalties of the errors of a few.[6]

"Today", he continued, "the world is faced with risks of irreversible damage to the human environment that threaten the very life support systems of the earth, the basis for man's survival and progress".[7]

"The words 'environmental trends' have now come to embody a host of appalling global predicaments, such as desertification, mass deforestation, loss of genetic resources, water pollution, toxic air emissions, hazardous wastes, acidification of the environment, and world sea-level rise".[8]

And alluding to the perils faces by the Maldives, he cautioned:

> As for my country, the Maldives, a mean sea-level rise of 2 metres would suffice virtually to submerge the entire country of 1,190 small islands, most of which barely rise over 2 metres above mean sea-level. That would be the death of a nation. With a mere 1 metre rise, also, a storm surge would be catastrophic and possibly fatal to the nation".[9]

He referred to studies independently carried out by a number of scientists and organizations on the possible effects of sea-level rise in different coastal areas of the world. The Maldives would not

[6] *Ibid* at 21.
[7] *Ibid*.
[8] *Ibid*.
[9] *Ibid*.

be the only nation to suffer catastrophic damage. Each of the other countries studied, – the Netherlands, the United States, Egypt and Bangladesh, – could face equally devastating impacts from rising seas.

Then, describing the spectacular beauty of his island nation, he commented with deep emotion:

> "The Maldive Islands are not merely the home of a few thousand people; they are a unique natural phenomenon, such as is found nowhere else on Earth. It is the phenomenon that Thor Heyerdhal, the Norwegian explorer, describes in his book The Maldive Mystery as 'green jade necklaces and scattered emerald jewelry on a blue velvet, each islet a separate gem in a ring of golden beach sand'.[10]

And President Gayoom would then utter these words that still resonate in the hearts and minds of those who heard him on that day. "We did not contribute to the impending catastrophe to our nation; and alone, we cannot save ourselves".[11]

"It is now a distressing possibility that industrial progress in the developed world may slowly drown this unique paradise in its entirety".[12]

Ten years later, at the Conference of the UN Framework Convention on Climate Change (UNFCCC) at Kyoto, Japan, on December 8, 1997, an equally emotional plea was delivered by the Rt. Hon Bikenibeu Paeniu of the Small Island State of Tuvalu.[13] Describing the increasing frequency of climate change catastrophes and their impacts, he pointed out:

> We are already experiencing the increased frequency of cyclones, tornados, flooding, and tidal surges – many of which unexpectedly hit us outside of the usual climatic seasons of

[10] *Ibid* .
[11] *Ibid* 26.
[12] *Ibid* 27.
[13] Bikenibeu Paeniu, "Tuvalu and Global Warning" (Statement delivered at the United Nations Framework Convention on Climate Change – Conference of Parties 3, 8 December 1997), online: <http://www.tuvaluislands.com/kyoto-panieu.htm>.

> the islands. This year alone, in 1997, Tuvalu was devastated by three tropical cyclones; the first two in March – Gavin and Hina -, and more recently Keli.[14]
>
> The cost of these effects to us in Tuvalu is enormous. It is almost unbearable. Not only were houses and whole villages damaged, but also vegetation and food crops were completely destroyed. In one recent incident an entire island community was left homeless, and its vegetation damaged so much, that the island is uninhabitable right now. In another incident, one whole islet disappeared into thin air. Erosion to coastal area of our already scarce land is further worsened, and the increasing salinity in underground water is seriously affecting not only vegetation and traditional food crops, but also the health and lives of our people.[15]

"Mr. President", he added,

> [C]learly while Parties to the UNFCCC here in Kyoto debate over what emission reductions to take, Tuvalu continues to bear and suffer the increasing cost of climate change impacts which is threatening the very existence, culture, and unique identity of Tuvalu as a member of the global community. The option of relocation by some countries therefore is utterly insensitive and irresponsible.[16]
>
> My delegation fully appreciates the high cost to developed countries of reducing greenhouse gas emissions to acceptable levels. Indeed, coming from a Small Island State already suffering from the effects of climate change, we are trying to understand the rationality of lack of actions to implement commitments made in Rio five years ago.
>
> However, we also wish to remind the Conference that the costs of not doing something to that effect, urgently now, are even much higher.[17]

And like President Gayoom ten years earlier, he added this emotional appeal: "To us in Tuvalu, it is certainly not a question of economics and costs. It is a matter of life and death. Ignoring our pleas will amount to nothing less than denial of our rights to exist as part of the global society and of the human race".[18]

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[14] *Ibid* at para 7.
[15] *Ibid* at para8.
[16] *Ibid*, at para 9.
[17] *Ibid* at para 10.
[18] *Ibid* at para 10.

Another twenty years have elapsed since the Kyoto Conference of the UNFCCCC. This anniversary coincides with the release in the U.S.A. of the 4th National Climate Assessment (NCA), mandated by the U.S. Congress under the provisions of the Global Research Act of 1990. This latest report emanates from scientists belonging to 12 Federal agencies, who assessed more than 1500 scientific studies and reports, and whose work is peer-reviewed by the National Academy of Sciences.[19]

In its findings that the planet is at its warmest in the history of modern civilization, the report confirms that "it is extremely likely that human activities, especially emissions of greenhouses gases, are the dominant cause of the observed warming since mid 20th century".[20]

In a statement by the Union of Concerned Scientists, Rachel Licker, the Union's Senior Climate Scientist, declared:

> The draft NCA highlights the significant impacts climate change is already having around the country. Those impacts, including on our health and economy, will likely worsen unless we take strong steps to limit global warming emissions, and adequately prepare and protect communities.[21]
>
> The assessment is like a doctor's report that evaluates a patient's vital signs and uses the information to diagnose a medical condition. In this case the medical condition is climate change and the symptoms are rising temperatures, higher sea levels and more extreme weather events. Experience tells us, and the Climate Science Special Report confirms, the Unites States is experiencing recurring heat waves, heavy rainfalls, more intense wildfires, and greater flooding from rising seas.[22]

[19] US Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment*, vol 1, eds DJ Wuebbles et al (Washington: US Global Change Research Program, 2017).
[20] *Ibid* at "Executive Summary".
[21] Union of Concerned Scientists, Press Release, "National Climate Assessment Moves through Scientific Process to Diagnose U.S. Climate Change Ills" (3 November 2017), online: <https://www.ucsusa.org/about/news-center/press#.W6jx4PYpDIU>.
[22] *Ibid*.

Last year, 2017, marked the 30th anniversary of the Brundtland Report, and its call for the adoption of Sustainable Development by the world community. The words "Sustainable Development" are now part of the international lexicon, and are widely invoked. Yet the interrogations endure as to whether they have changed global behaviour towards ecological sustainability and a sustainable planet Earth. Are we as a world community satisfied that we have now put into place such sustainable conditions as to enable "future generations to meet their own needs"? In the current socio-economic context of incessant production and growth, whose most visible symbol is the frenetic competition to build ever more cars, mobile phones and luxury goods, it is fair to ask whether the industrialized world has listened.

In his book *The Future of Life*, renowned biologist and scientist Edward O. Wilson points to the dichotomy between our standard measurements of the market economy and those of what he terms the natural economy. He opens the chapter entitled "Nature's Last Stand" with these words:

> The wealth of the world, if measured by domestic product and per-capita consumption, is rising. But if calculated from the condition of the biosphere, it is falling. The state of the latter, the natural economy, as opposed to the former, market economy, is measured by the condition of the world's forests, freshwater, and marine ecosystems. When distilled from the databases of the World Bank and United Nations Development and Environment Program as a single Living Planet index, the result forms a powerful counterweight to the more familiar GNPs and stock market indexes.[23]

Here indeed lies the challenge of Brundtland and of the Sustainable Development concept. That is, the reconciling of two divergent visions, the short-term driven by socio-economic and political imperatives, and the longer and far less visible and tangible other, the preservation of the natural heritage and of the life-sustaining functions of the planet.

[23] Edward O Wilson, *The Future of Life* (New York: Alfred A Knopf, 2002) at 42.

This thesis aims to answer the following question: How do Agreements between Indigenous Peoples and Governments advance the cause of Sustainability and Environmental Justice?

The case studies I have chosen are based on personal experience of many years of cooperative work with the Algonquins of Barriere Lake; and research on, as well as readings of, the struggles and initiatives of the Haida Nation to recover its autonomy and its rights to its ancestral home of Haida Gwaii. The thesis argues that the type of Land and Resource Use Agreement entered into by these First Nations with relevant governments can be a practical and affordable method of ensuring the implementation of sustainability and the improvement of internal governance, in addition to constituting a way of recognizing and upholding Indigenous Peoples' rights.

Models, when well planned towards a clear visionary goal, can achieve their objectives, and often reach beyond them. The Agreement mode or template envisaged in this thesis, whilst admittedly not an end in itself,represents one concrete and workable answer to the continuing pleas of Indigenous Peoples for recognition of their rights, their lands, and the sustainable use of their resources. It constitutes above all an instrument of environmental and social justice.

CHAPTER ONE

SUSTAINABILITY AND THE CONCEPT OF THE SEVENTH GENERATION

Has the world order, since the Brundtland Report, succeeded in leading the global commons towards ecological sustainability and a sustainable planet Earth?

Sustainable Development as envisioned in Brundtland is most certainly a noble, desirable, and essentially important concept. It implies that the economy must tailor itself to the integrity of the planet's ecosystems, and their perennial capacity to sustain life and living of human and animal species. In this regard, Herman Daly, in his book "Beyond Growth: The Economics of Sustainable Development", gives us food for thought when he observes: "The Economy has gotten bigger, the Ecosystem has not. How big has the Economy become relative to the Ecosystem?".[24]

And to quote Herman Daly again: "There is something fundamentally wrong in treating the Earth as if it were a business under liquidation".[25] More than three decades ago, the renowned zoologist David Attenborough described the challenge clearly:

> If we are to manage the world sensibly and effectively we have to decide what our management objectives are. First, we must not exploit natural stocks of animals and plants so intensively that they are unable to renew themselves, and ultimately disappear. This seems such obvious sense that it is hardly worth stating. Second, we must not so grossly change the face of the earth that we interfere with the basic processes that sustain life – the oxygen content of the atmosphere, the fertility of the seas – and that could happen if we continue destroying the earth's green cover of forests and if we continue using the oceans as a dumping ground for our poisons.[26]

[24] Herman Daly, *Beyond Growth: The Economics of Sustainable Development* (Boston: Beacon Press, 1996).
[25] Herman Daly, *Steady-State Economics* (San Francisco: WH Freeman, 1977) at 248.
[26] David Attenborough, *The Living Planet: a Portrait of the Earth* (London: Collins, 1984) at 308.

Among the challenges confronting sustainability in a world increasingly dichotomized between wealthy and poor nations, the notion of equity looms large, so closely intertwined it is with the concept of sustainable development. As David Pearce and Giles Atkinson point out in their paper entitled "The Concept of Sustainable Development: An Evaluation of its Usefulness Ten Years after Brundtland"[27]:

> The World Commission's definition made it clear that the emphasis on future generations was only part of the story: concern with the poor now was also important, indeed the highest priority. These questions pertain to the distribution of wealth within each generation. The analysis above can be applied to this equity as well, for the poor cannot improve their lot without access to productive capacity. If their well-being is to improve, then they must secure better education, better technology, more man-made capital, and more natural capital. Social capital will matter as well in the sense of the need for more participation in decisions that affect their lives, and more consultation. Control over resources can be facilitated by establishing secure property rights to land and other resources.[28]

Pearce and Atkinson make this further point:

> Indeed it can be argued that the philosophy of sustainable development arose precisely because there were concerns about the unsustainability of forms of development that sacrificed the environment in the name of economic growth[29].

The challenge involving broad idealistic concepts such as Sustainable Development lies in giving them a concrete form apt to achieve meaningful and positive change. Such broad concepts are given to varied and divergent interpretations, which make their evaluation a daunting task. Sustainable Development is likely to be seen by a commercial promoter very differently from a conservationist.

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[27] David Pearce & Giles Atkinson, "The Concept of Sustainable Development: an Evaluation of its Usefulness 10 years after Brundtland" (1998) 1:2 Environmental Economics and Policy Studies 95.
[28] *Ibid* at 97.
[29] *Ibid* at 98.

Is it then relevant to ask ourselves: is Sustainable Development as envisioned by Brundtland an attainable and realistic goal, and a hope possible of fulfilment?

The case can be made that coalescence around a common agenda and action-plan at the international level remains a daunting challenge, despite the imposing number of multilateral environmental agreements (MEAs) endorsed to-date by a majority of nations. A topical example of this challenge is the recent withdrawal of the U.S.A., the largest emitter of carbon dioxide after China, from the 2015 Paris Climate Accord.[30]

It is reasonable to suggest that the evolution of international environmental cooperation is too often marked by commitments unkept and targets unmet.

Yet there are hopeful signs that "Our Common Future" and Sustainable Development have left a significant imprint over the last three decades. Sustainable Development has become a familiar term around the world, a definite "brand". The practice of it may not match the notoriety of the brand, but there are encouraging signs leading to change towards sustainability. It was striking, for example, that in the aftermath of President Trump's withdrawal from the Paris Climate Accord, a significant number of States, cities and municipalities of the U.S.A. proclaimed loudly that their climate and sustainability programs would continue with undiminished determination.[31]

This brings to mind another most encouraging example – involving some of the world's large urban centres and their thrust towards sustainability. Cities can play a significant role, given their relative autonomy of action – they can move forward with environmental initiatives without the

[30] "Paris Climate Deal: Trump Pulls US out of 2015 Accord", *BBC News* (1 June 2017), online: <https://www.bbc.com/news/world-us-canada-40127326>.
[31] Nick Stockton, "U.S. Cuties and States Try to Keep Washington's Climate Promises", *Scientific American* (9 November 2017), online: <https://www.scientificamerican.com/article/u-s-cities-and-states-try-to-keep-washington-rsquo-s-climate-promises/>.

imprimatur of central governments. They also happen to be closer to the grassroots and thus more flexible in inciting public participation.

The recent announcement of the inaugural City Climate Leadership Awards, in September 2013, highlighted achievements in sustainability which can serve as worthy models and examples to be replicated. Ten cities received awards. Among them: Bogota for its urban transport system used by over 70% of its 7 million population, and now undergoing further improvements to enhance its carrying capacity; Copenhagen for its plan to become carbon neutral by 2025; Munich, which is now powered by 37% of renewable sources and projects a target of 80% by 2025; San Francisco now sees 80% of all its trash diverted from landfills, and will bring this target to 100% by 2020; Melbourne for its Sustainable Buildings Program enabling energy and water retrofits.[32]

Cities and municipalities of all sizes are becoming increasingly involved in recovery, recycling, re-use and composting, a progress I can witness regularly in my own home-town.

So, even if the planetary sustainability challenges remain formidable ones, it must be recognized that the global commons is increasingly conscious of them because of Brundtland, an important step in itself.

This said, there is arising as well an increasing consciousness within the international community of the need to measure the progress or regress of sustainable development and sustainability since Brundtland – to attempt creating objective and credible measurement standards.

[32] Siemens & C40 Cites Climate Leadership Group, Joint Press Release, IC201309.011e "C40 & Siemens Inaugural City Climate Leadership Awards Honour Ten Cities for Excellence in Urban Sustainability" (4 September 2013), online: <https://c40-production-images.s3.amazonaws.com/press_releases/images/46_C40_20Siemens_20Cities_20Climate_20Leadership_20Award_20Winners_20FINAL.original.pdf?1388095717>.

One of the most often quoted and credible attempts in this direction, is the recent research conducted by the Stockholm Resilience Centre of Stockholm University, involving a group of 28 internationally renowned scientists which, in 2009 introduced a framework of planetary boundaries.[33]

The Stockholm Resilience Centre identified nine planetary boundaries, the crossing of which could cause sudden or irreversible environmental changes. These boundaries are:

Ozone depletion; biodiversity loss; chemical pollution; climate change; ocean acidification; freshwater consumption; land system change; nitrogen and phosphorous biospherical flows; and atmospheric aerosol loading.

In the aftermath of the release of the framework, Johan Rockstrom and several of his fellow scientists affiliated with the Stockholm Resilience Centre published a paper entitled "A Safe Space for Humanity", in which they confirmed their findings that three of the nine planetary boundaries had been crossed, namely climate change, loss of biodiversity, and altered phosphorous and nitrogen cycles.[34]

In 2015, scientists W. Steffen et al published updated planetary boundary findings in "Planetary Boundaries: Guiding Human Development on a Changing Planet" to the effect that a fourth planetary boundary, land-system change, had been crossed.[35]

Bashkar Vira argues, not without reason, that:

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[33] Stockholm Resilience Centre, "Planetary Boundaries Research", online: <http://www.stockholmresilience.org/research/planetary-boundaries.html>.
[34] Johan Rockström et al, "A Safe Operating Space for Humanity" (2009) 461:7263 Nature 472at 472-475.
[35] Will Steffen et al, "Planetary Boundaries: Guiding Human Development on a Changing Planet" (2015) 347:6223 Science 1259855.

> Growth remains the singular mantra of all major economies, dominating discussions in most decision making circles in the last six years".[36]

He further comments:

> "De-growth remains in this context, beyond the contemporary imagination of those who pull the levers of power in the global economic system.[37]

In the face of these adverse findings and cautions, it is logical to become despondent and cynical, and conclude that change towards sustainability is illusory. Yet, the example of the world's Indigenous Peoples (IPs) should give us pause for inspiration and positivity. Indeed, IPs represents a mere 4% of the world's population, but occupy some 20% of the planetary land, which surface contains 80% of the earth's biodiversity.[38]

Against formidable odds, chiefly resulting from colonization and ensuing loss of governance and autonomy over their ancestral lands, IPs have battled with singular resolve and tenacity to maintain their socio-cultural and spiritual ties to their lands and their natural ecosystems and biodiversity. For them the connection to "Mother Earth" and its bounty are an inherent part of their beings and beliefs.

They see the land very differently from us of the industrialized world. Where we view land as an object of ownership, possession, and development for economic purposes, they view land as a sacred trust to be safeguarded and nurtured not only for themselves, but for the generations to

[36] Bhaskar Vira, "Taking Natural Limits Seriously: Implications for Development Studies and the Environment" (2015) 46:4 Development and Change 762 at 769.
[37] *Ibid*.
[38] Claudia Sobrevila, *The Role of Indigenous Peoples in Biodiversity Conservation: the Natural but Often Forgotten Partners* (Washington: The International Bank for Reconstruction and Development/The World Bank, 2008).

come. Indeed, IPs live by the concept of the Seventh Generation, whereby before planning and acting, they think in terms of seven generations ahead.

When invoking the concept of sustainable development, it is significant to note that it has taken the impending and foreboding signs of environmental disasters for our current world order to very recently – in the last decades – turn its attention towards the environment and the need for behavioural change. Until then, the decision-dominant part of the world community forged ahead headlong into unbounded economic growth, driven by short-term governance instruments and strategic planning. In doing so, our decision-makers kept ignoring all warnings by credible minority voices urging them to take into account the capacity of planetary ecosystems to sustain such untrammelled development. Indeed, it is still a challenge for those minority voices to be heard and heeded, despite the overwhelming evidence.

The IPs, on the other hand, have not needed world commissions, scientific evidence, or learned experts' papers, to learn about ecosystem health and boundaries, and to practise sustainability. For them the bond with "Mother Earth" and her bounty is an innate part of their beings, as individuals and community. This is a holistic bond, a cultural and spiritual attachment to Earth and all its species. The forests and flowers are the adornments of the dress of Mother Earth, and the oceans, rivers and waterways are the arteries and veins which sustain her life. The clearer the latter flow, the healthier will she be. Such attachment and respect for the earth's bounty is a sacred trust to be passed on to future generations. And whatever you plan, and whenever you act, you must always keep in mind the seventh generation ahead.

While the example of IPs is an inspiring one, it would be superficial to advance it as some form of perfect answer to sustainability and ecological integrity. It must be viewed as one face of a broader horizon.

Indeed, the challenges faced by IP's and the concept of the Seventh Generation should not be minimized.

In addressing the issue of sustainability as well as of the concept of the Seventh Generation, it is important to situate them in the context of the changing realities brought about by colonization.

Indeed, colonization brings about forceful regime-change, and a context of dominance by the colonizing power, with corresponding loss of autonomy and a state of dependency on the part of the conquered entity. As the authors point out in the report *Our Responsibility to the Seventh Generation – Indigenous Peoples and Sustainable Development*:

> Whereas our ancestors had been able to sustain their existence and the existence of all members directly from the environment, the introduction of trade goods and money, over time, created a dependence on the products of the European market system. Increasing dependency for essential items such as clothing, food, implements such as rifles, shelter and other technologies very quickly became the norm.[39]

As I have been able to observe closely over the years, there is no doubt the reserve system imposed upon Canada's First Nations by the *Indian Act* compounded this state of dependency.

Colonization inevitably means not only a clash of cultures and ways of life, but also of societal values and traditions, as well as instruments of governance. This dichotomy expresses itself clearly in the constantly uneasy relations between Canadian First Nations and their governments. As Clarkson, Morisssette and Régallet judiciously point out:

> In order to ensure access to the land, governments set out to destroy the traditional forms of governance and to forestall any initiative for independent political action. Traditional governments are characterized by the collective ownership of all lands, waterways, forests and wildlife, full participation and consensus in decision-making, and non-coercive leadership. These were perceived as standing in opposition to western forms of governments which are based upon private ownership of land and productive wealth,

[39] Linda Clarkson, Vern Morrissette & Gabriel Régallet, *Our responsibility to the Seventh Generation – Indigenous Peoples and Sustainable Development* (Winnipeg: International Institute for Sustainable Development, 1992) at 26.

> representative politics, majority rule decision-making, and centralized, hierarchal leadership.[40]
>
> This loss of confidence was the logical outcome of living in a society that measured happiness and well-being in terms of material possessions. Our young people especially could not help but blame themselves and their people for not measuring up to such an ideal. Given that most Indigenous people have been victims of the residential school system, and have all lived and been exposed to the mainstream culture for quite some time, the habits and the perceptions of self in a consumer-oriented, individualistic society, have had an irresistible impact.[41]

I have chosen to highlight several excerpts from the 1992 IISD Report "Our Responsibility to the Seventh Generation" because they resonated with my own experiences and observations over many years of interaction with Indigenous Peoples. Like the authors of the report, I have been able to witness at first hand the vast array of challenges facing Indigenous Peoples, not only in respecting the spirit of the Concept of the Seventh Generation, but more directly, in practising it.

In his research paper of 2008 entitled "Seven Generations, Seven Teachings: Ending the Indian Act", John Borrows highlights yet another important reason why the observance of the traditional concept of the Seventh Generation has become so problematic for Indigenous Peoples since colonization.

> And in the latest generation my daughters have no right to live on the reserve or participate in community life, again, because of the Indian Act. I am not so sure they would have been separated from their family and ancestral lands if they were born before 1876, when the Act's decay started to permeate our lives.
>
> For my family, it is now the seventh generation since the Indian Act was introduced. The seventh generation! This generation holds special significance for Indigenous people. Decisions about the future are not supposed to occur without taking them into account. Unfortunately, the Indian Act cuts most deeply at this very point. The Indian Act is purposely designed to assimilate us. It is meant to sever the generations. The Act is working its purpose, through provisions concerning land, elections, membership,

[40] *Ibid* at39.
[41] *Ibid* at 44.

> commerce and education. It cuts us from those future relationships. We can not take account of the seventh generation of the Indian Act continues to remove them from us.[42]

Forestry is one of the central resources of Indigenous ancestral lands, and one which has been at the core of the evolving sustainable-development discussion. Given the crucial importance of forests for sustainability, the presence and involvement of Indigenous Peoples and their lands is generally accepted to be a very positive factor.

In an article in Environmental Law in 2010, entitled "Ahistorical Indians and Reservation Resources", professor Ezra Rosser questions whether the notion of ascribing a primary role to Indigenous Peoples as guardians of the environment is a stereotype. He quotes Professor Rebecca Tsosie as arguing that

> [T]he cultural connection between Native peoples and the land should not be dismissed as a romanticized notion that is of limited utility in the modern era", adding that "studies confirming or making note of the central place of nature and land in Indian belief and value systems are ubiquitous.[43]

However, this innate bond with nature and the land does not make the challenge of practising the Seventh Generation concept any less daunting regarding forestry or any other natural resource.

As Stephen Wyatt of the Faculty of Forestry of the University of Moncton points out in a research paper on First Nations and forest lands:

> First Nations that enter into economic relationships with forest companies are usually asked to accept existing forest management systems and to adopt dominant visions of development. In this context, planning, management, and use of natural resources are viewed as technical activities, cased on economic benefits and positivist, scientific, and rational criteria (Lane 2001). The aspirations of the First Nations, their choices about

[42] Borrows, *supra* note 1 at 2.
[43] Ezra Rosser, "Ahistorical Indians and Reservation Resources" (2010) 40:2 Envtl L 437 at 10.

> development, or their views on ways to access and distribute economic benefits may conflict with government or industry objectives for the management of forest lands.[44]

Whilst objectivity demands that the role of IP's in advancing sustainability through the concept of the Seventh Generation should not be "romanticized" or exaggerated, the involvement of IP's nevertheless remains a positive factor and reality.

In a 2015 Symposium on Environment and Human Rights, professor Elizabeth Ann Kronk Warner observes that "[m]any Indigenous peoples also possess unique connections to the land, including legal, spiritual, and cultural connections, which play an important role in the human rights claims by indigenous peoples in response to environmental problems".[45]

The references I have outlined above reflect the intense and continuing dichotomy overshadowing the lives and decisions of Indigenous First Nation communities.

On one hand, there exists that inherent and deeply-felt bond with the land, a cultural and spiritual respect for "Mother Earth" shared by Indigenous Peoples in Canada and beyond.

On the other hand, there looms the heavy burden of everyday reality, the consequences of Indigenous First Nation life since colonisation, be it the dominance of the market economy, or reserve life and the other impositions of the Indian Act.

Thus it is not surprising that First Nation communities are consistently torn by contradictory pulsions in their decision-making regarding land and resource use on their ancestral territories.

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[44] Stephen Wyatt, "First Nations, Forest Lands, and 'Aboriginal Forestry' in Canada: from Exclusion to Comanagement and Beyond" (2008) 38:2 Can J Forest Research 171 at 174.
[45] Elizabeth Ann Kronk Warner, "Working to Protect the Seventh Generation: Indigenous Peoples as Agents of Change" (2015) 13:1 S Santa Clara J Intl L 273 at 277.

Hence the objective of this thesis - to advance the proposal of an agreement model or template in an attempt to bridge the gap between these two contradictory elements.

There are communities where the leadership and collective membership have decided to observe true sustainability, and to protect their lands and natural resources against all forms of unsustainable exploitation and development. Indeed, the Algonquins of Barriere Lake, who constitute one of the two case-studies of this thesis, are a striking example of such community resolve. Despite the formidable socio-economic disadvantages they face for the reasons outlined earlier in this chapter, they have resisted with a ferocious determination against all situations liable to impair the sustainability of their lands, be it clean-cuts by large forestry companies or mining exploration.

In fact their continuous struggle to prevent mining activities on their lands has been led by one of their young community leaders, with the backing not only of the community as a whole, but significantly of a very militant group of young Algonquins.

Such militant action requires both determined abnegation and courage in the defence of nature and sustainability. For it would be easy – and in many ways understandable – for the Algonquins of Barriere Lake to strike a deal with a mining conglomerate which would shower significant money incentives upon the community, likely in the millions.

Not only have the Algonquins of Barriere Lake resisted this understandable temptation, but they have been so vociferously opposed to any mining exploration on their lands, that they have succeeded in convincing both government and mining interests to desist and leave them alone.

However, this example is not the norm. Burdened by a continued array of socio-economic problems, many First Nation communities have chosen to strike deals with mining and other

interests. Consequences and results vary of course, and certain agreements provide for forms of environmental protection and mitigation.

A research paper by Ginger Gibson of the University of British Columbia and Jason Klinck of the University of Alberta offers a comprehensive illustration of the impacts of agreements struck between Indigenous communities and mining interests. Entitled "Canada's Resilient North: The Impact of Mining on Aboriginal Communities",[46] it offers a clean synoptic example of the wide range of consequences posing ongoing challenges to sustainability relating to the exploitation of land and resources.

In advancing the proposal of an agreement model where two IP First Nations play a central role, I remain continuously conscious of the significant limitations and challenges they face on applying the concept of the Seventh Generation. However, I remain convinced, through my interaction of several decades with IP's of different First Nations and generations that they share an inherent inter-generational bond with the earth its natural bounty. This, in my mind, is how the reality and practicality of the Seventh Generation concept should be interpreted.

Our world has evolved in unexpected and even exponential ways scientifically and technologically. The world in which we live today is a vastly different one from the post WWII one. The present global commons is one of instant communications, and countries that were then remote and inaccessible from our own now lie at our door-step. Marshall McLuhan's vision of the "Global Village" is today a practical reality.[47]

[46] Ginger Gibson & Jason Klinck, "Canada's Resilient North: The Impact of Mining on Aboriginal Communities" (2005) 3:1 Pimatisiwin J Indigenous & Aboriginal Community Heath 116.
[47] Eric McLuhan "The Source of the Term 'Global Village'" (2010) 1:2 Intl J McLuhan Studies.

We now possess highly-advanced scientific and technological knowledge, as well as computerized instruments, systems and models, enabling us in real time to plan, assess, and measure sustainable impacts on ecosystem life – whether it be forestry and other land-uses, or their biodiversity. These are extremely valuable tools which we cannot ignore in our quest for sustainability.

The significant value of the IPs' lessons is to be found above all in their ethical and spiritual connection with the land and its biodiversity. For them this connection is a way of life, inherently practised over the millennia.

Although, in contrast, the developed world's approach trends towards the practical and short-term result, where the goals of growth and financial returns too often dominate, its scientific and technological contribution can be a powerful force for the common good.

I have been inspired into becoming interested and involved in the story of sustainability from the perspective of IPs and the conservation of their lands in the face of overwhelming odds. I firmly believe that their efforts could be solidified and even enhanced by the blending of traditional Indigenous knowledge with the modern scientific and technological advances we now possess as a world community.

It seems to me that it would be the blending of two complementary positives – heart and muscle.

With this in mind, I would like to propose a thesis involving agreements entered into by two First Nations with their respective governments, and how they intend to use this process to preserve not only the ecological integrity of their lands, but their communities' rights to an environmentally sustainable development future.

The two First Nations I have selected for this purpose are: The Algonquins of Barriere Lake in the Outaouais region of Quebec, and the Haida Nation in Haida Gwaii on the north-west coast of British Columbia.

The question my thesis will seek to answer is this: “How can integrated-resource and land-use co-management agreements between Indigenous Peoples and governments advance the cause of sustainability and autonomous governance on their ancestral lands?”

CHAPTER TWO

THE ALGONQUINS OF BARRIERE LAKE

It is deliberately that I have chosen to open this Chapter on the Algonquins of Barriere Lake with an imaginary event, highlighting a speech by a Chief who represents and articulates the arguments and aspirations I have heard consistently from actual chiefs and elders over the years. I felt it would arrest attention as a way of underlining the perspective of IP's, in this case the Algonquins of Barriere Lake, in the face of interactions and negotiations with governments.

The date was May 12, 2016. The new Chief of the Mitchikanibibok Inik, the Algonquins of Barriere Lake, Gabriel Saint-Yves, had convened a Community Feast, to which he had invited the Canadian and Quebec Ministers of Indigenous Affairs.

The Ministers, Sandra Hawkins and Jean-Paul Courtois, had accepted the invitation, and were sitting in the first row of seats, outside the Community Hall, surrounded by their respective staffs.

The new Chief cut an imposing figure. Very tall and broad-shouldered, he towered over those around him. His piercing look signalled authority and decisiveness, and his confident demeanour that of a leader not to be taken lightly.

It was around eleven that morning when he stood on the steps of the Community Hall, to address the Ministers, reporters, and especially the large number of community members gathered to hear him.

> Before convening the Traditional Feast, he said, I would like to welcome our guests, the Ministers, but above all my Algonquin brothers and sisters who have entrusted me with the leadership of our community.

We have all gathered here in this most symbolic place, the land of our ancestors, who nurtured it with their utmost care and wisdom, so that we of my generation can enjoy its blessings today.

However, much has happened and changed since our ancestors lived here, and made it their home over thousands of years.

If they were alive today, they would not recognize the land for which they devoted ceaseless nurturing care, with the intention of leaving it to us with all the bounty and blessings they had known themselves.

They would be astounded to learn that some three centuries ago, uninvited peoples from France, and then more recently from England, had arrived in their thousands to take over our ancestral lands by force, and occupy them for their own benefit.

Thus it was that, suddenly, we became strangers on our own land. No longer were we allowed to care for the land according to our wisdom, our ancestral knowledge, our own customs, and our own laws. The conquering settlers created "parliaments", where they made laws which they forcefully imposed upon us. We, on our ancestral territory, which has been ours and which we have occupied for thousands of years, had no say whatever in the making of those laws – which we were expected to respect and obey.

The new Canadian government built a vast parliamentary edifice on our Algonquin lands, without any involvement or consent on our part. It was in this edifice that 130 years ago, the settlers' parliament enacted a law which they called "The Indian Act", the one supreme law they conceived to rule over our lives.

It was through this infamous "Indian Act" that the settler government would devise the solution to the "Indian problem". The children and youth of our communities would be sent away from our lands to live in what the government called "Residential Schools", run by the settlers' religious orders. Our children were forcefully separated from our parents, forbidden to speak their ancestral languages, and given new names and identities. The objective was to assimilate the young generations into the ways, language, culture, and religion of the dominant settler community. Thus we "Indians" would enjoy the blessing of being turned into "Canadians".

I am now 61 years old, and spent the years of my childhood and youth in a French-speaking residential school. My French name is a legacy of this forced and imposed adoption. I never knew my parents until I was liberated from the school "prison" at the age of nineteen. Not having been allowed to use my ancestral language, I did not know how to speak it when I returned home. I had to get accustomed to establishing a bond with my parents. I had been forced into a cruel exile during all the formative years of my life, severed from the caring love and teachings of my parents, and cut off from the ancestral ways, customs, language and culture, of my Algonquin forebears.

There are some, perhaps even many, who have never got over such cruel memories, and who spend their lives in resentment, and in some cases even hate. Although I can understand why such feelings exist, I cannot live that way myself. Searching into the lessons and wisdom of my ancestors, I believe they would advise me to rise above feelings of resentment and hate, which consume and gradually destroy hope and living. It is never easy to forget and forgive such a bitter experience, but this, I know, is what my ancestors would want me to do.

However, they would also advise me in doing so, to send to the settler governments the message that I now deliver to you, as clearly and decisively as I can, in front of my people. My message to you is this: this our land, it has always been our land, and it will remain so for ever. It has been passed on to us by our ancestors as a sacred trust for our coming generations. We have neither the power nor the intention to betray that sacred trust, and surrender even a tiny dot of that land to you.

I am conscious of course that since the colonization you have interfered with our ancestral trap lines, that you have allowed logging companies to desecrate our forests with vast and crippling clear-cuts, that you have rained chemical pesticides upon us and our lands from your aircraft, that you have created a public park on our land and opened it to outside hunting and fishing – and all this, without the elementary courtesy of informing us and consulting with us, let alone asking for our permission. Your mining laws allow corporate mining interests to lay claims on our territory as if the land was theirs.

You have imposed upon us highly-paid managers to administer our affairs, and disburse funds and services, again without our having consulted with us and obtained our agreement.

As if the experience of the residential school imposition under the dreaded "Indian Act" had not served as a sufficient lesson, you recently used the same dictatorial act for yet another unilateral imposition upon us. Our Chiefs have been chosen according to the time-honoured custom of our people over thousands of years – but again without our consent, you decided to inflict your own electoral system upon us. We have protested and asked on several occasions that you respect the overwhelming wish of our community to return to our own selection custom, but you keep turning a deaf ear to our repeated requests. You act like the masters, and you know best what is good for us. We are not wise or intelligent enough to judge for ourselves.

Now, your laws tell us that if we want to have our ancestral territory recognized as ours by your governments, we must comply with the use of the most complicated, bureaucratic, legalistic, lengthy, and expensive process devised by you under those same laws. Bitter as is the irony of it, it is what you call "justice" under your laws: namely, that we need your legal and parliamentary blessing to claim before you what is ours in the first place. Is this right, is this true justice, that you should come uninvited, and by force take over what has been ours for thousands of years- and now ask us to plead with you to give it back?

Well, I am here on behalf of our ancestors, our elders, and our people, to tell you that, yes, we are prepared to cooperate and work with you, not as "subjects" to be ignored, but as sovereign partners in a covenant of mutual respect and understanding. And we offer to join with you in this covenant, which will serve to redress the impositions and injustices of the past, and usher in a dawn of reconciliation and justice.

This is the covenant or agreement that we propose to you:

That our ancestral laws, our traditional and spiritual beliefs and customs, including our language, be respected on our lands. That our bond with Mother Earth and our lands is a sacred trust passed on to us by our ancestors, for the benefit of our and future generations. This means maintaining the bounty of our lands in the way our ancestors left them to us, and that our laws provide.

That therefore the ecological integrity of our lands and the wildlife on which we depend for sustenance, will be respected and enhanced – which implies no clear-cuts and unsustainable logging, strict conservation of our wildlife, and no mining of any form. That we will participate as co-managers with you in the sustainable use of our resources, and that we will have a direct say in how this is planned and implemented. This will imply blending our traditional indigenous knowledge with your scientific and computerized knowledge and models, in order that we may benefit from both these sources of use and knowledge.

That we will share fairly and equitably in the revenues derived from our territory's resources.

That we will not rest until we are able once again to select our leaders according to the age-old custom passed on to us by our ancestors.

That henceforth we will manage and administer our own affairs, and this in all transparency and openness.

What I convey to you here as the new Chief of our community, is in no way my own personal and unilateral opinions and decisions. Under our laws, we do not have leaders who govern and decide by themselves. We discuss and decide by consensus, listening to the advice of our elders, and making sure to consult with our community. So my voice today is our voice as a people and as a community.

We hope that you will join with us in a common future of mutual respect, conciliation, and cooperation. I reiterate, however, that our future together will depend on your willingness to accept the proposal I have set out before you regarding our lands, and our presence as trustees of our ancestors. We do not intend to plead under your laws and your Parliaments for the recognition by you of the ancestral lands which have been ours since

> time immemorial. The covenant with you, when accepted by your governments, will be the confirmation of our interrupted bond with our lands.
>
> May the wisdom of our ancestors and elders be our continuing guide towards a future of mutual respect and understanding.[48]

The Algonquins of Barriere Lake, a Canadian First Nation, live in distressing conditions in a small reserve called Rapid Lake, in the Outaouais region of Quebec. The sufferings and adversities they have endured since colonization would have driven many other communities to despair, and perhaps obliteration. Yet, they are still there, defending the environmental integrity of their ancestral land with a tenacity and resilience which deserve admiration. They have succeeded against formidable odds in preserving their language and culture, and in keeping alive their strong bonds with nature and the environment, a legacy they strive to pass on to the younger generations.

Their attachment to the land transmitted to them by their ancestors is not only constant, but intense and immovable. Indeed, their ancestral lands represent for them the fundamental link with their roots and their beings as an Algonquin nation. Were they to abandon their lands in part, or especially as a whole, they are convinced they would cease to exist as an autonomous community and people, striving despite formidable odds to maintain their culture, language, and way of life.

The lands are not only the focal expression of their existence and evolution as a people, but also the tangible life-line which protects them from encroachment and usurpation. As long as they can hold tenaciously to their ancestral lands, they keep their distinct identity and presence – and conversely, the more they allow gradual occupancy and usage of them by outside parties, the

[48] Speech by an imaginary Algonquin chief, as an illustration.

further they lose their autonomy of action and decision, already seriously impaired by outside intervention.[49]

Not all First Nations view their ancestral lands with the same possessive intensity as the Algonquins of Barriere Lake. Numerous are their sister First Nations which have decided to allow the use of their lands for cooperative short-term resource-extraction projects yielding immediate financial benefits. The temptations such projects pose to the average First Nation are readily understandable.

When a community lives in adverse and often deplorable conditions, relying on government support programs as a mainstay; when unemployment continues to hover at unsustainable levels; the incentive of sudden and perhaps substantial revenues becomes irresistible.

So the First Nation signs on as the silent partner in a mining or other resource-extraction project, which provides instant jobs for the life of the project, as well as much-needed cash benefits for the community.

However, as many First Nations have found out, the corporate "partners" involved have no interest in an altruistic long-term association. Their sole purpose is development for profit, and immediately that lucrative phase is completed, they return to base leaving the First Nation with the scars and long-term impacts of a strictly exploitative venture.

To their immense credit, and despite the pitiful living and social conditions which they have faced for a long time as a community, the Algonquins of Barriere Lake have systematically resisted all

[49] A general description reflected by Shiri Pasternak in *Grounded Authority: the Algonquins of Barriere Lake against the State* (Minneapolis: University of Minnesota Press, 2017).

entreaties from outside interests to make a fast financial profit from the unsustainable use of the resources on their lands.

For instance, their lands remain mining-free today, and knowing their determined stand as well as I do, I am convinced they will continue to remain thus. This, despite the fact that the provisions of Quebec's mining law allow for quasi-unrestricted mining exploration anywhere within the province. What has stood between mining corporations – using the flexibility of the law to their advantage – and the Algonquins of Barriere Lake, is the fierce and unrelenting determination of the latter to forbid any mining on their lands, regardless of the consequences.

The lessons they learned so painfully from logging operations on their territory over the years, no doubt played an important part in stiffening their resolve.

I became involved with the Algonquins of Barriere Lake soon after they signed a *Trilateral Agreement* with the Federal and Quebec governments. The agreement was born out of the continued resistance of the Algonquins to large-scale clear-cut logging operations on their territory.[50]

The *Trilateral Agreement* was signed on August 22, 1991. At that time Quebec's Forest Act provided for agreements known as CAAFs, or logging permits, between Quebec and forestry companies. The latter were granted 25-year CAAFs for logging operations on a particular territory, agreements that were renewable for another 25-year period. It was obvious the advantage lay solely with both signatories, Quebec and the forestry corporations involved. Regarding CAAFs granted on their ancestral territory, the Algonquins were simply an afterthought and bystanders – indeed

[50] *Trilateral Agreement*, Algonquins of Barriere Lake, Gouvernement du Québec, and Government of Canada, 22 August 1991 [*Trilateral Agreement*].

an irritant in the way of logging roads, and of the powerful fallow-bunchers able to clear-cut forests at an alarmingly rapid and destructive pace.

Algonquin community-lore has it that one of their chiefs would have commented wryly that between government and forestry companies, his community was being clear-cut out of existence!

So vast and destructive were the clear-cuts, that in the middle-eighties a young and newly elected Customary Chief, Jean-Maurice Matchewan, known as "Pancho", decided to oppose the unchecked and unsustainable logging operations. He led the members of the Algonquins of Barriere Lake community in systematic protests against the rampant and reckless logging practices in which his community had no say.

Logging roads were blocked, community members stood or camped in front of the logging equipment, and even erected tents on the grounds of the Canadian parliament – which sits on unceded Algonquin land – to call attention to the injustices visited upon them.

Two salient events were to serve as catalysts in their quest for environmental and social justice. The first was the adoption in 1987, by the General Assembly of the United Nations, of the Brundtland Report. The Brundtland Report, introduced the concept of "Sustainable Development", which, as stated in the Introduction, it defined as "the kind of development which meets the needs of the present without compromising the ability of future generations to meet their own needs".[51]

The Brundtland Report also advocated that "Indigenous Peoples' rights should be recognized and that they should have a decisive voice in resource management decisions on their territories".[52]

[51] Brundtland Report, *supra* note 2.
[52] *Ibid*.

Two years after the introduction of the Brundtland Report, a general election took place in Quebec, which became the second catalyst for action by the Algonquins of Barriere Lake.

Indeed, these two events coincided with the continuous and disruptive blockade tactics of the Algonquins, involving costly interventions by the Sûreté du Québec, Quebec's provincial police, as well as revenue losses by the forestry companies and the neighbouring lumber mills.

The Algonquins warned both the Federal and Quebec governments that they intended not only to continue, but to accelerate, their interventions and disruptions, unless the governments heeded the recommendations of the Brundtland Report, which they – both governments – had endorsed with much official enthusiasm and publicity.

For the Quebec government in particular, the Algonquin opposition and disruptions were becoming an increasing political problem on the eve of an election.

Thus was born the *Trilateral Agreement* to which I have referred earlier.

The *Trilateral Agreement* covers and identifies the ancestral territory of the Algonquins of Barriere Lake both within the provisions of the Agreement itself and in two Annexes, which are maps of the territory.

The latter is identified in two parts:

(1) Annex 1, a territory of 17,000 sq. kms., which the Algonquins of Barriere Lake view as their current land-use territory, which they also share with other aboriginal communities.[53]

(2) Annex 2, a study-area territory of 10,000 sq. kms., described as the "core territory" of the Algonquins of Barriere Lake.[54]

[53] *Trilateral Agreement, supra* note 50 at Annex 1.
[54] *Ibid* at Annex 2.

The objectives of the *Trilateral Agreement* are the following:

To develop an ecosystem-based Integrated Management Resource Plan (IRMP) with a commitment to the principles of Sustainable Development, conservation, protection of the traditional way of life of the Algonquins, and versatile resource-use.

To reconcile forestry operations and sports hunting and fishing with the traditional way of life of the Algonquins.

These objectives are supported by the collection, study and analysis of data regarding renewable resources and their uses on Algonquin territory.

For purposes of more effective management of the IRMP, the Annex 2 territory (Study Area) is divided into seven (7) Traditional Management Areas (TMAs), corresponding to traditional family-interest areas.

Three programs are instituted:

(1) An Indigenous Knowledge program;
(2) A natural Resources and Sustainable Development program;
(3) An Economic and Social Development program.

A series of studies and initiatives provide data and evidentiary support to achieve the objectives of the *Trilateral Agreement*:

(1) Sensitive Area Study (SAS) Mapping and Identification, to ear-mark sensitive zones and areas of concern for protection within cutting areas, e.g. sacred sites, burial grounds, moose yards, spawning area, medicinal plants etc.
(2) Toponymy Study to identify toponymy sites and hydrography roads.
(3) Modelling of Forest Growth, identifying the age class of the forestry content.

(4) Data on Habitat Classification for the moose population on a seasonal basis.

The sustainable management of the Forestry and Wildlife resources are subject to the following implementation provisions:

Forestry:

According to the modelling studies and data collected, as well as the detailed sensitive area and forest-content mapping, Forest Management Plans are prepared for the Seven Traditional Management Areas (TMAs).

The process to be followed is to agree on forestry cutting-plans for a five-year period, and these plans involve three distinct zones:

(i) Green Zones, where cutting is allowed on a sustainable basis, subject to pre-agreed conditions and guidelines.

(ii) Orange Zones, where cautionary measures are enforced to protect areas of concern as identified in the SAS maps.

(iii) Red Zones, where no cutting of any form is allowed.

Wildlife:

Five (5) Wildlife Management Plans are prepared for Moose, Black Bear, Furbearers, Small Game and Fish.

No integrated resource-management plan – no matter how carefully structured to ensure the long-term and sustainable land and resource use – can succeed without a stable and effective socio-economic base.

The objective of sustainability is to manage renewable resources in such judicious, efficient, and generational way as to derive sufficient and steady economic benefits, which in turn ensure the socio-cultural well-being, as well as the health and food-security, of the community.

The sad reality is that since colonization and until today, the Algonquins of Barriere Lake have yet to enjoy the benefits derived from the resources on their ancestral lands.

Studies commissioned by the Government of Quebec in 1994 on the value of economic activities in the region of the *Trilateral Agreement,* placed the overall revenue at $56,534,540, which in 2017 dollars would amount to approximately $92,000,000. These activities relate to forestry, tourism, services, and recreation.[55]

As none of the benefits flow through to the Algonquins, they have to rely on government support programs for their sustenance as a community.

The purpose and hope for the *Trilateral Agreement* process is that it will open the way for them to restore an increasing measure of governance autonomy on their lands whilst sharing in the economic benefits from the sustainable use thereof.

It will replace imposition and forced dependence by social and environmental justice, allow for capacity building and empowerment, and pave the way towards conciliation and peaceful co-existence.

The present living conditions faced by the Algonquins of Barriere Lake are intolerable, especially given the wealthy and prosperous country that is Canada,

[55] Cogesult study on regional economic activities and revenues, 1994

The *Trilateral Agreement* led to subsidiary accords and documents providing for the substantial enlargement of Rapid Lake, the present reserve where the community lives, as well as for its electrification, and for renewed housing and living conditions.[56]

Typical of the treatment then handed down from on high, the Algonquins had to forcibly leave their previous and ancestral home of Barriere Lake in the nineteen sixties when the whole area was flooded to create a large hydro-electric dam. And just as typically, it was the local priest that selected the site for the new reserve, which in bitter irony, is not supplied by hydro-electricity. Power is supplied by a polluting and noisy oil-fired generator, until electrification is completed by Hydro-Quebec under the terms of the accords with the federal and Quebec governments.

I cannot address the subject of the Algonquins of Barriere Lake without referring to the roles of the two governments involved in their fate and future: the government of Canada, whose constitutional jurisdiction imposes the responsibility for our Indigenous Peoples and communities; and the government of Quebec, whose constitutional jurisdiction encompasses territorial resources.

The twenty-five year story of the *Trilateral Agreement* has been one of most unfortunate ups and downs involving the two governments, with the Federal government significantly the more unfair and blameworthy of the two.

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[56] For information about the Memorandum of Mutual Intent of 1997 and the Ciaccia-Lincoln Joint Recommendations, along with other discussions and documents between the parties, see Indigenous and Northern Affairs Canada, "Algonquins of Barriere Lake" (2016), online: https://www.aadnc-aandc.gc.ca/eng/1100100016352/1100100016353; Algonquins of Barriere Lake, "Backgrounder" (2016), online: <https://canadians.org/sites/default/files/ABL%20Backgrounder%20Agreements%20-%20final.pdf>; and Tim Kitz, "Recent Timeline of Mitchikanibikok Inik's Struggle" (22 January 2009) *Indigenous Peoples Solidarity Movement Ottawa*, online: <https://ipsmo.wordpress.com/2009/01/22/recent-timeline-of-mitchikanibikok-iniks-struggle/>.

The Agreement was a mere two years old when a dispute arose with Quebec in 1993 over the CAAFs – which Quebec held had predominance over Algonquin continuing opposition to their quasi-unrestricted scope. It resulted in Quebec's unilateral withdrawal from the Agreement.

Mediation followed under the aegis of Judge Rejean Paul of the Superior Court of Quebec. Judge Paul ruled in favour of the Agreement, describing it as "tantamount to a treaty".[57]

Quebec resumed its participation in the Agreement some six months afterwards.

In 1996, it was the turn of the Federal government to act arbitrarily towards the Algonquins of Barriere Lake. It set aside the community's customary governance system and installed an Interim Band Council (IBC) made up of a dissident faction within the community.[58] At the same time, it appointed a Third Party Manager to take over the administration of the community.[59]

There ensued another mediation process undertaken by Judge Rejean Paul, who ruled in January 1997 that the government had wrongly interfered with the customary governance of the Algonquins of Barriere Lake in appointing the Interim Band Council.[60]

Two Facilitators were then appointed, who oversaw the codification of the community's customs, following which the government reappointed the Customary Council under Chief Harry Wawatie in April 1997.[61]

Subsequent to the reaffirmation of Harry Wawatie as Chief, and to attest to a new spirit of conciliation, a "Memorandum of Mutual Intent" was signed on October 21, 1997 during a formal

[57] The Honourable Rejean Paul, "Mediation Report" 28 January 1997.
[58] Andrew Crosby and Jeffrey Monaghan, "Settler Governmentality in Canada and the Algonquins of Barriere Lake" (2012) 43:5 Security Dialogue 421 at 429.
[59] *Ibid*.
[60] Paul, *supra* note 57.
[61] *Supra* note 56.

ceremony at the Rapid Lake reserve, by Chief Wawatie and the Deputy Minister of the Ministry of Indian and Northern Affairs, Scott Serson, representing Minister Jane Stewart.[62]

This Memorandum, (MOMI), provided, inter alia, an amount of compensation of $2.3 million to the Algonquins to offset the impacts caused to the community by the arbitrary destitution of their legitimate Chief and Council. It also included a provision of $20 million for new housing.[63]

The compensation was never paid. In 2005 – when I resumed my representation of the Algonquins of Barriere Lake at their request – I met with the Senior Official of INAC in Quebec, Pierre Nepton, to review the outstanding issues between the government and the community. Among the subjects we discussed was the compensation outlined in the MOMI, and I asked him why the commitment had not been kept. He told me that the MOMI was actually what it was titled, a Memorandum of Mutual Intent, and implied no contractual obligations.[64] It leaves one to wonder why IP's are so cynical of governments and their "commitments".

The MOMI, as mentioned, included a provision for new housing with a figure of $20 million. As this item was still outstanding eight years afterwards, I asked Mr. Nepton to provide us with an updated amount for housing. I received a document later that year setting out a figure of $17 million. So, eight years after, the provision for housing had decreased significantly, whereas the corresponding amount to the original 1997 $20 million should have been $24 million – another convenient and unfair short-cut.

In 1998, Quebec signed a Bilateral Agreement with the Algonquins of Barriere Lake, to reaffirm its intention to support and work towards the implementation of the Trilateral Agreement

[62] *Ibid.*
[63] *Ibid.*
[64] Meeting between Pierre Nepton of Indian and Northern Affairs and Clifford Lincoln (2005) at Indian and Northern Affairs, Quebec City.

process.[65] This Agreement confirmed, inter alia, the right of access of the ABL to the resources on their lands, as well as revenue-sharing from the financial benefits therefrom.

In 2001, Canada withdrew unilaterally from the Trilateral Agreement, invoking the significant continuing expenditure it involved.

In 2005, Quebec and the Algonquins of Barriere Lake agreed to undertake negotiations to arrive at recommendations towards the long-term implementation of the Trilateral Agreement provisions. Quebec appointed one of its former senior ministers, John Ciaccia, to act on its behalf, while I was asked by the Algonquins to act as their representative.

After more than a year of in-depth negotiations and analyses, we reached a complete consensus by way of the Ciaccia-Lincoln Recommendations, which were submitted to the Quebec government in July 2006.[66]

The purpose of the seven (7) Recommendations was to seek the endorsement by both parties of the key elements required to implement the Trilateral Agreement of 1991 and the Bilateral Agreement of 1998. These were the Recommendations:

(1) Recognition of the Trilateral Agreement territory – this entailed a description of the Annex 1 and Annex 2 components as the "Algonquins of Barriere Lake's asserted interest territory".

(2) Integrated Resource Management Plan: -this covered the main IRMP elements, i.e., Forestry, Wildlife, Lands, and Social Indicators.

[65] *Supra* note 56.
[66] *Ibid*.

(3) Participation in the management of renewable resources: this referred to the establishment of a co-management committee to oversee the implementation of the IRMP, and of a natural resources office to provide technical support to the joint committee.

(4) Revenue Sharing and Access to Resources: the contribution of $1.5 million a year, indexed yearly, to the Algonquins of Barriere Lake.

(5) Expansion of the Land Base at Rapid Lake: the enlargement of the reserve's land base by 10 sq. kms, to open the way for a housing-renewal program.

(6) Electrification of Rapid Lake: the hooking of Rapid Lake to the Hydro-Quebec electric grid at the cost of Hydro Quebec.

(7) Without Prejudice: that nothing relating to the agreed Recommendations "shall be a recognition or denial of aboriginal right to the territory".

I still deeply regret to this day that despite the consensus represented by these Recommendations, they failed in the end to be ratified by the Quebec Cabinet. In fact, it took several years for a final Cabinet decision to be made. I cannot count the number of meetings that both John Ciaccia and I had with various Quebec government officials and bodies in the aftermath of the Recommendations – the one contested item inevitably being Recommendation 4, Revenue Sharing. Certain Quebec ministries insisted that the precedent created would see every other Aboriginal band in Quebec demanding the equivalent.

We pointed out of course that the 1998 Bilateral Agreement between the parties specifically included revenue sharing, but to no avail. Finally, four long years after the tabling of the Recommendations, yes four years, the Quebec Cabinet accepted 6 of the 7 Recommendations, and rejected Recommendation 4, Revenue Sharing. As a result, the consensus was breached, and the

Algonquins justifiably refused to endorse the absence of a key element and an incomplete set of consensual Recommendations.[67]

At the Federal level, the years from 2006 to now have been particularly conflictual regarding the relations between the government and the Algonquins of Barriere Lake. A succession of controversial federal decisions would intensify the climate of tense relations which already characterized the interaction between the two parties.

In 2006, the Federal government once again refused to recognize Chief Jean-Maurice Matchewan and his Council, and in addition, imposed Third Party Management (TPM) on the community, invoking the reason of financial deficits.[68]

Once again, Judge Rejean Paul was called in to mediate, and confirmed in 2007 the legitimacy of Customary Chief Jean-Maurice Matchewan and his Council – the Federal government being left with no choice but to recognize them.[69]

However, after new tensions arose as a result of various Federal interventions, the government invoked Section 74 of the Indian Act in April 2010, abolishing the community's Customary Election process and replacing it with "elections to be held in accordance with this Act".[70] In other words, election by ballot, and another imposition from on high, flouting an age-old ancestral custom regardless of the wishes of the people directly concerned and affected. Further, contrary to the customary election tradition, eligibility is not confined to actual residents of the community. Anyone outside Rapid Lake who claims membership of the Algonquins of Barriere Lake – even if that person has lived outside for a prolonged period and has severed affinity links with the

[67] Decision by Quebec Cabinet, July 2010
[68] *Supra* note 56.
[69] *Ibid*.
[70] *Ibid*.

community – is entitled to vote, thereby introducing both unpredictability and instability, and the possibility of undue influence.

The Algonquins of Barriere Lake have been consistently demanding from the federal government the restoration of their customary election process, but in vain.

They have also asked for the removal of Third Party Management, the Third Party Manager acting as a form of colonial governor – paid substantial fees from the band's fund, and acting with scant if any consultation with community leaders. The Algonquins are currently in a mediation process with the Federal government regarding the possible removal of the TPM.

Besides, they keep asking, again vainly, for the provisions and spirit of the 1997 Memorandum of Mutual Intent to be honoured.

The decision in 2010 of the Quebec government to refuse Revenue Sharing and thus allow the 2006 Recommendations to fail, left in its wake an increased feeling of despondency and cynicism on the part of the Algonquins of Barriere Lake. However, to his credit, the Quebec Minister of Aboriginal Affairs, Geoffrey Kelley, offered in 2015 to reopen the file and fund another round of negotiations, based on the seven Recommendations of 2006.[71]

These negotiations, which have followed closely the spirit and provisions of the Ciaccia-Lincoln Recommendations, have led to a consensus in the form of an Implementation Agreement between Quebec and the Algonquins of Barriere Lake, an Agreement which is currently pending ratification by both parties.[72]

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[71] Geoffrey Kelley agreed to do so in a meeting with Chief Casey Ratt at Minister's Office in January 2015 (See "Mitchikanabikok Inik (Algonquins of Barriere Lake) Newsletter from Chief and Council" (May 2016) *Algonquins of Barriere Lake*, online: <http://montreal.mediacoop.ca/sites/mediacoop.ca/files2/mc/abl_may_2016_final.pdf>.

[72] Bilateral negotiations between Quebec and ABL, concluded in May 2017 (see *Ibid*).

The hope for the future is that: The Implementation Agreement with Quebec be ratified; that the ancestral Customary election process be restored; that the Third Party Management regime be abandoned; that substantially-improved living conditions be created through the enlargement of the reserve, electrification, and an updated acceptable housing program.

The Algonquins of Barriere Lake have suffered for too long. They yearn for peace and conciliation born in fairness, and genuine respect for their ancestral way of life, their traditions, their attachment to the land, and their rights as a people. What they seek is social, economic, and environmental justice.

Postcript to this Chapter: As the last revisions to this thesis were being made, an election under the Indian Act was held on August 11, 2018, in which a majority opposing the ratification of the agreement with Quebec was elected. As a result, the ratification by the new Council of the Algonquins of Barriere Lake now becomes unlikely. However, this electoral decision does not affect the intrinsic value and purpose of this type of agreement as a model already recognized as a forward-looking instrument and template, inter alia by the Royal Commission on Aboriginal Peoples and the United Nations.

CHAPTER THREE

THE HAIDA NATION

In the course of the research carried out by the Algonquins of Barriere Lake, during the final negotiations with Quebec, it was decided to study the case of the Haida Nation, whose strategic approach regarding its ancestral lands closely parallels that of the Algonquins. This research opened my eyes and mind to the fascinating history and contemporary evolution of the Haida people.

Like the history of most of Canada's First Nations, that of the Haida is a tragic and regrettable one. Until the arrival of Captain George Dixon in his ship Queen Charlotte in 1787, the Haida had been masters of their own home on the territory of some 10,000 square kilometers they had occupied for some 13,000 years. This ancestral territory consisting of an archipelago of 150 islands and islets on the north coast of British Columbia is now known as Haida Gwaii, the "Islands of the People". [73]

Although the archipelago had been visited by European mariners and explorers in the second half of the 18th century, namely by Juan Perez in 1774 and Captain James Cook in 1778, no attempt to occupy them was made until the arrival of Captain George Dixon, and his decision to survey the islands.[74]

[73] Dennis Horwood, *Haida Gwaii: a Guide to BC's Islands of the People*, 5th ed (Vancouver: Heritage House, 2016).
[74] *Ibid*.

He named them the Queen Charlotte Islands, in honour of Charlotte, the wife of the English king, George III, using the same name which already graced his ship, the Queen Charlotte.[75] The name Queen Charlotte Islands would remain the archipelago's official one for over two and a quarter centuries, until June 3, 2010, when the Government of British Columbia passed the *Haida Gwaii Reconciliation Act*, renaming the islands "Haida Gwaii". This name is now officially recognized by the Canadian and all provincial governments, and has attracted, in a very short time, general acceptance and recognition[76].

Haida Gwaii is a group of strikingly beautiful islands, a natural ecosystem of extremely rich biodiversity. Its forests are homes to giant conifers, known to be the tallest in Canada, and a significant variety of endemic trees, the Sitka spruce, western red cedars, yellow cedar, shore pine, western hemlock, mountain hemlock, and red alder.[77]

The Haida were a totally autonomous and established society, supported by its own language and culture, until the advent of outside occupation and colonization in the late 18th and during the 19th century. According to archeological research, the islands were settled by the ancestors of the Haida as far back as 13,000 years ago.[78]

Estimates are imprecise as to the size of the Haida population before the advent of colonization. The highest estimate derives from Statistics Canada, which places the population as perhaps as high as 30,000 people. However, several other research documents refer to between 8,000 and

[75] *Ibid.*
[76] *Haida Gwaii Reconciliation Act*, SBC 2010, c 17.
[77] James Calder, Roy Taylor & Gerald Mulligan, *Flora of the Queen Charlotte Island* (Ottawa: Queen's Printer for Canada, 1968).
[78] Village of Masset, "History", online: <http://massetbc.com/about-us/history/>.

10,000. In any event, it was significantly higher than the present Haida population of some 2,500.79

Colonization brought with is the loss of autonomy of a fiercely independent people, who had established age-old roots anchored in their language and culture, and the sustained stewardship of the rich ecosystems and biodiversity of their islands. Skilled hunters and fishers, they had lived until then a life of self-sufficiency, supported by rich ancestral traditions. Carvers and jewellers of exceptional talent nurtured from generation to generation, their artifacts are renowned to this day. 80

The intricate carvings on the giant totem poles they carved from cedar trees, expressed their close bonds with nature and the wildlife around them, in addition to their spiritual beliefs.

Innate mariners and traders, they displayed special skills as builders and carvers of canoes, using the huge cedars at their disposal. Canoes were built of various sizes, depending on their uses: from the smallest 4 to 7 meter units to impressive and beautifully carved 22 meter ones, able to carry forty people and two tonnes of supplies.81

The Haida were also warriors, and their large canoes, besides being used for trade, would venture as far north as Alaska and as far sound as Vancouver Island to raid villages and settlements, and to bring home slaves.82

[79] Statcan.gc.ca/census-recensement/2011. Although a Statistics Canada document refers to a population of 30,000 before colonization, several other research documents place the population at 8 to 10 thousand. In any event it was significantly higher than the present Haida population.
[80] "Horwood, *supra* note 73.
[81] *Ibid*.
[82] Christie Harris, *Raven's Cry*, revised ed (Vancouver: Douglas & McIntyre, 1992).

Colonization was to bring devastation to the Haida in its wake. Indeed, UNESCO, in conferring the title of World Heritage Site to two of the Haida islands in 2006, referred to the "vanished civilization" of the Haida. The Haida civilization may not have vanished actually, but it was certainly decimated by the advent of the "white man" and colonization.[83]

Imported diseases would ravage the Haida population in the 19th century, and it is estimated that ninety per cent of the inhabitants lost their lives to smallpox, tuberculosis, measles and syphilis. Today, the population of the islands amounts to approximately 5,000 people; half of whom are Haidas.[84]

Not only did the colonizing island settlers introduce these crippling diseases, but also two additional scourges – alcohol and firearms. Both alcohol and firearms were to inflict their detrimental impacts on the social fabric of Haida life and destabilize it for the long term.[85]

The traditional life and customs of the Haida were to be drastically transformed as well by arriving missionaries, zealously intent on evangelizing the "pagan" natives. An Anglican clergyman from Ireland, the Reverend William Henry William Collison, who settled in the Queen Charlotte Islands in 1876, led the way towards a radical "conversion" of the Haida, and the abandonment of their cultural and spiritual heritage.[86]

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[83] When SGang Gwaay (Haida Gwaii) became a UNESCO World Heritage Site in 2006, the description of it referred to the "vanished civilization of the Haida Indians"; however, actors from within the Haida community and the British Columbia government succeeded in having that terminology removed (Jennifer Iredale & Ursula Pfahler, "Community Involvement in the Nomination and Management of SGang Gwaay World Heritage Site" (2012) Heritage Branch, Ministry of Forests, Lands and Natural Resource Operations (BC).
[84] Harris, *supra* note 82.
[85] *Ibid*.
[86] *Ibid*.

The traditional community celebration held to honour a special event, and marked by joyous feasting, dancing and rejoicing, the potlatch, occupied a socio-cultural pride of place in the lives of the Haida. As did their traditional dress and adornments made from their own creations including sea-otter furs. So did also the large number of colourful and meaningful totem poles which towered majestically in the landscape.

The potlatch, the totem poles and their totems, the Haida dress and ornaments, and all age-old spiritual beliefs and observances of the Haida, were an affront to the religion of the missionaries, who decided they must be eradicated. Gradually, the potlatch disappeared, as did the totem poles, as did the traditional dress, and the Haida's spiritual beliefs and rituals. Zealously and intensely preaching from "The Book", the missionaries converted and baptized – and christened. The Haida family names would soon be replaced by "civilized and anglicized ones. [87]

The Haida language almost disappeared as well in the process and is undergoing a painstaking attempt at revival through the scattered number of elders who still practise it.

The conversion of the Haida and of their way of life was not only social and cultural. Besides the ravages caused by disease, the Haida Nation's core values were systematically uprooted and nearly destroyed, whilst the Haida lands and seas were being severely desecrated.[88]

Colonization brought with it, not only the imposition of settlers' laws, but their thirst for economic spoils. Here was a particularly rich territory, ripe for sudden development as "we" know best to achieve.

[87] *Ibid.*
[88] *Haida Gwaii: On the Edge of the World*, 2015, Documentary (Vancouver: Shore Films, 2015).

And as was inevitable, the logging companies with their modern machinery would one day apply their favourite method, the clear-cut, to the abundant forest, making sure in the process to eliminate pesky surrounding bushes with generous applications of pesticides. [89]

And in tandem the modern fishing fleets would appear as well, extracting fish by the mega-ton, until far quicker than expected, fish stocks would decline significantly. A British Columbia count, for instance, would show that the salmon production had declined by half over fifty years.[90]

The proud and tenacious Haida Nation, after witnessing powerlessly the ransacking of their territory and the rapid loss of all the values bequeathed to them by their ancestors – their way of life and customs, their communion the land and sea and the biodiversity thereof – decided that they could countenance it no longer and the time had come to act.

Starting in 1974, the Haidas had been trying to stop logging projects on their lands, specifically Lyell Island, where logging was due to commence in 1975. After vain attempts, including legal procedures, to stop the granting by the British Columbia Government of logging licenses, the Haidas organized a blockade of logging on Lyell Island in 1985.[91]

Statistics published in 2004 would show that between 1900 and 2004, 100 million of cubic meters of wood were logged in an area of 170,000 hectares on Haida Gwaii.[92]

Thanks to their tenacious resolve and continuous actions over the last five decades, including blockades and systematic protests, the Haida have achieved key milestones in the recovery of their

[89] John Broadhead, "Island Spirit Rising – Haida Gwaii" *Common Ground* (May 2005), online: <https://www.commonground.ca/OLD/iss/0505166/cg166_Haida.shtml>.
[90] Haida Gwaii: On the Edge of the World, *supra* note 88.
[91] Broadhead, *supra* note 89.
[92] *Ibid*.

ancestral lands, and of their way of life and culture. The sequence of landmark successes to this end is impressive, and a tribute to a people faced with near-obliteration.

Among the major achievements won by the Haida over the last twenty-five years, the following are exceptional breakthroughs by any measures:

1. The *Gwaii Hanaas Agreement,* between the Government of Canada and the Council of the Haida Nation, on January 30, 1993.[93]

   The purpose of the Agreement was to create in the area of the Archipelago known the as South Moresby and now as Gwaii Haanas, what the Haida designate as the "Gwaii Haanas Heritage Site" and the Government of Canada a "National Park of Canada".

   A striking feature of this landmark agreement is Section 1.1, where both parties confirm and accept divergent "viewpoints" with respect to "sovereignty, title or ownership".

   1.1. The parties maintain viewpoints regarding the Archipelago that converge with respect to objectives concerning the care, protection and enjoyment of the Archipelago, as set out in Section 1.2 below, and diverge with respect to sovereignty, title or ownership, as follows:

Two parallel enunciations then follow Section 1.1, one by the Haida and the other by the Government of Canada, and they read respectively thus:

> The Haida Nation sees the Archipelago as Haida Lands, subject to the collective and individual rights of the Haida citizens, the sovereignty of the Hereditary Chiefs, and jurisdiction of the Council of the Haida Nation. The Haida Nation owns these lands and waters by virtue of heredity, subject to the laws of the Constitution of the Haida Nation, and the legislative jurisdiction of the Haida House of Assembly.

[93] *Gwaii Haanas Agreement*, Government of Canada and Haida Nation, 30 January 1993.

> The Haida have designated and managed the Archipelago as the "Gwaii Haanas Heritage Site", and thereby will maintain the area in its natural state while continuing their traditional way of life as they have for countless generations. In this way the Haida Nation will sustain the continuity of their culture while allowing for the enjoyment of visitors.
>
> "Haida" means all people of Haida ancestry.[94]

The viewpoint of the Government of Canada is set out as follows:

> The Government of Canada views the Archipelago as Crown land, subject to certain private rights or interests, and subject to the sovereignty of her Majesty the Queen and the legislative jurisdiction of the Parliament of Canada and the Legislature of the Province of British Columbia
>
> By virtue of the above, the Constitution Acts and, more particularly, by an agreement between the Governments of Canada and the Province of British Columbia dated July 12, 1988, the Crown in right of Canada is or will become the owner of the Archipelago and an area within the Archipelago Marine Park Area in order that these lands may be constituted as a reserve for a National Park of Canada and a reserve for a National Marine Park of Canada respectively, to which the National Parks Acts will apply. The Government of Canada intends to establish the park reserves pending the disposition of any Haida claim to any right, title or interest in or to the lands comprised therein.
>
> For purposes of the Government of Canada's authorization and implementation of this agreement "Haida" refers to the aboriginal people of Haida Gwaii with respect to whom sub-section 35 (1) of the Constitution Act, 1982 applies.[95]

The Agreement establishes an "Archipelago Management Board" (AMB), composed of two representatives of the Government of Canada and two representatives of the Haida Nation, working by consensus to manage and operate the Gwaii Haanas Heritage Site/National Park Island.

The Gwaii Haanas Agreement is now twenty-five years old, and it can be considered a success – a success in conciliation, in conservation, and the perennial preservation of what the Agreement describes as "one of the world's great natural and cultural treasures".

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[94] *Ibid.*
[95] *Ibid.*

As the finishing touches are being put to this thesis, the Council of the Haida Nation and the Government of Canada have issued a Draft Gwaii Haanas Land-Sea-People Management Plan to update the original Gwaii Haanas Agreement.

This Draft Plan is open to public review and comments until July 15, 2018, following which it will be finalized in the coming months.

The Draft Plan incorporates six guiding principle; Respect, Responsibility, Interconnectedness, Balance, Seeking Wise Counsel, Giving and Receiving.

The intention is to continue protecting Gwaii Haanas ecological and cultural integrity, whilst ensuring livelihoods.

The draft the zoning of land and sea to manage varied activities – protecting bird nesting and village sites, biodiversity, eco-touristic norms, and Haida food security in areas of traditional use.

In the ocean, the zones range from "strict protection" to "multiple use", subject to an ecosystem-based approach.

The Draft Plan reflects the continuing and determined concern of the Haida for the sustainable protection of Gwaii Haanas, which has been a Haida Heritage Site since 1985.

2. In March 2003, a Planning Process was agreed between the Haida Nation and the Government of British Columbia. The purpose of this agreement was to lay the groundwork for an ensuing long-term Strategic Land Use Agreement.[96]

[96] *Haida Gwaii/Queen Strategic Land Use Plan: Planning Process Framework*, Haida Nation and British Columbia, March 2003

The Planning Process entailed the conception of a cooperative land use plan for Haida Gwaii, regarding which it would be incumbent on the Haida Nation to develop a "land use vision".

The Process would structure a "comprehensive, balanced, ecosystem-based land and resource management plan" to:

- Protect ecosystem-integrity;
- Maintain spiritual and cultural values;
- Enhance sustainable economic activity; and
- Foster social and community well-being.

The plan would include and ecosystem-based system of land use zones, within each one of which management objectives and strategies would define the parameters for resource uses.

The plan would be subject to the following principles:

- A commitment to ecosystem-based planning and management of natural resources and lands.
- Conserving native species, biodiversity and habitats.
- Maintaining the function of hydroriparian areas.
- Cooperative process design and management by the Province and the Haida Nation.
- Respect for the traditional culture, practices and knowledge of the Haida Nation.

- Engagement of all stakeholders in a collaborative process, ensuring that the interests of the communities within the planning area, the Haida Nation and all British Columbians are represented.
- And efficient and expedient process for plan development.
- Use of science to support decision-making, and
- An adaptive management approach that acknowledges uncertainty and provides for monitoring to assess outcomes of plan implementation.[97]

3. In November 2004, the Haida Nation won a defining judgment of the Supreme Court of Canada in Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511[98]

   This judgment will mark Canadian jurisprudence for years to come, and will serve to transform the framework of the legal and structural relationships between Canadian governments and Indigenous First Nations.

   The case concerned "Tree Farm Licenses" (TFLs) issued by the Government of British Columbia to forestry companies on Haida territory over several years, without either consultation with, or the consent of, the Haida Nation.

   In a unanimous judgement in favour of the Haida Nation, the Supreme Court held that the Crown has a "duty to consult with Aboriginal Peoples and accommodate the interests". This duty is grounded in the honour of the Crown, and applies even where title has not been proven.

[97] *Ibid.*
[98] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 [2004] 3 SCR 511.

Since the Haida judgement of 2004, all governments in Canada having dealings with Indigenous communities are under the strict obligation to "consult" and "accommodate". This provision has to a marked extent tilted the balance of relationships towards a more careful and respectful; attitude of governments towards First Nations and their inherent rights. No longer can governments impose unilaterally, as had been the common practice before "Haida". "Haida" now serves as an essential cautionary instrument for governments, as well as a protective one for First Nations.

4. In September 2007, the follow-up to the 2003 Planning Process, the Haida Gwaii Strategic Land-Use Agreement, was signed between "The Indigenous People of Haida Gwaii" and the Province of British Columbia.[99]

   The Agreement enshrines an operating model of "Ecosystem Based Management" (EBM), defining land use obligations in defined zones, described as "Operating Area", "Special Value Area" and "New Protected Area" on the Haida territory.

   The intention of the Land Use Agreement is thus "to confirm strategic land use zones and provide a framework for its collaborative implementation by the Parties, including":

   (a) The use of interim and permanent protection measures.
   (b) The analysis, testing, subsequent verification, and establishment of land use objectives implementing EBM; and
   (c) The establishment of appropriate management structures, including structures to oversee the implementations of EBM on Haida Gwaii.

[99] *Haida Gwaii Strategic Land Use Agreement*, The Indigenous People of Haida Gwaii and British Columbia, 13 September 2007.

A very comprehensive document, the Agreement includes specific provisions and criteria for Objectives, Measurement Indicators, and Targets.

It provides for an advisory committee to oversee the implementation of the Agreement, with joint representation of the Haida and the British Columbia government.

Among the Implementation provisions of the Agreement, it is significant to note that the two parties, the Haida and the British Columbia, have carefully approached the jurisdictional issue of sovereignty, as had been the case in the Gwaii Haanas Agreement signed in 1993 between the Haida Nation and Canada.

Thus the two opening Implementation Clauses read as follows:

- This Land Use Agreement will be implemented by the Haida in accordance with their Laws, policies, customs, traditions and their decision-making processes and authorities.
- This Agreement will be implemented by the Province in accordance with its laws, policies, and decision-making processes and authorities.

It is also important to note the four clauses in Section 10.0, "General Provisions" of the Agreement, which refer to the constitutional and jurisdictional issues affecting the parties. These clauses read as follows:

10. General Provisions

10.1. This Land Use Agreement is not a treaty or a land claims agreement within the meaning of section 25 and 35 of the Constitution Act, 1982 and does not define, amend, recognize, affirm, deny or limit the aboriginal rights, aboriginal title, or treaty rights of the Haida Nation.

10.2. Except as the Parties may agree otherwise in writing, this Land Use Agreement will not limit or prejudice the positions that either Party may take in future negotiations or court actions.

10.3. This Land Use Agreement does not change or affect the positions either Party has, or may have, regarding its jurisdiction, responsibilities and/or decision-making authority, nor is it to be interpreted in a manner that would affect or unlawfully interfere with that decision-making authority.

10.4. Nothing in this Land Use Agreement limits or defines the consultation and accommodation obligations between the Haida and the Province.[100]

5. In June 2010, The Haida Gwaii Reconciliation Act was passed by the British Columbia Government, and approved by the federal and all other Canadian governments. Henceforth the Queen Charlotte Islands are named and officially recognized as "Haida Gwaii".[101]

   In the aftermath of the 2007 Land Use Agreement between the Haida and British Columbia, this official name change is seen as an important mark of reconciliation, as well as another step forward in the recovery of autonomy and control of their lands by the Haida.

   The President of the Haida Nations, Guujaaw, said on the occasion:

   "We have already agreed to the care and protection of the land; and now we develop processes for more responsible management. This marks an opportunity to build a relationship on mutual trust and to design a model for sustainable economy."

   "After 100 years of conflict, we have set the ground for a more productive era of peace".[102]

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[100] *Ibid*.
[101] *Haida Gwaii Reconciliation Act, supra* note 76.
[102] "Queen Charlotte Islands Renamed Haida Gwaii in Historic Deal" (11 December 2009) *CBC News*, online: < https://www.cbc.ca/news/canada/british-columbia/queen-charlotte-islands-renamed-haida-gwaii-in-historic-deal-1.849161>.

6. In April 2015, the Haida Nation and the Government of British Columbia agreed on the "Haida Gwaii Marine Plan".

   The Haida Gwaii Marine Plan complements the implementation of the 2007 Strategic Land Use Agreement between the Haida and British Columbia. The intention of the plan is to reflect a shared perspective on the most effective way to maintain, and restore where necessary, a healthy marine environment and a sustainable marine economy on Haida Gwaii.

   The Plan is founded on an ecosystem-based framework and uses the best available science, traditional and local knowledge. It describes a long-term vision, and outlines objectives and strategies for the protection, conservations and management of Haida Gwaii's coastal and marine areas and resources.

   These are the purposes of the Haida Gwaii Marine Plan:

   1. Provide a framework for joint or shared management of marine and coastal areas in and around Haida Gwaii through an ecosystem-based approach to management and marine resource decision-making;
   2. Provide policy, detailed planning, and management direction regarding marine uses, activities and values throughout the plan area that are within the jurisdictional authority of BC and/or the CHM;
   3. Identify acceptable marine uses that support sustainable communities while protecting and, where necessary, restoring marine ecosystems;
   4. Support marine economic development and provide direction for encouraging and managing future growth;

5. Provide guidance for tenuring and marine resource use decisions by BC and CHN in Haida Gwaii waters;
6. Provide valuable information that will make important contributions to future processes between CHN, BC and/or Canada, such as identifying areas for consideration in the development of a marine protected area network; and
7. Identify changes to existing CHN-BN protected areas including zoning, allowable uses and enhancements to marine protection.[103]

In March of 2018, the Haida Nation won an important decision before the Supreme Court of British Columbia. The Court agreed to hear the case of the Haida's claim that they hold Aboriginal title and rights over all of Haida Gwaii, including the land, waters, seabed, airspace, and all living creatures therein and thereon.[104] According to the claim brought forward by the Haida, British Columbia and Canada infringed on the Haida's Aboriginal rights and title through forestry, fisheries, and by alienating the Haida from parts of the land. In his ruling agreeing to hear the case, Justice Andrew Mayer of the B.C. Supreme Court described the case as "incredibly expansive and complex". The Judge pointed out that the case will raise several legal issues that no Canadian court has ever considered before, including a claim of Aboriginal title over private lands and lands submerged under the sea. Because of the complexity of the case, it will be heard in two Phases. Phase 1 will be the main phase, as it will deal with the Haida Nation's principal claim to Aboriginal title and rights over all of Haida Gwaii. Phase 2 will cover the issue of possible damages claimed by the Haida for loss of revenues collected by Canada and British Columbia from resources

[103] Haida Nation & British Columbia, "Haida Gwaii Marine Plan" (2015) Marine Planning Partnership Initiative, online: <http://www.haidanation.ca/wp-content/uploads/2017/05/MarinePlan_HaidaGwaii_WebVer_21042015-opt-1.pdf>.
[104] *The Council of the Haida Nation v British Columbia*, 2018 BCSC 277 (CanLII).

exploited by them on Haida Gwaii. The case will likely start to be heard in the fall of 2018, and due to its complexity, may take a long time to be completed.[105]

The strategy of the Haida Nation towards the recovery of its autonomy and the control of the lands and resources of Haida Gwaii has been tactically deliberate. The Haida have decided to eschew the Comprehensive Land Claims Policy of the Government of Canada in favour successive bilateral agreements either with Canada or in the majority of cases, with British Columbia.

It is a gradual and incremental strategy, each new step of which is calculated to bring the Haida ever closer to their central goal of autonomy over their territory and its resources.

The resilience, patience, and calculated assertiveness of the Haida towards their main objective appears so far to have achieved increasing positive results. Step by step, the Haida Nation has made gains on a variety of key fronts: environmental, cultural, judicial and political. On the crucial issue of Aboriginal rights, the decisions of the Supreme Court of Canada in 2004 on the duty to consult and accommodate, and more recently of the Supreme Court of British Columbia to hear the claim of the Haida for title on the Haida Gwaii, constitute developments of major importance.

When it comes to the issue of sustainability, and of land and resource use, the Gwaii Haanas Agreement with Canada, and the several Agreements concluded with British Columbia, all described earlier, also represent significant steps forward for the Haida Nation.

In assessing the Haida strategy, and also the comparable one used by the Algonquins of Barriere Lake mentioned in the Introduction to this paper, it is relevant to ask whether the Haida and Algonquins of Barriere Lake have been wise in circumventing the federal Comprehensive Land Claims policy (CLCs) in favour of a more direct and incremental approach.

[105] *Ibid*.

In the following Chapter, Chapter Four, we address this question by assessing the CLC process in contrast with the strategy adopted by the Algonquins of Barriere Lake and the Haida Nation.

The Haida strategy over the last five decades, for the recovery of the rights and title to their ancestral lands, is of special interest and importance in the context of Indigenous Peoples' rights in Canada. It may even serve as a lesson beyond our shores.

It has been an intelligently planned approach of progressive and incremental initiatives and actions, always anchored in an unshakable conviction by the Haida in their inherent rights to their ancestral lands.

Where certain First Nations have been tempted to negotiate land claim recovery agreements with the Federal Government leading to extinguishment of title, the Haida have steadfast resisted any form of negotiation or agreement which might in any way prejudice or diminish their inherent rights to Haida Gwaii.

There is another element of the Haida strategy which is of significant importance. In all their dealings with governments, in the claims before the courts, and their consistent statements and documents, the Haida have always proclaimed their sovereignty over Haida Gwaii.

The Haida Proclamation in the Preamble of the Constitution of the Haida Nation, sets out this position without the slightest ambiguity:

> "The Haida Nation is the rightful heir to Haida Gwaii. Our culture is born of respect; and intimacy with the land and sea and air around us. Like the forests, the roots of our own people are intertwined such that the greatest troubles cannot overcome us. We owe our existence to Haida Gwaii. The living generation accepts the responsibility to ensure that our heritage is passed onto following generations. On the islands our ancestors lived and

> died and here too, we will make our homes until called away to join them in the great beyond".[106]

However, it is significant to note that in spite of their repeated claims and declarations of sovereignty over Haida Gwaii, the Haida have always sought conciliation and openness towards non-Haida settlers on the island.

In fact, it is noteworthy that in their court claim for title on Haida Gwaii before the B.C. Supreme Court 1n 2018, the Haida Nation confirmed before the court that they have no intention of displacing property owners from the islands or to cancel land tenures or permits.[107]

The Haida Nation has been positively consistent in recognizing the presence of non-Haida settlers as cooperative inhabitants of Haida Gwaii. These settlers represent some fifty-per-cent of the archipelago's current population. Welcome they are, as long as they recognize the predominance and governance of the Haida over their island-home.

The conciliatory attitude of the Haida towards the settlers has the beneficial result of giving to Haida Gwaii the critical mass of people needed to ensure and effective level of sustainable development for the islands.

Indeed, like Haida recognized that their present numbers as a people had dwindled to such a vulnerable extent, that they no longer represented that critical mass needed to ensure effective governance and delivery of services – especially in the short term.

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[106] *Constitution of the Haida Nation*, as amended at the 2014 House of Assembly, online: <http://www.haidanation.ca/wp-content/uploads/2017/03/HN-Constitution-Revised-Oct-2014_official-unsigned-copy.pdf>.

[107] *The Council of the Haida Nation v. British Columbia*, *supra* note 104.

In an article entitled "The Spirit of Haida Gwaii" in 2003[108], Chris Tenove and Brooke McDonald describe a striking example of mutually-beneficial cooperation between the Haida and settlers for the British Columbia mainland. Tenove and McDonald relate the story of a gathering held in 2002 in the coastal village of Skidegate:

> The island delicacy of herring roa and sea kelp, or k'aaw, was set out along with hundreds of pounds of Chinook salmon, as at a traditional Haida potlatch. By early afternoon the cedar hall was loud with drumbeats and chatter as more than 300 guests arrived.
>
> Potlatches and communal barbecues are not rare on the Queen Charlotte Islands, but this congregation was unique, and crafted as a message. Half of the attendees were Haida, and the other half were local loggers, many of the employees of the American multinational Weyerhaeuser. The loggers had shut down the on-island logging industry for the day, their trucks and equipment left idle in the forest.
>
> Dale Lore, a local logger, helped organize the event as a pageant of support for the Haida's legal battle for title over Haida Gwaii. If it's successful, the Haida would gain a large measure of control over the land and coastal waters, including control of the resources. For years, the logging industry had fought the attempts of Haida and environmentalists to limit the harvest of the island's forests. This group of loggers had broken rank' they believe that they would be better off with the Haida in charge of the islands, and not the provincial government or big logging.
>
> Lore claims that companies like Weyerhaeuser aren't interested in sustaining the forests or the local community. 'They use us up, spit us out, and go to the next place without a thought' he says, and as far as he can tell, they do so with the blessing of the B.C. government.
>
> Dale Lore doesn't feel much pity for multinationals like Weyerhaeuser. 'They're not interested in sustainability. They want to cut the best timber as quickly as they can at as high a volume as they can, make as much money as they can', says Lore. A bluff man with a gift for the popular harangue.[109]

Another striking example of the cooperation between the Haida and the residents who settled on the islands from the mainland, is the significant contribution made by John Broadhead, a Haida

[108] Chris Tenove & Brooke McDonald, "The Spirit of Haida Gwaii" *This Magazine* 36:4 (January-February 2003) 29.
[109] *Ibid* at 32-33.

Gwaii resident for over forty years. Referring to the reconciliation gradually taking place regarding the Haida and Haida Gwaii, he describes it as a "formula for mutual respect and a formula for sharing of responsibility."[110]

John Broadhead is one of the founders in 1994 of the Gowgaia Institute, a local conservation and community development organization. He has been a leading figure in helping the Haida in the process of recovery of their ancestral lands.

Here are the elements of the mission of the Gowgaia Institute:

> The purpose of the Gowgaia Institute is to promote sustainability, which means a lasting and diversified economy, prosperous communities, and a healthy, productive environment. It also means that whatever we enjoy on the islands today should be here in equal measure, and equal value, for the generations to come after ours,
>
> We approach our goals through programs of community networking, communications, mapping, technical analysis and land use planning. We aim to build awareness and understanding about what's happening in the Haida Gwaii bioregion by publishing maps and information, encouraging public dialogue and engaging with others in the search for solutions.
>
> We believe that Haida Gwaii belongs first and foremost to the Haida, as it has for the past ten thousand years and will for millennia to come.[111]

What the Haida are in the process of creating is a community of conciliation and sustainability, within which the Haida Nation gradually recovers the independence of action, and the dignity as a people, that the cruel hardships and injustices of colonization had taken away from them.

This they are gradually achieving in peaceful ways, using the strategy of wisdom, patience, and intelligently planned initiatives – social, legal, and political. By their measured and effectively-

[110] Ibid at 36.
[111] Gowgaia Institute, "About", online: <http://gowgaia.ca/>.

communicated actions, they have highlighted the eminent justice of their cause, and inspired the support of both non-Haida residents and the public at large.

Theirs is an example of an unassailable cause and case for justice and -I suggest the following word is justified – atonement for the injustices and trials imposed upon them after colonization.

The conclusion should be a positive one – that from a recent regrettable past is being borne a new model of reconciliation, social justice, and sustainability. For this the Haida Nation deserve not only gratitude, but continuing support.

CHAPTER FOUR

THE IMPORTANCE OF WELL-STRUCTURED MODELS

Experience of many years has taught me that models or templates, if inspired by creative ideas, and if judiciously planned and structured, can become important catalysts and nurturers of projects and products which then taken root and spread, and even multiply.

Whatever endeavour we select today, and whatever product we use, be it the tiniest needle or a giant aircraft, was initially the germ of an idea. Like the seed that blossoms into a flower, and the small acorn and that becomes a massive oak, once an idea takes root because it shows its worth, it will spread inevitably.

A model is a germ that will inevitably sprout and spread as well, if it proves its value and validity.

Whenever I think of a model, I visualize a spiral. A spiral spreads in concentric and ever-increasing circles from an initial core. Some models, like some small spirals, beget a limited number of circles, whilst others prove their superior utility or value, and extend into ever widening circles.

What I intend to establish in this thesis is that the agreement-model which is proposed here constitutes a worthwhile idea and purpose, with the potential ability of being adopted and replicated. Why should it take hold and spread and, with hope, spiral? Because it is valid and useful, practical in its format and application, adaptable to changing circumstances, and thus easily replicable as a template.

The fact that it stems from two actual and tested cases outlined in this thesis, gives the model both validity and credibility, especially as in one of the cases, it has received the recognition of the United Nations and of the Royal Commission on Aboriginal Peoples.

The many examples of successful models with which I have been associated either as a participant or as a close witness, have convinced me that a sure way of achieving a successful project is the creation of a carefully-conceived and intelligently-structured model. The dimension and reach of the latter spiral-effect derive from the value and usefulness of the core idea and starting point, and the effectiveness in which the latter are translated into a replicable model or template.

When I initially ran for election to the National Assembly of Quebec several decades ago, in 1981, the party to which I belonged, the Quebec Liberal Party, was soundly defeated by the Parti Quebecois, under its charismatic leader, Rene Levesque. I ended up on the Opposition benches, and on my request, was appointed the Environment critic.

Soon after, I was contacted by Louise Beaubien-Lepage, the head of an environmental organization called Fapel, an acronym for "Fédération pour la protection de l'environnement des lacs". [112] Louise Beaubien-Lepage belonged to a well-known Quebec family, the Beaubiens. In the early 1900s, when the road to the upper Laurentians of Quebec was opened, her grandfather had acquired a significant tract of land on the shoreline of a lake known as Petit Nominingue. The Beaubien family still occupies homes and cottages there, either as summer, or in a few cases, permanent residents.

[112] See information about the Fédération pour la protection de l'environnement des lacs [Fapel] at https://rqge.qc.ca/repertoire/name/federation-des-associations-pour-la-protection-de-lenvironnement-des-lacs/.

When living there with her family during the summer, Louise Beaubien-Lepage had become increasingly upset at the degradation of the shorelines of the cluster of Nominingue lakes. Most cottagers would deforest the lake shoreline for an uninterrupted view of the water, thereby causing the inevitable consequences to the environment: shore erosion, disappearance of shade preventing the spawning of fish and the nesting of aquatic birds, the proliferation of algae and accelerated eutrophication.[113]

Thus was born the idea of Fapel, the French acronym for Federation of Associations for the Environmental Protection of Lakes. Starting with her own lake as a model, Louise Beaubien-Lepage created an association dedicated to the environmental education of residents, the reforestation of the shoreline, and the creation of a conservation by-law template for adoption by the local municipality, which included the requirement for up-to-date septic tank installations.

From the Petit Nominingue model sprang no less than 800 associations of Fapel. Volunteer educators would teach and spread the lesson of shoreline protection and conservation, and local municipalities would adopt and enforce the model by-law, providing for shoreline buffer-zones and the essential requirement of updated septic tank systems. Besides, Fapel would acquire a large tract of land in Lanaudiere, where it created a tree-nursery. As an incentive, trees would be made available for free to Fapel members committing to restore their shorelines.[114]

Thus Fapel became an active example of the tenets of environmental sustainability: education, prevention, protection, conservation, and legal enforcement of environmental norms.

[113] Personal recollection and experience as Environment critic, 1981-1985.
[114] *Ibid*.

It was also during my mandate in Opposition as Environment critic, that I met another dynamic trail-blazer and environmental champion, Normand Maurice. Normand Maurice was a teacher at the large regional high school in Victoriaville, Quebec. A powerfully-built man with a gruff voice, all-action and eschewing pleasantries and small talk, he had invited me to visit his school, where he had pioneered a recycling and recuperation program.[115]

I had no sooner shaken hands with him when he informed me quite bluntly that he did not share my political affiliation, and that he was a member of the Parti Quebecois, dedicated to the independence of Quebec. However, this was of no consequence, he said. What mattered was our common bond through the environment, and provided I was ready to give fair attention to his project, political issues became unimportant.

His no-nonsense frankness impressed me from that very first moment, and I knew then that we could look forward to a healthy and fruitful association.

This first meeting happened in the early eighties, when recycling and recuperation programs were still the exception, and very far from being the regular practice they have become today.

Normand Maurice had published an illustrated booklet about recycling and recuperation, which he had distributed not only throughout the school, but across the several towns and villages in the region.

With the participation of students, he had built an artisanal plant on the grounds of the school, where paper, glass and cloth were collected and sorted, and readied for recycling. He had struck agreements with a large paper manufacturer, a glass factory, and a garment company, so that there were regular outlets for the recyclable materials.

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[115] *Ibid*.

To build up a consistent critical mass of such materials, he had coopted the support of adjoining municipalities, backed by a vast volunteer network of homeowners and grassroot organizations, such as the Boy Scouts and Girl Guides.

Every week the network would spring into action, ensure the collection, and supply the sorting centre at the school. The project evolved into a large and effective regional undertaking, the first comprehensive and integrated one in a Quebec region.

Four years afterwards, in the aftermath of the electoral victory of the Quebec Liberal Party, I was appointed Minister of the Environment. One of the first persons to contact me was Normand Maurice. He had conceived a new project, called "Caravane de la Recuperation", to educate leaders of towns and municipalities across Quebec into initiating comprehensive recycling programs.[116]

He had raised $100,000 from the Canadian National Railway and the federal government, and wanted my ministry to contribute the third layer of $50,000 – which I agreed to do. The money was used partly to buy a large type of recreational vehicle, which would be staffed during the summer by a team of his students, thoroughly trained to demonstrate to Quebec municipalities how to initiate and operate a successful recycling program.

I recalled that after the first summer, he reported that 36 municipalities had been enlisted, and had started comprehensive recycling programs.

A decade after, in the middle nineties, I happened to be a federal member of parliament and Parliamentary Secretary to the Environment. And who stopped at my office one afternoon if not

[116] Recollection and experience as Minister of the Environment of Quebec, 1985-1988.

the irrepressible Normand Maurice, seeking support for yet another trail-blazing recycling and recuperation project he had created.[117]

Every time a can of paint is discarded after use, remnants of paint are left in the can, so that the cumulative effect of discarding tens of thousands of such cans adds up not only to a highly significant product-waste, but to serious toxic pollution.

Normand Maurice had initiated a project to mechanically scrape off the paint remnants from the cans, involving the participation of the prison community in the process. A viable recycled-paint enterprise had evolved from his initiative, to the benefit of the environment and consumers alike.

It is no wonder that to his grateful community and region he became known as the "Pere de la Recuperation".

My first piece of legislation, in 1986, after being appointed Minister of the Environment, a bill to curb cigarette-smoking, was deliberately chosen for both its symbolic value and the significant challenge it represented. If my first bill was a particularly difficult one to pass, and I succeeded in having it enacted, it would send the signal at large that the Ministry of the Environment was ready and unafraid to tackle the most challenging issues.[118]

At that time, the jurisdiction for regulating tobacco-smoking belonged to the Ministry of the Environment, because of the underlying issue of air quality. It has since been transferred, and logically, to the Ministry of Health. The tobacco lobby across Canada was then so powerful, that the only two attempts to legislate curbs on cigarette-smoking, one federal and the other provincial, had both been abandoned. Quebec then held the dubious distinction of being one of two competing

[117] Personal recollection and experience as Parliamentary Secretary to the Environment, Ottawa, 1993-1995.
[118] Personal recollection and experience as Minister of the Environment of Quebec, 1985-1988.

champions of tobacco-use in Canada. Cigarette-smoking was widespread and unchecked, even in hospitals and health centres, not to mention taxis, buses, and subway cars, as well as restaurants and eateries. No location or setting was immune. Tobacco and tobacco smoke were ubiquitous.

Besides, I found out to my surprise that some Quebec regions, e.g. Joliette, represented by the Opposition, were tobacco-growing areas.

The forces thus lined up against any potential anti-smoking legislation, anchored by the all-powerful tobacco lobby, were both wide-ranging and extremely determined.

I have always believed that it is that crucial first step which opens the way. Any idea or concept needs that essential start, no matter how tentative. If the idea or concept is valid in the first place, it will inevitably take root and grow in time.

So, in this challenging case, I understood the need to avoid categorical commitments and provisions, while attempting to achieve a legislative framework around inevitable compromises. Opponents would prove as unexpected as they were numerous. For instance, my Municipal Affairs colleague, as well as the municipalities he represented, were adamant, and fiercely so, against any umbrella law which would impose blanket regulations and sanctions upon them. A major bus corporation complained that banning smoking would destroy its business. Sports establishments rallied loudly against any restrictions on smoking.

Thus the bill finally introduced was flexible enough to avoid immediate pitfalls which would lead to its being stillborn. Even then, it faced continuous challenges during the second-reading phase. The municipal opposition was circumvented by a provision leaving it to individual municipalities to decide whether to adopt the law at all, and if they chose to do so, passing a by-law endorsing its

framework and content. Other compromises were negotiated. The bus corporation agreed to a three-year moratorium, following which the provisions of the law would apply.

Eventually, Bill 84, the *Act Respecting the Protection of Non-Smokers in Certain Public Places*, was adopted in June 1986, the first such law passed in Canada. It became law on March 1, 1987.[119]

As soon as it was enacted, I convinced the principal municipality in my constituency, the City of Pointe Claire, to serve as a model and catalyst for helping spread the law across Quebec. The highly-respected then Mayor of Pointe Claire, Malcolm Knox, became an enthusiastic supporter of the law, leading the way for the enactment of a relevant by-law.[120]

Pointe Claire firefighters were enrolled and trained to diffuse knowledge of the by-law's provisions and ensure its enforcement. The Community Health Centre at the Lakeshore General Hospital, located in Pointe Claire, became actively involved in promoting the observance of the law. Gradually Pointe Claire became the model and the reference, and other municipalities interested in adopting a by-law would be guided by its experience and the progress it had achieved.

Bill 84 became a beginning and a model, a foundation on which to build. three successive enhancing laws have been passed since[121], each one more constraining than the former. Today, smoking is prohibited even on restaurant terraces, a far cry from the situation which held sway three decades ago.

The lesson, once again, is that models work, and that initial blue-prints and ideas, if translating a need, not only gradually take hold, but more importantly and inevitably, spread like a spiral.

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[119] RSQ 1986, c P-38.01, as repealed by *Tobacco Act,* SQ 1998, c 33, s. 76.
[120] Personal recollection and experience as Member of the National Assembly 1985-1989.
[121] *Tobacco Act*, SQ 1998, c 33; *An Act to amend the Tobacco Act and other legislative provisions*, SQ 2005, c 29; *Tobacco Control Act*, CQLR 2015, c 28.

In 1995, I was on an assignment in India for Environment Canada. It had been strongly recommended by one of my colleagues that I seek a meeting with Dr. Amulya Reddy, a pioneer and leading international proponent of renewable energy. In the aftermath of his death in 2006, at age 76, a tribute was paid to him by fellow scientists N. Sreekuman and Girish Sant[122], from which I quote these introductory lines:

> "How do you describe Amulya? Cricketer, electrochemist, energy analyst, rural energy practitioner, spokesman for sustainable development, campaigner against nuclear energy and weapons, respected teacher, and more than anything, a person who has tried to live up to Gandhiji's talisman".

Before leaving Canada, I had sought an appointment with Dr. Reddy, which he graciously accepted. Some twenty-five years have elapsed since, but I still recall our meeting as vividly as if it had taken place yesterday. We sat outside, on a garden bench of the vast hotel garden in Bangalore, under the shade of stately tropical trees.

In a gentle voice that seemed to define kindness and humility, he described his initiative to provide electrification to rural communities. At that time, some 78 million citizens in rural India lived without the benefit of electricity.

In an autobiographical article he had written for a 1993 seminar, Dr. Reddy described how twenty years earlier he had spoken out about the lack of attention and compassion of Indian science towards rural communities:

> "I argued that India was a dual society with islands of elite affluence amidst vast oceans of poverty of the masses… I attacked Indian science and technology for firmly allying itself with the elitist pattern of industrialization and demanded that it should devote itself

[122] N Sreekkumar and Girish Sant, "Tribute: Amulya K.N. Reddy: A Pioneer Takes Leave" (2006) 41:22 Economic & Political Weekly 2194 at 2194.

> to the generation of an alternative pattern of capital-saving labour-intensive technologies of relevance to the rural poor".[123]

Dr. Reddy described to me how he used a replicable energy model in one village, Pura, in Karnataka State in South India, to create community energy grid in the region. Using the Pura experiment as the core of the overall electrification project, he conceived a basic artisanal plant to transform cattle dung into biogas energy to supply electricity to the village residents.

He formed and trained specific work-teams among the villagers, whose assignments were coordinated to ensure the most effective delivery of electricity throughout the village.

One team was trained to operate and maintain the basic plant. Another to oversee the collection and supply of the cattle dung to the plant. A third team would be responsible for the effective administration of the project, by ensuring the fair distribution of electricity to the villagers and the community well. Inevitably, the daily energy output would vary, depending on the extent of the cattle dung supply.

So it was left to the administrative team to decide at which hours and for how long to distribute the electricity the most fairly and effectively.

Having achieved a functional and successful operation in the initial experimental village, Dr. Reddy organized for the teams of that village to train residents of ten other villages. And the process would be replicated throughout the State, the ultimate objective being to electrify one thousand villages.

At that time, Dr. Reddy told me, the Indian government had planned for the construction of a nuclear plant to provide energy to the region, at a cost of several billion dollars.

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[123] *Ibid* at 2194-2195.

A determined opponent of nuclear energy, Dr. Reddy convinced the Indian government to delay the project until he had had the opportunity of creating and equivalent alternative energy-grid.

To boost up his village biogas project, Dr. Reddy approached the owners of the several sugar-cane mills operating in the region. When crushed to produce sugar, sugar canes leave a residue called bagasse, a natural product which can be transformed into electricity. The island of Mauritius, a significant sugar producer, had already achieved bagasse energy transformation for several decades.

Dr. Reddy invited specialists and operators of bagasse transformation from Mauritius to install the process in the relevant Indian sugar-cane mills.

An overall energy-grid of comparable output was thus developed, which enabled Dr. Reddy to convince the Indian government to cancel the construction of the projected nuclear plant.

The "Model Act" was another successful model which blazed a trail. It was the inspiration, in 2010, of Adele Hurley, an icon of the Canadian environmental community, who was then the Chair of the Water Program at the Munk Centre of the University of Toronto.

Adele Hurley became convinced of the essential necessity of safeguarding Canada's transboundary water basins through legislation, to ensure their perennial protection. To this end, she had created CWIC, the Canadian Water Issues Council, whose sole purpose would be to draft a "Model Act", which the Canadian parliament would be asked to enact into law.

The board of CWIC was composed of specialists representing the tissue of disciplines and knowledge apt to integrate their combined skills towards the research and drafting of a successful "Model Act". Every board member had a particular talent to contribute, be it constitutional law, expertise in water issues, or political strategy.

As a board member of CWIC, I was able to witness at first hand how effective the merging of specialized talents could prove to be.[124] The research into the substance of the "Model Act" was both methodical and thorough, and no aspect of the proposed legislation was left unattended. We would meet regularly to review and update the drafts, and after a year's work the final draft was completed and the "Model Act" became ready to be presented to the federal government.

Given the international context of the proposed legislation, we chose to present it to the then Minister of Foreign Affairs, Lawrence Cannon. We suggested to the Minister that id the government were to adopt the draft legislation and ensure its enactment into law, it would earn significant credit for having achieved the protection of our boundary waters for future generations. We were extremely pleased that the Minister welcomed our suggestion, and indicated his willingness to consider it during his mandate.

We followed upon this initial approach to the government, by convincing the Opposition parties to support the legislation when it came before parliament.

Finally, the government chose the route of a Private Member's Bill to introduce the legislation before parliament. The bill was piloted through the House of Commons by Conservative M.P. Larry Miller, and passed unanimously on May 8, 2013, as C383, The Transboundary Water Protection Act.

My personal experience has thus taught me that worthy and valid models do take root and spread – and in proposing this thesis, I feel confident that the type of model which underpins its objectives has the potential of being adopted and replicated.

[124] Personal recollection and experience as a Board Member of CWIC.

When considering the models described in this chapter as examples, and the two models highlighted as case-studies in this thesis, namely the Algonquins of Barriere Lake and Haida agreements with their respective governments, it is noteworthy that they share essential common attributes and criteria.

To be successful, and act as a catalyst for diffusion and replication, models must share the following essential features:

1. Validity of the core idea.

   In order to take hold, attract attention and support, and spread its message and content, the model must represent a novel and imaginative idea and premise. This core idea must be so well thought-out and prepared as to be credible and stand the initial test of critical analysis.

2. Practicability and Usefulness.

   The core idea must be practical and useful in its application, so as to be able to attract potential demand.

3. Replicability as template.

   The very purpose of a model is to ensure that it should spread its premise and content. Thus it should be so structured as to become replicable as a template, while adaptable to relative situations calling for amendments and changes.

4. Topicality and Improvement.

   The model must represent as idea or process that is topical and can serve as an imaginative alternative or improvement to the current situation or product.

5. Inspiration and leadership.

> Successful models inevitably involve as inspiring, credible, and knowledgeable champion, convinced of the value of the core idea, and whose leadership and example serve as a potential incentive to others.

New ideas and models spring forth often and abundantly in all spheres of activity. However, unless they exemplify the above criteria and fulfil a real need, they are liable to fail.

I believe that the agreements I propose in Chapter Five as the foundation for a replicable model do exemplify the criteria outlined above and have the capacity to fulfil a credible and useful need within the important context of Indigenous lands and sustainability.

CHAPTER FIVE

THE LESSONS OF THE ALGONQUINS OF BARRIERE LAKE, AND HAIDA INTEGRATED RESOURCE AND LAND USE AGREEMENTS AS AN ALTERNATIVE MODEL

In chapters Two and Three the key provisions of the Algonquin and Haida Integrated Resource and Land Use Co-Management Agreements with the Quebec and British Columbia governments have been outlined.

The core purpose of these two agreements is to achieve these central goals – equity and sustainability.

Both the Algonquins of Barrière Lake and the Haida have striven with continuous determination over the past decades to seek a fundamental change in their status as Indigenous First Nations in context of their relations with governments and other stakeholders.

No longer would they accept to be treated as impotent observers and vassals on their ancestral lands, whilst governments and outside parties would decide, exploit, and benefit at their expense. There needed to be redress and the instauration of fairness and equity, and fundamental justice. They were determined to be treated with respect, dignity, and equity.

No longer would they accept to see their lands and their resources thereon be desecrated by others for their behavior, with no regard for sustainability and the concept of the Seventh Generation. Forestry clear-cuts, indiscriminate mining and mineral exploitation, over-fishing and irresponsible hunting, would be tolerated no longer. Wanton disregard for resource and biodiversity conservation would be replaced, by an ecosystem-based management with strict regard for sustainability.

The agreements would replace unfairness with equity and unsustainable practices with sustainability.

The intention in this thesis is to propose as an Appendix an Agreement-model reflecting these core goals of equity and sustainability. This agreement-model is so structured as to reflect the salient objectives and features of the Algonquin and Haida agreements described in Chapters Two and Three.

The agreement model would be built around a Vision for the Future, inspired by the orientations of the Algonquins of Barriere Lake, as follows:

1. Resilience through the practice and maintenance of culture, language and traditional way of life, in a spirit of mutual respect, conciliation, and peaceful co-existence.
2. Perennial sovereignty over traditional ancestral territory left in trust by previous generations.
3. Self-governments, adhering to the customary system of governance and continued observance of ancestral customs, adapted as necessary to meet contemporary circumstances.
4. Fostering of education, training, and capacity-building.
5. Community development, including social development and economic self-sufficiency, anchored in community well-being as well as proper and equitable living conditions.
6. A decisive voice in land use and resource management decisions within the traditional territory, guided by the principles of sustainable development and the equitable sharing of resources

The main features of the Agreement detailed in Chapters Two and Three can be summarized under the following five headings:

1. Territory.

   A clear definitions and description of the ancestral accepted by both parties to the agreement, supported by an officially agreed map.

2. Co-Management.

   An ecosystem-based and comprehensive integrated land use and resource co-management plan, based on the concept of sustainability.

3. Knowledge-Sharing.

   The combined use of traditional Indigenous knowledge and current scientific and technological knowledge.

4. Revenue-Sharing.

   The equitable sharing of revenues derived from the sustainable use of the territory and its renewable resources.

5. A dispute-settlement mechanism.

It is not the intention here to present the idea of an agreement-model as a panacea, or some form of superior method for solving the environmental and socio-economic problems of indigenous communities, as well as their political and administrative dealings and difficulties with their respective governments.

Indeed, the agreement-model proposed here is not meant to solve long-lasting problems of a fundamental nature which have endure since the colonization of Indigenous lands. Nor will such and agreement-model create sudden empowerment through overnight capacity-building.

What this type of agreement represents, however, based on the Algonquin and Haida experience, is a realistic step towards autonomy of governance, and the instauration of sustainability as the fundamental principle in the management of land and resource uses.

Through their gradual evolution, the Algonquin and Haida agreements strive to replace distrust and discord by conciliation and mutual understanding. When dissenting people choose to work cooperatively towards a worthy common goal, suspicion gradually gives way to tolerance and respect. Both Indigenous Peoples and governments then find out that the genuine search for social, environmental and economic justice, leads to a sustainable and more stable community of interests.

The Algonquins of Barriere Lake and the Haida Nation have entered into agreements with their respective governments not because they are an end in themselves, but because they judge them to be significantly more judicious and practical transitional instruments, than the formal Comprehensive Land Claims (CLC) process.

What are the key elements and criteria that distinguish the Algonquin/Haida agreements from CLC's?

What is the CLC process, and how does it function?

The CLC process is a federal policy introduced in 1973 as a practical negotiation process whose aim was to resolve outstanding grievances regarding Indigenous lands in Canada not subject to historic land treaties.[125]

It was borne out of Canada's desire to respond to the question of Aboriginal title after Calder v. The attorney of British Columbia (1973). Calder, in conjunction with other major court decision, has created significant uncertainty around the ownership of land.[126]

[125] Crown-Indigenous Relations and Northern Affairs Canada, "Treaties and Agreements" (2018), online: https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231.
[126] Mark L. Stevenson & Albert Peeling, "Memorandum Re Canada's Comprehensive Claims Policy" (15 February 2002) Assembly of First Nations: Delgamuukw Implementation Strategic Committee, online: <http://www.turtleisland.org/news/disc.pdf>.

Within the orbit of the CLC policy and subject to its provisions, there are a number of regional land-negotiation processes, such as claim tables in Ontario, Quebec and the Atlantic provinces, as well as the British Columbia Treaty Process.[127]

No doubt the most crucial and controversial provision of the CLC policy is known as "extinguishment", whereby to achieve "certainty" for economic and resource development through a compensatory "modern treaty", the First Nation involved must agree to the extinguishment of its Aboriginal title.

Indeed, the First Nation must agree to "cease, release and surrender" its pre-existing Aboriginal rights and Aboriginal title, or under the "certainty" clauses, to concede to never assert these rights and titles.[128]

In a paper in the Canadian Journal of Law and Society in 2016, Colin Samson makes the point that "the most powerful means of termination is through the extinguishment and certainty clauses". And further, that "collective ownership and other aboriginal rights that give Aboriginals their unique status are terminated".[129]

The federal government attempted to improve the CLC policy in 1986, by tweaking it to make it less stringent and categorical. The 1986 policy allowed for the retention of Aboriginal rights on land which might still be held after a settlement has been concluded – but then, subject to the extent

[127] Crown-Indigenous Relations and Northern Affairs Canada, *supra* note 125.
[128] *Ibid*.
[129] Colin Samson, "Canada's Strategy of Dispossession: Aboriginal Land and Right Cessions in Comprehensive Land Claims" (2016)31:1 CJLS 87 at94.

that such rights be consistent with the settlement agreement. In other words, a very marginal difference in substance.[130]

In 1993 another review of the CLC was carried out, which basically reaffirmed the objectives of the 1986 policy. It also acknowledged the involvement of provincial and territorial governments in modern treaty negotiations, subject to cost-sharing agreements with the federal government. Conscious of the continuing suspicion of Indigenous First Nations towards the CLC, and their increasing reluctance to enter the process in exchange for extinguishment of Aboriginal title, the federal government commissioned a report on the issue by Douglas R. Eyford, a "Ministerial Special Representative". The Eyford Report, issued on February 20, 2015, is titled: "A New Direction: Advancing Aboriginal and Treaty Rights".[131]

Prior to the issue of his report, Douglas Eyford had called for comments on the Interim Policy document he had issued. In an opinion piece entitle "Canada's Misguided Land Claims Policy" in November 2014, Bruce McIvor of First Peoples Law responded:

"Rather than acknowledge Indigenous lands as being integral to the survival of Indigenous peoples as prosperous, self-sufficient societies, successive federal governments have viewed Indigenous lands from the perspective of the country's southern, non-indigenous society – 'as a source of commodities, colonial territories that will make those of us in the south rich.'"[132]

[130] Indian Affairs and Northern Development, *Comprehensive Land Claims Policy* (Ottawa: Ministry of Supply and Services Canada, 1986).
[131] Douglas R Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (Ottawa: Indigenous and Northern Affairs Canada, 2015) [Eyford Report].
[132] Bruce McIvor, "Canada's Misguided Land Claims Policy" (24 November 2014) First Peoples Law, online: < https://www.firstpeopleslaw.com/index/articles/170.php>.

> "Canada's land claims policy, like all the policies that have preceded it, is focused on the negotiation of treaties that extinguish Indigenous peoples' interests in their lands in exchange for a lesser interest over a fraction of their territory".[133]

The Eyford Report acknowledged the flaws of the CLC policy and process;

> It is discouraging, however, that only 26 agreements have been finalized in 42 years, given the expenditure of time and resources on negotiations… Today, 75 claims are at various stages of negotiation. More than 80% of those tables have been in the treaty process for longer than 10 years, some for more than decades… Since 1973, Canada has advanced in excess of $1 billion to Aboriginal groups through loans and contributions. The debt burden has become an unsustainable barrier to progress… Since 2005, annual expenditures to participate in comprehensive land claims and self-government negotiations have averaged $22.9 million.[134]

However, the Eyford Report does not open the way for a fundamental change regarding Aboriginal title. As Bruce McIvor comments:

> "Rather than negotiate agreements that recognize Aboriginal title, Canada has decided to continue a land claims policy that is incompatible with the fundamental principles of Aboriginal title".[135]

Since then, the current Liberal government of Prime Minister Trudeau has declared its intention on several occasions to review the CLC policy within the framework of the "Inherent Right Policy", i.e. recognition of the inherent right of self-government of the Aboriginal Peoples of Canada.

The persistent question of Aboriginal rights and title has become an increasingly focal and visible policy and political issue for the present government. No doubt the ever-assertive tenacity of

[133] *Ibid*.
[134] Eyford Report, *supra* note 131.
[135] McIvor, *supra* note 132.

Canada's First Nations plays its important part in creating this pressure. Of important relevant importance as well, are the successive Supreme Court judgements confirming Aboriginal rights, culminating in the Landmark Tsilhqot'In decision,[136] and Canada's endorsement of UNDRIP, the UN Declaration on the Rights of Indigenous Peoples.[137]

However, a clear and unequivocal federal policy has yet to emerge regarding the CLC. As recently as February 2018, the Parliamentary Standing Committee on Indigenous and Northern Affairs issued a report on Indigenous land rights, in which it states:

> The government's policies and processes prevent Indigenous communities from achieving a fair resolution of their claims. Further, the Committee found that the current processes cannot efficiently achieve the goals set by federal government, as evidenced by the high number of unresolved claims.[138]

In its report, the committee issued sixteen recommendations, of which recommendation 1 reads: "Adopt a holistic and flexible approach rooted in the recognition of rights for the resolution of comprehensive claims".[139]

In the same month, February 2018, the Federal Budget devoted its Chapter 3 entitled "Reconciliation" to Canada's Indigenous Peoples. It provided the following:

> The launch of a Working group of Ministers to conduct a review of federal laws, policies and operational practices to ensure that Canada is meeting its constitutional obligations with respect to Aboriginal and treaty rights, adhering to international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples,

[136] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.
[137] *United Nations Declaration on the Rights of Indigenous Peoples* UNGAOR, 61st Sess, UN Doc A/RES/61/295 (2007).
[138] House of Commons, Standing Committee on Indigenous and Northern Affairs, *Indigenous Land Rights: Toward Respect and Implementation* (February 2018) (Chair MaryAnn Mihychuk) at 2.
[139] *Ibid*.

> and supporting the implementations of the Truth and Reconciliation Commission of Canada's Calls to Action.[140]

The Budget's document further provided "[a]ccelerate progress on existing rights and recognition tables to identify priorities for individual priorities".[141]

The Budget allocated "an additional $5 billion over 5 years" to Indigenous Peoples' issues. This sum is added to the $11.8 billion earmarked in the 2016 and 2017 budgets.[142]

Indeed, worthy intention and new funding have been announced and highlighted, but no clear and definite policies have emerged apt to give confidence to Canada's Indigenous Peoples that fundamental change to the basic CLC policy is at hand or pending within a realistic time.

Real change would mean to reverse the very core and nature of the CLC policy and process into becoming a positive instrument of fairness and justice. The suggestions made by Stevenson and Peeling in their Memorandum of 2202 to the Assembly of First Nations on the CLC still resonate today, sixteen years after.

1. Negotiations should be subject to the financial independence of the Aboriginal Peoples concerned. "The fiduciary (the Federal government) ought not to perpetuate the vulnerability of the beneficiary".
2. There should be parity of resources of Aboriginals with the other parties. "It is inherently unequal that Aboriginal peoples in conducting negotiations are faced against the entire resources and expertise of both federal and provincial governments. Perhaps some independent office, not under the purview of the government, could be set up to provide a

[140] Canada, Minister of Finance, *Budget 2018: Equality Growth: a Strong Middle Class*, Budget 2018 (Ottawa: Ministry of Finance, 27 February 2018 at 124.
[141] *Ibid* at 127.
[142] *Ibid* at 126.

parity of resources and expertise. The perpetuation of a relationship of inequality is inconsistent with the fiduciary duty".

3. There should exist a process of effective dispute resolution. "This means ultimately that there must be some form of judicial review of the conduct of the parties available to submit disputes in the spirit of the concluding remarks of Lamer C.J. in Delgamuuk. In addition to a dispute resolution mechanism, there is perhaps even a greater need to hold the Crown accountable for meeting minimum fiduciary standards".
4. Full disclosure of what is actually being negotiated is essential. "A fiduciary cannot make a profit or compete with of take advantage of opportunities arising out of the relationship. Without full disclosure. Clearly, the amount of disclosure is inadequate in today's treaty process. The policies are ambiguous, have changed without disclosure, or they are not being followed. There should be a mechanism in place to ensure disclosure".[143]

Given the disadvantages and unfairness of the CLC policy, and the vagueness, uncertainty and remoteness of fundamental changes to its core elements, the option should be considered, of practical and effective alternatives which do not sacrifice Aboriginal title.

The Algonquins of Barriere Lake and Haida Nation Agreements with Quebec and British Columbia respectively, are examples of such practical and effective alternatives. They offer these clear advantages to the First Nations involved:

1. Aboriginal title is not surrendered or extinguished.
2. The Agreements can be negotiated and implemented at a fraction of the cost of the smallest CLC.

[143] Stevenson & Peeling, *supra* note 126.

3. Although the Algonquins and Haida Agreements do not include or involve a recognition of title, they confirm the mapped identification and accepted definition of the relevant ancestral lands.
4. The co-governance provisions give the First Nations concerned an incrementally assertive and direct oversight and control over their land and resources – an important evidentiary case-builder towards an eventual judicial recognition of title.
5. The model created by the key provisions of the Algonquin and Haida agreements becomes a generic template, which can be replicated and easily adapted to specific circumstances. It can be used not only in Canada, but internationally – using the aegis of the United Nations Convention on Biodiversity or other Convention, and the services of the GEF, the General Environment Fund of the United Nations.

I want to reiterate that the proposed agreement model is in no way an end in itself, but should be seen as a credible process for change towards equity and sustainability.

I am conscious in proposing it that it does not enjoy constitutional or statutory protection, that it relies on the good will of the parties involved, IPs and governments. However, the protracted and difficult negotiations that led to the Algonquin and Haida agreements are in themselves an important expression of the will of the parties to change course towards mutual relations of respect and fairness, and the observance of sustainable practices.

Indeed, although agreements such as these do not enjoy formal judicial protection, experience shows that they are durable because they represent the solemn intention of both parties, entered into in utmost good faith.

In their practicability, flexibility, and relative ease of process and observance, they represent a significant step forwards towards the restoration of constructive relations of governance between IPs and governments.

In concluding this chapter, it is worthy of note that Indigenous communities in Canada are continually exploring ways of preserving their traditional culture and way of life through the ancestral ties to their lands. The sustainable protection and conservation of their lands constitute for them the key to survival and enhancement of their cultural and spiritual values and heritage.

There are common elements in the various forms of agreements and initiatives IPs seek to implement with governments and other relevant stakeholders: Indigenous governance, sustainable land-use management, the reliance on traditional knowledge, and economic self-sufficiency to ensure long-term community well-being.

Whilst the Algonquins of Barriere Lake and Haida agreements have been selected as the model for this thesis, it should be noted that other creative and worthy initiatives have the potential of achieving comparable objectives.

For example, several Indigenous communities in Canada, mostly based in B.C., have coalesced around the initiative known as Indigenous Protected and Conserved Areas (IPCAs) – the establishment of protected tribal parks within ancestral lands. Besides the central goals of conservation and sustainability, these IPCAs are meant to provide economic benefits through such projects as run-of-river hydro, and small-scale logging – with sustainable eco and cultural tourism as the mainstay.

The common aim remains the search for practical and achievable forms of agreements and initiatives apt to ensure for IPs, within a reasonable future, a sustainable environment based in autonomy and equity.

CONCLUSION

My close interaction, over the years, with Indigenous Peoples, chiefly the Algonquins of Barriere Lake, has convinced me that their cause is above all one of restorative justice – social justice, political justice, economic justice, and environmental justice.

They never asked to be colonized and to live on reserves. They were fully satisfied with living their lives on their own lands.

They never asked for "our" laws to be imposed upon them. They were fully satisfied with their own Indigenous laws.

They never asked for "our" way of life. They were fully satisfied with their own traditional way of life.

They never asked for "our" methods of development and management. They were fully satisfied with their own methods of using resources according to their Concept of the Seventh Generation.

What the Algonquins of Barriere Lake and Haida Nation Agreements with governments strive to achieve, is to replace the injustices and impositions of the colonizing past with a process of restorative justice: their recovery of autonomy and dignity as trustees of their lands, and of the resources and benefits derived from them. The instilment of ecosystem-management, sustainability and environmental justice.

The hope and purpose in using these Agreements by way of a model or template, is that the model can serve as a realistic and achievable step forward towards sustainability and environmental justice. That because of its adaptability, it can be replicated at a reasonable cost both in Canada, and beyond through the auspices of the UN and the GEF.

The model proposed here is certainly not meant as any form of complete answer in the quest of restorative justice by Indigenous Peoples. That quest represents a long and arduous journey, and one far beyond the scope of this thesis. If, however, the model, because it is adaptable, replicable and transferable, and because it is feasible and tested –can serve as one useful and constructive step along that journey, it will accomplish its objective and fulfil its purpose.

APPENDIX

PROPOSED MODEL OF AN AGREEMENT BETWEEN GOVERNMENT/S AND AN INDIGENOUS FIRST NATION

This Agreement is made between:

The ABC First Nation, represented by its authorized Chief, Chief ……., and herein referred to as ABC

And

The Government of ……, represented by ……., Minister of Indigenous Affairs, and herein referred to as GOVT

WHEREAS the Brundtland Report on Environment and Economy has endorsed the concept of Sustainable Development, defined as ‘’the kind of development which meets the needs of the present without compromising the ability of future generations to meet their own needs’’.

WHEREAS Indigenous Communities have always lived by the Concept of the Seventh Generation, whereby no plan is made or action taken without thinking seven generations ahead.

WHEREAS in order to respect the concepts of Sustainable Development and of the Seventh Generation, it is necessary to ensure, on ABC’s ancestral territory, the sustainable management and use of renewable resources and of the lands which generate them.

WHEREAS both Parties to this Agreement commit themselves to preserve the culture and traditional way of life of the ABC, and to this end take advantage of traditional Indigenous knowledge whilst benefitting from contemporary technological and scientific advances.

WHEREAS the Parties to this Agreement intend to achieve the preparation and implementation of an Integrated Management Plan (IMP) covering land and renewal resource uses on the ancestral territory of the ABC, as more fully described in this Agreement.

WHEREAS this Agreement takes into account the ABC's "Vision For The Future", inspired by the following orientations:

1. Resilience through the practice and maintenance of culture, language and traditional way of life, in a spirit of mutual respect, conciliation, and peaceful co-existence.
2. Perennial sovereignty over traditional ancestral territory left in trust by previous generations.
3. Self-government, adhering to the customary system of governance and continued observance of ancestral customs, adapted as necessary to meet contemporary circumstances.
4. Fostering of education, training, and capacity-building.
5. Community development, including social development and economic self-sufficiency, anchored in community well-being as well as proper and equitable living conditions.
6. A decisive voice in land use and resource management decisions within the traditional territory, guided by the principles of sustainable development and the equitable sharing of resources.

THEREFORE THE PARTIES AGREE TO THE FOLLOWING:

1. Without prejudice to their respective rights and claims regarding title, the Parties agree to identify the Territory described in the Map appended to this Agreement as Annex 1, as the core territory which the ABC has continually occupied and used as its ancestral territory.

2. The Parties will cooperate towards the creation and implementation of an Integrated Management Plan (IMP) covering land-uses and the sustainable development of renewable resources on the territory described in Annex 1 of this Agreement.
3. To achieve the purposes of Section 2 above, the Parties shall establish a Joint Management Committee (JMC), mandated to ensure and oversee the implementation of the IMP, to manage the IMP process on a continuing basis, and to make recommendations to the Parties on changes and improvements to the IMP as necessary. The JMC is established and acts in conformity with Annex 2 of this Agreement, entitled JMC Terms of Reference.
4. In support of the JMC, the Parties shall establish a Land and Resource Use Office (LRO) to provide technical assistance to the JMC, to help develop human-resource capacity, and to identify sustainable development opportunities relating to renewable resource use. The LRO is established and acts in conformity with Annex 3 of this Agreement, entitled LRO Terms of Reference.
5. The costs for establishing and operating the JMC and LRO shall be borne by GOVT by means of an annual contribution of $....., subject to a five-year review.
6. The annual revenues derived from the sustainable use of renewable resources on the Territory described in Annex 1, will be monitored and compiled by the JMC, and notified to the Parties at the end of each calendar year. ABC shall be entitled to a share of these annual revenues equivalent to ……%, such percentage being subject to review every five (5) years.
7. The funds relating to the revenue-share provided under Section 6 of the Agreement shall be paid to a corporation of the ABC duly constituted for this purpose, and the ABC shall have the sole authority over the management and distribution of such funds.

8. In support of this Agreement and the IMP constituted therein, the Parties shall institute three Programs, whose framework and scope will be determined and monitored by the JMC, as follows:
    1. An Indigenous Knowledge Program;
    2. A Natural Resource and Sustainable Development Program;
    3. An Economic and Social Development Program.
9. In order to provide data and evidentiary support to achieve the objectives of this Agreement and of the IMP constituted therein, a series of studies shall be conducted under the aegis of the JMC:
    1. A Sensitive Area Study (SAS) involving mapping and identification, to ear-mark sensitive zones and areas of concern within sites of forestry and other natural resource use operations, such as sacred sites, burial grounds, moose yards, spawning areas, and medicinal plants.
    2. A Toponymy Study, to identify toponymy sites and hydrography roads.
    3. A Modelling Study of Forest Growth, to identify the age class of the forestry content.
    4. A Habitat Classification Data Study, to monitor the moose and other wildlife populations on a seasonal basis.
10. Dispute Resolution Process.
    1. A ‘’dispute’’ means any controversy, claim or disagreement arising out of the interpretation or implementation of this Agreement and which is raised formally and with substance by any of the Parties.

2. The dispute resolution process begins by the sending of a written notice from one party to the other specifying the subject matter of the dispute and the issue to be resolved.
3. Upon receipt of this notice, each party shall appoint a representative authorized to find a joint resolution to the dispute.
4. The appointed representatives may agree to refer the dispute to an independent third party for mediation.
5. The dispute resolution process ends after sixty (60) days following the reception of the initial notice, unless the representatives agree to set a new deadline.
6. The Parties commit to the following:
    a. To make exceptional use of this process.
    b. To attempt to resolve any disagreement without resorting to this process.
    c. To attempt the settlement of any dispute in a non-adversarial, cost-efficient and informal manner.

ANNEX 1

This Annex will consist of a detailed official map of the ABC ancestral territory, approved by both Parties to the Agreement.

ANNEX 2

TERMS OF REFERENCE OF THE JOINT MANAGEMENT COMMITTEE (JMC)

WHREAS Section Three (3) of the Agreement between ABC and GOVT provides for the establishment of a Joint Management Committee (JMC)

The Parties agree as follows:

1. Composition: The JMC shall consist of six (6) members to be appointed within two (2) weeks of the execution of these Terms of Reference, as follows:
    1.1. Three (3) members shall be appointed by ABC, one of whom shall have decision-making authority for ABC.
    1.2. Three (3) members shall be appointed by GOVT, one of whom shall have decision-making authority for GOVT.
    1.3. Replacement. Members appointed to the JMC shall hold their appointment at the pleasure of the appointing Party and may be replaced at any time by such party.
    1.4. Quorum. Quorum for a meeting of the JMC shall consist of all six (6) members of the JMC.
    1.5. Rules of Procedure. The Rules of Procedure of the JMC are appended hereto as Schedule 1. The JMC may, from time to time, provide for additional or amended rules for its orderly functioning, provided such additions or amendment are not incompatible with any provision of the Rules of Procedure or of these Terms of Reference.
    1.6. Funding. Funding for the JMC and its functioning shall be as provided in Section 5 of the Agreement between the Parties.

1.7. Annual Report. The JMC shall provide the Parties with an annual report of its undertakings and activities, including a summary of the meetings, and a financial statement. It shall also be responsible, in compliance with Section 6 of the Agreement, for the computing and certification of annual revenues derived from the sustainable development of the territory's renewable resources. A detailed and verifiable statement to this effect shall be made available to the Parties no later than sixty (60) days from the end of each calendar year.

1.8. Communications. Communications related to the activities of the JMC shall be subject to the approval of both Parties, and to the confidentiality provisions of these Terms of Reference.

2. THE JMC SHALL BE SUBJECT TO THE FOLLOWING GUIDING PRINCIPLES

2.1. The fostering of cooperation and understanding between the Parties with the objective of achieving ecosystem-based and sustainable resource management.

2.2. The JMC shall be guided by transparency and accountability principles.

3. ROLES AND RESPONSIBILITIES OF THE JOINT MANAGEMENT COMMITTEE

3.1. The JMC shall be responsible for the creation, implementation and management of the Integrated Management Plan in accordance with Sections 2 and 3 of the Agreement, consistent with the following vision:

"To provide for the sustainable development of the ABC ancestral territory including its ecosystems and living species; to provide for the pursuit of the ABC's traditional activities, and the development of the ABC's socio-economic interests; to use Indigenous

traditional knowledge while taking advantage of contemporary scientific and technological advances; to oversee the implementation of ecosystem-based, adaptive and ecologically-sound management principles so as to ensure sustainability in land and resource uses".

3.2. The IMP objectives will be consistent with the maintenance and sustainability of biodiversity at the species, landscape and ecosystem levels.

3.3. The coordination of the IMP planning and implementation processes, including:

- the incorporation of identified ABC values and traditional knowledge;
- the compiling of renewable resource and wildlife inventory information;
- the development of Area of Concern management prescriptions;
- the determination of allowable resource use consistent with the sustainability principle;
- the development and monitoring of annual sustainable wildlife management plans.

3.4. The JMC will advise and participate in natural resource management planning and implementation for the IMP area, including input into integrated resource management plans, land use plans, forest plans, the allocation and harvesting of fish and wildlife, and the development of guidelines for the management of natural resources.

3.5. The use of traditional Indigenous knowledge complemented by contemporary scientific and technological knowledge in the preparation and development of the IMP.

3.6. The identification and ensuing implementation of measures to develop capacity-building of the ABC, such as to ensure their ability to participate fully in all aspects of the IMP process.

3.7. Identify and recommend a suitable process to the Parties for regular review of the IMP and its results.

4. Dispute Resolution. The dispute resolution process described in Section 10 of the Agreement will be used by the JMC to settle disputes.

5. Effective Date. The Terms of Reference come into effect on the day of the signing of the Agreement.

SCHEDULE 1: RULES OF PROCEDURE OF THE JOINT MANAGEMENT COMMITTEE (JMC)

Notice and Location of Meetings

The members of the JMC (hereinafter the "Members") shall call and hold their first meeting no later than one (1) months after the Committee has been formed. The committee shal subsequently meet at least once a month, except as otherwise provided by this Terms of Reference. In addition, the JMC may hold special meetings for the purpose of addressing and resolving specific significant issues and critical matters which may arise and require prompt action.

Regular meetings of the JMC will be called by the chairperson of the JMC by giving at least ten (10) days written notice to all Members.

Special meetings of the JMC may be called by the chairperson on the request of any of the Members by giving a reasonably shorter written notice to all Members.

The secretarial Services of the JMC shall prepare and distribute the notices of meetings to the Members, which notices will state the time and place of the meeting and the matters to be discussed. The Members may agree to discuss matters other than those stated in the notice.

Co-Chairs

ABC and GOVT shall each appoint a Member to serve as a co-chair of the JMC for a period of one (1) year.

The co-chairs shall jointly:

- Preside over the meetings of the JMC;

- Perform any other functions assigned to them in writing by the JMC.

Participation

A meeting of the JMC may be held entirely by telephone, electronic or other communication facilities only with the full consensus of the members of the JMC.

Observers may attend meetings of the JMC with the approval of both Parties and upon signature of a confidentiality agreement.

As may be required, the JMC may, at its sole discretion, invite personnel of a Party or any other individual to attend and participate in its meetings.

A Member may participate in a meeting by telephone, electronic or other communication facilities in order to allow all Members and invitees participating in the meeting to communicate with each other simultaneously and instantaneously. A Member or invitee participating in such a meeting by such means shall be deemed to be present at the meeting.

Secretarial Services

ABC shall provide secretarial services to the JMC which will include preparing and distributing notices and agendas of meetings of the JMC, and preparing, distributing and keeping minutes of meetings, including a list of action items for follow-up after meetings.

The secretary of the JMC shall expeditiously forward draft and final copies of the minutes of its meetings to the Parties.

Attendance and Review of Documentation

Members shall attend regular meetings of the JMC and shall strive a minimum attendance level of seventy-five percent (75%) on an annual basis.

Prior to meetings of the JMC, Members shall review all documents or materials at the meeting.

Quorum

Quorum for a meeting of the JMC consists of all six (6) members of the JMC.

If there is no quorum at a meeting, it will be adjourned without notice other than a statement to this effect at the meeting.

Confidentiality

Unless otherwise agreed by the JMC the discussions at meetings, minutes and reports of the JMC and working group established by the JMC and any information provided or received by its Members of members of such other committees in the context of their functions shall be deemed Confidential Information and shall be treated accordingly.

Invitees and observers at meetings of the JMC and any working group established by the JMC, shall be required to sign a Confidentiality Agreement.

Conflict of Interest

A conflict of interest is a situation where a Member is taking advantage, or could be seen to be taken advantage, of their position on JMC in order to gain a personal benefit, or to benefit the interest of a family member or friend. A Member who believers that they are in a conflict of interest should immediately inform the remainder of the Committee and take appropriate action to address the actual or perceived conflict of interest. This may involve withdrawing or removing him/herself from any decision or action related to the conflict.

Accountability

A member shall, in the exercise of his functions, act with honesty and goo faith and with the care, diligence and skills of a reasonable person in comparable circumstances.

ANNEX 3

LAND AND RESOURCE USE OFFICE (LRO)

1. A Land and Resource Use Office (LRO) is established as a complement and to provide technical support to the JMC.
2. The ABC shall be responsible for the establishment, composition, and staffing of the LRO on its territory.
3. The Rules and Guidelines of operation of the LRO conform to and are consistent with the provisions of the Agreement and the Terms of Reference of the JMC.
4. The mandate of the LRO is the following:
   - 4.1. Serve as an interface among the ABC, GOVT and third-party stakeholders in matters od land and resource use management and oversight.
   - 4.2. Provide technical and professional support to the ABC and the JMC.
   - 4.3. Assist, advise and participate in land and natural resource use management and operational planning as required.
   - 4.4. Foster a climate of cooperation and understanding among ABC, GOVT and other stakeholders with the objective of achieving sustainability in land and resource use management.
   - 4.5. Assist the JMC in building human resource capacity through the provision of administrative and technical support, and educational and training opportunities, to ABC community members in land and resource use management.
   - 4.6. Coordinate public outreach and communications within the ABC community related to land and resource use development plans.