Aboriginal and Environmental Responses to Resource Development: A Love-Hate Relationship with Promise[166]

Connie Hunt writes in her overview for this Panel:

> While land claims agreements are not a panacea for the host of problems that resource developers face when they wish to conduct activities on lands claimed by aboriginal Canadians, they offer a viable (and perhaps the only) alternative to the present chaos typified by the situation in British Columbia.[167]

From industry's and often government's perspective, the chaos to which Professor Hunt refers is presumably the uncertainty of tenure over lands and resources, threatened or instituted legal action resulting in expense, delays, stoppages and, certainly, uneasy investors. Are environmental or aboriginal interests served by this "chaos"? Do land claims agreements offer a viable and perhaps the only alternative to these constituencies?

From the perspective of environmental concerns of both aboriginal peoples and environmentalists, the answer to the first question is most certainly no; the answer to the second is, I submit, somewhat more difficult.

Neither of these constituencies can desire the chaos to which Prof. Hunt refers. Aboriginal people are the most likely of all the constituencies being considered by this Panel to regard the territories affected as homeland rather than hinterland. At home, one desires peace, stability and control. Environmentalists would most likely view affected territories as "wilderness", where peace and stability reign but which is the home of no person – a place where, in the words of the

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[166] Hutchins, Peter W., *Aboriginal and Environmental Responses to Resource Development: A Love-Hate Relationship with Promise*, presentation for the Environmental Law, Native Justice and Natural Resources and Energy Sections Panel on The Impact of Native Land Claims on Resource Development in Canada, Canadian Bar Association Annual Meeting Papers, Vancouver, August 21-23, 1989.

[167] Constance D. Hunt, "Natural Resource Development and Land Claims: An Overview", presented to the Canadian Bar association Annual Meeting, Vancouver, B.C. 1989, p. 23, hereinafter "Hunt".

1964 United States *Wilderness Act,* "man himself is a visitor who does not remain". [168]

There is, of course, recourse to the courts – the favourite proceeding being interim or interlocutory injunction with a view to halting the threatening activity, at least temporarily.

It cannot be denied that legal action has, at times, been effective for aboriginal people in forcing governments to intervene.[169] *Calder*,[170] of course, precipitated a new era in land claims negotiations. *Kanatewat*[171]resulted in the first two Canadian comprehensive land claims agreements, the *James Bay and Northern Quebec Agreement*[172] and the *Northeastern Quebec Agreement.*[173] *Macmillan Bloedel*[174] spurred discussions aimed at protecting unique coastal areas. Other examples exist.[175] The environmental movement hindered in the past by problems of standing and lack of substantive law has been encouraged

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[168] See the Report of the Mackenzie Valley Pipeline Inquiry, *Northern Frontier, Northern Homeland,* b Mr. Justice Thomas R. Berger (Toronto, James Lorimer & Company, 1977), vol. 1, p. 30.

[169] Hunt at p. 9

[170] *Calder v. A.G.B.C.* [1973] S.C.R. 313

[171] *Kanatewat et al. v. The James Bay Development Corporation et al.* [1974] R.P. 38 (C.S.), rev'd [1975] CA 166

[172] Quebec, *The James Bay and Northern Quebec Agreement* (Quebec: Editeur Officiel du Québec, 1975) as amended by Complementary Agreement 1-10.

[173] Canada, Department of Indian Affairs and Northern Development, *Northeastern Quebec Agreement* (signed at Quebec, 31 January 1978)

[174] *MacMillan Bloedel Limited v. Mullin et al.* [1985] 3 WWR 577 (B.C.C.A.) At 607 per Macfarlane J., leave to appeal to S.C.C. refused 61 N.R. 240 N., hereinafter "*MacMillan Bloedell*".

[175] Hunt, *supra.*

by the Federal Court decision respecting the Rafferty and Almeda Dams in Saskatchewan.[176]

But the Courts, as Professor Hunt correctly points out, have not been enthusiastic in clarifying the practical significance of aboriginal rights or defining the respective rights and duties of the parties, preferring rather to encourage resolution "by negotiation and settlement".[177]

Public demonstrations and protests appear to have become more popular as a form of expressing opposition to development. This is more an expression of frustration, a cry for action, than a dispute resolution or problem-solving technique. It does get attention, occasionally delays development, but carries with it the risk of being counterproductive. While the B.C. Court of Appeal in *MacMillan Bloedel* carefully identified the reasons for granting an injunction in favour of various Indian Bands to stop logging on Meare's Island, it had harsh words for the non-Indian protestors:

> "That injunction [against non-Indian protestors] was justified and continues to be justified. The protestors against whom it was granted have appealed. There is no merit in their appeal. There is no place in this controversy for violence, intimidation, or obstruction. Those acts do not assist the Indian bands. They jeopardize their right to be heard in the courts, for the courts will not give audience to those who take the law into their own hands and show contempt for the democratic process."[178]

So, the solution perhaps is negotiation – but negotiations between whom, with what objectives in mind, and resulting in what form of instrument?

Before we rush to the assumption that the appropriate aboriginal and environmentalist response to impending development is negotiation of a treaty or land claim agreement, we should reflect upon the process and the instruments it produces. Space is limited, so I

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[176] *Canadian Wildlife Federation Inc. et al. v. Minister of the Environment and Saskatchewan Water Corporation* (10 April 1989) Ottawa, No. T-80-89, Federal Court of Canada, Trial Division.

[177] See *Macmillan Bloedel*, above.

[178] *Macmillan Bloedel*, [1985] 2 C.N.L.R. 58 at 80.

propose to examine in particular the environmental protection provisions of the *James Bay and Northern Quebec Agreement* to ascertain their effectiveness.

The approach will be to examine my model in the light of what I consider to be several fallacies underlying the assumptions and techniques one finds in the land claims process and its products – fallacies that are the result of sincere but simplistic thinking and that tend to raise speculations, only to dash hopes.

Fallacy No. 1 – Assumed Convergence of Aboriginal and Environmental Interests

At first glance, one would assume a convergence of interest between aboriginal peoples and environmentalists. The alliance would appear logical with both partners seeking to deflect renewable or non-renewable resource development. Such alliances have formed in the past, and the evidence is that they continue to form across the country.

In Northern Quebec, the James Bay Crees are opposing further hydroelectric development (Phase 2 of the James Bay Project).During the week of July 24, the U.S. Audubon Society held a press conference in Montreal calling for a halt to the James Bay hydro project until the Canadian and American governments conduct a full assessment of its impact on wildlife and the ecosystem. Several Quebec environmental groups and the James Bay Crees had shared reactions:

> "Representatives of several Quebec environmental groups also attended the press conference and congratulated the Audubon Society for attracting Canadian media attention to the environmental concerns of James Bay.
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> "'I think it is a real shame for the provincial government and the federal government that Americans have to come up here and tell us how to protect our environment,' said George Wapachee, a leader of the Quebec Crees, 10,000 of whom live in the James Bay area and oppose the project."[180]

In Ontario, it is reported that environmental groups threatened to blockade lumber roads under construction in the Temagami area if Ontario Premier David Peterson does not order the project stopped. This area, of course, has been the subject of a long-outstanding land

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[180] Michelle Lalonde, "Les Audubon Society vows to lobby for halt to James Bay Project", *Globe and Mail*, 26 July 1989

claim by the Teme-Agma Anishnabay Band and lengthy legal proceedings.[181]

On the international level, the Inuit through the Inuit Circumpolar Conference adopted a conservation strategy calling for detailed research on the environment and wildlife on which the Inuit depend for food and clothing. Peter Jull, a Canadian representative at the Inuit Circumpolar Conference in Greenland is quoted as saying, "What we are saying is that we live in the Arctic and we know what happens if you mess it up."

A recent National Task Force Report on Park Establishment advises the Minister of Environment that "The most effective, efficient, economic and just means of establishing National Parks is through the negotiation and settlement of aboriginal claims."[183]

Nor are these alliances only forged in the face of megaprojects or in the context of national policy. I am currently involved in an issue involving the extension of a local golf course over lands claimed by the Mohawks of Kanesatake (Oka), a small community outside of Montreal. Environmentalists have joined the Mohawks in opposing the project. We have succeeded in getting Environment Quebec to intervene. The *Montreal Gazette* of 30 July 1989 reported the story under the headline, "Mohawks, environmentalist vow to stop forest's destruction:

> "With the town mayor vowing to cut down a forest this week for nine new golf holes, Mohawks from nearby Kanesatake settlement and local environmentalists have formed an alliance to preserve the woods.
>
> . . .
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> "Jean-François Meilleur, a member of an environmental group formed to fight the extension of the Oka Golf Club, said his group's 60 supporters will be alongside the Mohawks if work begins to clear 'the beautiful forest'.

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[181] A.G. *Ont. v. Bear Island Foundation*, [1985] 1 C.N.L.R. 1 aff'd [1989] 2 C.N.L.R. 73 (Ont. C.A.)

[183] Canada, Report of the Minister of Environment's Task Force on Park Establishment, *Our Parks – Vision for the 21st Century". Ottawa, Environment Canada, Parks, 1987, p. 52,* [hereinafter "Task Force on Park Establishment"].

> "The Kanesatake band council claims the land slated for clearing belongs to them. Meilleur's group just doesn't want to see another green space disappear."[184,185]

In the summer of 1990 real hostilities broke out between the Mohawks and the Village of Oka over the Gulf Club extension, resulting in a summer long crisis drawing in other Mohawk communities, the Quebec Police Force (Sureté du Québec) and the Canadian Army. One policeman tragically lost his life, the community of Kanesatake was gravely traumatized by the barricading of the community with no possibility of leaving.

Not withstanding these encouraging initiatives, expectations of convergency between aboriginal and environmentalist interests risk disappointment and antipathy. Relationships formed in the face of development tend to be marriages of convenience. Assumptions of convergence are, in certain cases, the result of wishful thinking. They may also be the result of simplistic or, more serious, manipulative thinking.

In the case of Phase 1 of the James Bay Project, the alliance between the aboriginal peoples fighting the project through the courts and the environmentalists dissipated rapidly at the first hint that a settlement would be reached between the Cree and Inuit on the one hand, and governments and the utilities on the other. The *James Bay and Northern Quebec Agreement*, which admittedly acknowledged that the project would proceed somewhat modified, was perceived by certain elements in the environmental movement as a "sell-out". Forty-five years on following years of battling in the courts the Crees, Quebec and Canada have made peace (More details see John Ciaccia's Book) (see the Paix des Braves). The environmental movement for the most part has moved on.

A post-*Agreement* example of the exercise of Cree self-government that some environmentalists might think runs contrary to pure environmental interests occurred during the Parliamentary study of the

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[184] Graeme Hamilton, "Mohawks, environmentalists vow to stop forest's destruction, *The Gazette*, Montreal, 30 Juuly 1989.

[185] As of June 2019, thirty years following the crisis, a further attempt at an indigenous/conservationist alliance is being attempted to save the pines' facilitated by the Nature Conservancy of Canada.

Canadian Environmental Protection Act.[186] Under Part IV of the Act, "federal lands" were defined as including Indian reserves, but not Cree Category 1A lands. The Crees proposed that their lands be included on the condition that a Cree band would have to concur in any federal regulations applying to its lands. Minister McMillan refused, stating before the Standing Senate Committee on Energy and Natural Resources:

> "I do not know if there is a precedent for legislators to say, through law, 'We are going to regulate for the protection of the public interest, but we are going to give to some sector within society, however important, a veto over us as to those regulations.' The notwithstanding provision in the post 1982 constitution stands a brazen contradiction. *Sparrow* attempted to alleviate concerns in introducing the justification test. At no time did I ever express a preference to my officials or anyone else – let alone the legislative committee – for the concurrence aspect. I found that offensive to environmental principles."
>
> "In saying that, I do not want to cast aspersions. The Native people are probably the most environmentally-sensitive population in our country. It is rooted in their culture. However, the fact remains that we need safety valves. As the native people acquire, as they ought to, more and more self-determination and more wherewithal to give expression to that self-determination, they will be involved increasingly in economic activities that ought to be scrutinized from an environmental point of view.
>
> "While the people arguing for this concurrence might well have in mind environmental principles and, in practice, they may be motivated by that in the real world, it would greatly undermine the authority of the Crown to do what is needed to protect the public interest in this important field."[187]

The Crees consequently refused to have Category 1A lands subject to Part IV regulatory power. The Act as adopted respected the Cree position.

In the Northwest Territories, twelve years after the Report of the Mackenzie Valley Pipeline Inquiry resulted in halting that project, proposals for a pipeline are surfacing.

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[186] 36-37-38 Elizabeth II

[187] Canada, The Standing Committee on Energy and Natural Resources, Evidence, Hearings on Bill C-74, 13 June, 1988; 01 and 02 (unrevised transcript).

There is a change, however, from the North described by Mr. Justice Berger twelve years before, although it is a change foreseen and desired by Justice Berger. Aboriginal land claims are, or are being, settled. With the settlement of claims, a segment of the aboriginal population feels more confident and is ready to accept and benefit from pipeline development,[190] a situation Justice Berger foresaw. Yet other aboriginal voices dissent.[192] And what of the environmental positions described by Justice Berger:

> ". . . but there is also in Canada a strong identification with the values of the wilderness and of the land itself. No account of environmental attitudes would be complete that did not recognize this deeply felt, and perhaps deeply Canadian, concern with the environment for its own sake."[193]

A fact must be faced. The post-Agreement worlds of Northern Quebec and the Western Arctic may not reflect the wilderness wishes of the environmental movement.

The fact is that aboriginal people negotiate treaties or land claims agreements[194]to achieve recognition and protection of their rights and control over their lands, resources and lives. The objective is to protect and control the homeland, and to grow and evolve within it.

The environmentalist vision may be, as we have said, one of "man as visitor". If people call wilderness their home, then control should not be exercised by the homeowner, but rather by a curator or trustee. The 1987 Task Force Report on Park Establishment includes in its section entitled "Vision" the following disquieting prophecy:

> "Some of these wildlands will enshrine not only natural resources but also the way of life of original peoples in traditional uses and customs. There will be places where native people participate and return to experience the old ways of family, religion, and toil that framed their

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[190] "Dene leader backs gas project", *The Financial Post, 21 April 1989.*

[192] *Ibid.*

[193] *Northern Frontier, Northern Homeland,* above, at 29.

[194] Land claims agreements are, of course, recognized as treaties under s. 35 of the *Constitution Act, 1982.*

special land-man relationship. Parks and wildland areas will be truly special places."[195]

The strain on the aboriginal environmental alliance may occur well before settlement of land claims is reached. This appears to be what is happening in South Moresby:

"More money and political effort have been expended on South Moresby than on any other park reserve in Canadian history.

"Loggers have been driven off, destroying jobs and embittering local residents. But the alliance of convenience which triumphed over the loggers is under strain now and delicacy is required in protecting the park's future."[197]

The phenomenon being described is not exclusively Canadian. A World Bank study on indigenous peoples and conservation captures effectively the hopes and illusions of the protagonists. The Bank's study points to the role of land claims agreements, suggesting that their effect is to favour the aboriginal interests over those of the environmentalists. I quite agree. The study states:

"One of the realities behind the convergence prospectus is the steadily shrinking area of global habitat which has so far escaped transformation for one purpose or another. This has attracted the attention of conservationists anxious to pre-empt further development and settlement. Within that diminishing area, they are likely to encounter indigenous societies in active residence.

"Over the last twenty years, several of these indigenous peoples have managed to negotiate land claim settlements with national governments which have enabled them to retrieve a limited measure of the political self-determination that predated colonialism. Thus empowered, they have been able to turn their attention to matters of self-determined social and economic development.

"Specifically, some groups have managed to assert their priorities regarding environmental conservation over those of the conservation institutions which, to some degree, are themselves a product of colonialism. Conspicuous advances of this kind have been made in

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[195] *Task Force on Park Establishment,* above, at 3. And this has in fact occurred in the years that followed.

[197] Ross Howard, "Haida claim to Moresby is delaying federal park, *The Globe and Mail,* 17 August 1987, A-1 and A-5.

> Canada and the United States (Davis 1985) and there is evidence of parallel trends in the different political and environmental circumstances of Latin America. This amounts to a radical revision of the passive role previously assigned to indigenous societies, as part of the natural scene, to an active and demanding position, but one which does not contest the basic principles of environmental conservation.
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> "This connection with aboriginal land claims is crucial to these changes but has sometimes escaped the notice of conservation agencies preoccupied with issues of endangered species and disappearing habitat. For indigenous societies, similarly preoccupied with the defence of their traditional lands and economies, conservation measures are often seen as means rather than ends and their willingness to form alliances with environmental organizations in campaigning against industrial development should not be taken as a guarantee that they also share the same views upon the most appropriate follow-up to successful campaigns.
>
> "Instead, what has occasionally issued from such alliances of convenience is a version of conservation which is more pragmatic than protective and is centred around an attempt to find ways of adapting traditional practice while protecting the resource base."[201]

Often to the great deception of the conservationists, the followup to successful campaigns is the hammering out of a *modus vivendi* between the aboriginal peoples and industry or government or the emergence of the "aboriginal developer". In the context of a marriage of convenience, land claims agreements signify less sacred vows between aboriginal claimants and environmentalists (who are often excluded from the contract) than they do dower arrangements with government (always a party) and industry (often a party).

A 1998 detailed study on the implications of land claims settlements for natural resources in British Columbia concluded:

> Yet, native peoples must not be seen as having a single-minded concern with the environment. Many environmentalists take comfort in and many resource developers have fears arising from the notion that comprehensive claims settlements could possibly mean the removal of significant parts of the provincial land base from any extractive use. This is most unlikely. While it is true that native

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[201] World Bank, *Indigenous People & Conservation: A Study of Overlapping Interests and their Implications for Land Use Planning and Indigenous Policies in Latin America.* (Draft). Peter Poole, July 1988, [hereinafter "World Bank"].

> governments generally express concern for particular special places which may hold high resource values, they have also indicated a keen interest in acquiring timber rights and enhancing community development on the basis of logging and wood processing. Native peoples, like many other British Columbians, have strong concerns for the environment, but they also have pressing economic needs.[202]

The situation is not to be deplored out of hand. To dispel Professor Hunt's "state of chaos", to bring order to the heath, negotiations take place with the blessing, indeed the encouragement, of the courts – negotiations aimed at establishing an equilibrium, a balance of power, ideally guaranteeing reflection and study before action and ensuring compliance and respect.

Fallacy No. 2 – The Power of the Pen

This fallacy holds that contracts, agreements, legislation well-constructed and well-drafted will solve all problems. It is merely a question of lawyering or drafting skills.

As one of the negotiators and draftsmen on the wildlife, natural resource, environmental and self-government sections of the *James Bay and Northern Quebec Agreement*, I would like to report that our assumptions and techniques. Wordsworth could have been referring to drafters of environmental regimes when he proclaimed,

> "We poets in our youth begin in gladness;
> "But thereof come in the end despondency and madness."[203]

I do distinguish between assumptions and techniques. I believe that it is a fundamental distinction for our profession and its contribution to this process. What we must recognize and deal with is the universal discrepancy between the word (in this case the written and we assume constitutionally entrenched) and the deed.

We strive to articulate rights, design regimes and institutional structures and provide recourse to reflect our client's or the public

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[202] Frank Cassidy and Norman Dale, *After Native Claims? The Implications of Comprehensive Claims Settlements for Natural Resources in British Columbia.* Lantzville, B.C., Oolichan Books, 1988, p. 189. Also published in paperback by the and Institute for Research on Public Policy, June 1988.

[203] Wordsworth, William (1770-1840), "Resolution and Independence"

interest. We believe that if we can only draft these matters with enough skill and incorporate our handiwork into the appropriate instrument – treaty, land claims agreement, legislation, constitutional amendment – all will be well. We forget the human factor – the fickleness (and at times the duplicity) of politics, the capacity – indeed the right – of our clients to change attitudes, the importance of simplicity, and, most important, our own fallibility in understanding our clients and their requirements. In forgetting these matters, lawyers risk being perceived as the problem or, at best, redundant.[206]

There is a challenge in this. It is the challenge to draft for certainty, stability, and at the same time provide for evolution and change. One of the great paradoxes and dangers of treaties or land claim agreements is that they are considered by the signatories to be inviolable and continuing statements of rights and duties. Change is regarded with suspicion and even when accepted is effected through formal and lengthy amendment procedures. Yet occasionally, change, evolution, is necessary. How do we prepare and draft for this paradox?

In the environmental and social protection regimes negotiated and included in the *James Bay and Northern Quebec Agreement* sections 22 and 23 (the environmental and social protection regimes applying respectively in Cree and Inuit territories), techniques and structures were introduced in the belief that they would provide direction as well as checks and balances in the continuing scrutiny of development projects and their impact on the physical and human environment. Language relating to specific application and jurisdictional responsibility was left vague in order to allow administrators some flexibility in implementation.

After fourteen years, it is now clear that in contested and controversial areas such as the sharing of resources, the rate of development, the cots of restraint, vague language only provides excuses for debate and encourages paralysis. As the economic stakes increase, paralysis may become *rigor mortis.* In Northern Quebec, the stakes are high.

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[206] "Despite their complete disagreement about ownership, the two sides resumed talking about a management plan for South Moresby. Justice Department lawyers were excluded and the documents were hammered out in plain language after hours of face-to-face discussions on the meaning of custodianship." Howard, *supra*, at A-5.

> "In the context of recent Québec and Canadian history, this region has acquired a certain reputation as the location of a particularly large (28 WG: 140 Twh) series of hydroelectric complexes whose construction is expected to span the period from 1970 to the year 2005 or 2010. When complete, this development will account for 25-33% of Canada's installed hydroelectric capacity.
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> . . .
>
> "Within 15 years, we can expect the region to produce about two-thirds of the electrical power and energy generated in Québec and to plan an important role in the export of surplus power, seasonal and year-around, to neighbouring provinces and states. We have also seen forestry expand by a factor of two to three times in the last fifteen years, such that now some 750 km^2 of land are now clear-cut annually. James Bay yields about a quarter of the forest products transformed annually in Quebec – a disproportionate amount considering the area and volumes of timber involved. It is though the James Bay territory has not become a primary reservoir of raw materials, both for energy production and for forestry – as well as, to a lesser extent, the minerals industry."[207]

Sections 22 and 23 of the *James Bay and Northern Quebec Agreement* provide direction on implementation in the form of general statements on the objectives of the regimes (paragraphs 22.2.2 and 22.2.2) and guiding principles for responsible governments and agencies (paragraphs 22.2.4 and 23.2.4). Administrators have been unable to give these objectives/ principles "operational definition".[208]

The regime attempted to deal with the problem of projects involving matters of both federal and provincial jurisdiction in the case of the Cree regime through a tripartite (Cree, Quebec, Canada) Evaluating Committee (paragraphs 22.5.6 - 22.5.10) with responsibility to screen projects not only to the degree of impact assessment but also to which environmental impact assessment process (federal, provincial or mixed) would be applied. We believed that this structure would cut through much of the legalistic, bureaucratic wrangling over jurisdiction

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[207] A. Penn, "The involvement of Cree Indians in Environmental Impact Assessment: A Commentary on Experience Gained in Northern Quebec" (a paper presented at the 8th IAIA Conference, Montreal, Quebec, June 1989), pp. 1 and 2 (unpublished)

[208] *Ibid., at 8*

and allow the technical administrators to deal spontaneously and pragmatically with these issues.

We were wrong. In the words of a Cree consultant who has participated on this Committee and others over many years,

> "Problems of overlapping territorial jurisdiction are frequently encountered, including situations in which the Federal government has regulatory responsibility applicable to a project located on Quebec soil. Often the Cree's own 1A and 1B lands are involved. Although the tripartite committee structure at the stage of project evaluation was created in anticipation of this difficulty, it has in fact proved to be a major obstacle to implementation because of the sensitivity of Federal/Provincial relations in Québec. This feature of life has markedly restricted the use of the assessment procedure so far.[209]

Members of the Committee apparently mesmerized or traumatized by questions of jurisdiction refer back to their respective legal documents and that is the beginning of the end for substantive impact assessment.

There are, nevertheless, several hard-fought examples in the *James Bay and Northern Quebec Agreement* and subsequent legislation of techniques that permit flexibility and accommodate change. Significantly, they occur outside the environmental regimes.

The hunting, fishing, and trapping regime set out in Section 24 of the *Agreement* recognizes the dynamic character of aboriginal land tenure both at the micro-level (individual hunting territories) and the macro-level (the nation's territory). The Cree system of traplines or individual hunting territories has always involved shifting boundaries.[211] The territories occupied by aboriginal societies or nations

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[209] *Ibid., p. 7.*

[211] Hutchins, Peter W., "The Law Applying to the Trapping of Furbearers by Aboriginal People in Canada: A Case of Double Jeopardy"in *Wild Furbearer Management and Conservation in North America.* Milan Novak et al. (E). Toronto: Ontario Trappers' Association, 1987.

have shifted over time as a result of wildlife migration, demographics, hostilities.[212]

The *Agreement* managed to protect the Cree and Inuit systems of land tenure as they existed in 1975 and at the same time preserve the dynamic quality of the system. Cree hunters may continue to adjust trapline or hunting territory boundaries or exchange territories. The Cree and Inuit nations may modify their respective hunting territories without non-aboriginal government interference (paragraph 24.3.25, 24.13.9 of Section 24 of the *Agreement).* Of particular interest is the fact that these contractual provisions were incorporated into legislation with the result that aboriginal signatories may adjust territories defined in legislation and government is bound to recognize such adjustments – *An Act respecting hunting and fishing rights in the James Bay and New Quebec Territories.*[213]

The permanency of the regime and the maintenance of an equilibrium between users is enhanced by the links with other sectors of the *Agreement.* For example, a permanent and annually-indexed hunters' income security program provides economic support to Cree hunting – currently approaching $12-million in payments. This program was not, as Professor Hunt suggests, compensation for wildlife and harvest losses[214] but rather an initiative to ensure that hunting, fishing and trapping would constitute a viable way of life for the Cree people.[215] A remedial works fund of $30-million was established to be jointly administered by the Crees and the James Bay Energy Corporation and to be applied toward mitigating ongoing impacts of Phase 1 of the James Bay Project.[216] Material support, therefore, was provided to buttress harvesting rights and facilitate their exercise.

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[212] Trigger, Bruce, *Native and Newcomers: Canada's "Heroic Age" Reconsidered.* Kingston: McGill-Queen's University Press, 1985; Brian Slattery "Understanding Aboriginal Rights", (1987) 66 Can. Bar Rev., 727

[213] R.S.Q. c.D-13.1, s. 29.

[214] Hunt, above, at 22.

[215] Paragraph 30.1.8, s. 30, *James Bay and Northern Quebec Agreement*

[216] *Section* 8, *ibid.*

Subsection 24.11 of the *Agreement* expressly stated that the rights and guarantees of the Crees and Inuit established under the hunting, fishing and trapping section would be guaranteed, protected, and given effect through the environmental and social protection regimes. This ongoing protection has proved to be more difficult to ensure.

What is the problem? As we have seen, the environment and the hunting, fishing and trapping regimes have similar structures and employ similar techniques. In the hunting, fishing and trapping regime, however, techniques such as guiding principles and multiparty management Committees appear to be considerably more effective.

My assessment is that this is explained by a combination of drafting technique (considerably more specificity as to rights, guarantees and duties), credibility (the belief by the participants that the regime can protect and enhance aboriginal bush economies and societies) and appropriate financial and material support.

In the environment regimes, a combination of lack of specificity, lack of credibility (a profound belief that at least large-scale development cannot be stopped or, indeed, influenced) and lack of financial and material commitment results in self-fulfilling ineffectiveness.

Fallacy No. 3 – The Fallacy of Entrenchment

The fallacy here is that of associating too intimately environment and natural resource management solutions with the one-time aspect of treaties or agreements.

The crux of the problem lies in the differing perspective on the treaty process and its product: treaties or land claims agreements. While the earliest treaties (the 18th Century Maritime Treaties and other treaties concluded between the Indian nations and the French and English) were perceived by both sides as nation-to-nation arrangements, the later 19th Century and 20th Century instruments do not enjoy the same measure of consensus as to objectives.

Aboriginal and non-aboriginal communities have viewed the treaty process differently. For the aboriginal peoples, it continues to be a process directed at the protection of the homeland; for the non-aboriginal society the object is the opening up of the hinterland. For the aboriginal peoples, treaties have represented a recognition and protection of pre-existing rights, not just to land and resources but to

culture, self-determination and self-government. To the non-aboriginal community, treaties have meant the opening up of a territory, the right to develop, removing the cloud on the title of the Crown.

The *James Bay and Northern Quebec Agreement* and, in particular, its lands and resources provisions, suffers from this dichotomy.

In introducing the *Agreement* into the Quebec National Assembly in 1975, John Ciaccia[217] states:

> This Agreement has enabled us to accomplish two great tasks to which the government committed itself. It enables us to fulfill our obligations to the native peoples who inhabit our North, and to affirm finally Québec's presence throughout its entire territory.
>
> You may wonder at that last remark, and I can well imagine why. It would be natural to assume that Quebec has always been fully exercising its powers and authority everywhere in its domain, and that the structures of the state have made Quebec's presence felt everywhere within its boundaries. But that has not exactly been the case.[218]

In contrast, we have the statements of one of the aboriginal leaders, Grand Chief Billy Diamond, before the Standing Committee on Indian Affairs and Northern Development during hearings on the federal legislation approving the *James Bay and Northern Quebec Agreement*. Chief Diamond stresses the recognition of Cree rights, the right to continue traditional ways and the opportunity to grow and develop:

> "The Cree people knew that by accepting the *James Bay and Northern Quebec Agreement* they were not terminating their rights and the right to being an Indian. Instead, I feel that my people reinforced their identity as Crees. They have proven that their rights are much stronger now that they are written down.
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> "It matters very much for the hunter or trapper who lives in the bush to know that it his right to lead a traditional way of life, and that traditional way of life is being recognized and respected, hopefully, by

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[217] John Ciaccia was elected MNA for the riding of Mont-Royal in the Quebec general election of 1973. He represented Premier Robert Bourassa in the negotiations with the First Nations and the Inuit of James Bay, which led to the signing of the *James Bay and Northern Quebec Agreement* in November 1975.

[218] *James Bay and Northern Quebec Agreement,* "Philosophy of the Agreement" at XIII. Indeed, it is not the case today in 2019.

> all people of Canada. But that traditional way of life will continue because it is secured in the agreement.
>
> "On the other hand, those people who want to pursue a new way of life, but do not want to pursue the modern industrial society way of life, can do so under the Agreement. That is their choice. Perhaps the biggest right they have is the freedom to choose between two societies. If they want a little bit of both they can do so.
>
> . . .
>
> "We want the opportunity to grow and develop at our own pace. The Agreement gives us this opportunity. . ."[219]

While confrontation over resource development sometimes forces the parties to the negotiating table and leads to comprehensive agreements, the highly-charged atmosphere surrounding these negotiations and the complex array of issues before the parties may lead to trade-offs and fuzzy language to the detriment of environmental and social protections. If a major utility company or natural resources industry is a party to the negotiations and the agreement, there is a very good chance that the environmental and social protection provisions will reflect the preoccupations of these parties.

The *Agreement* was negotiated in the shadow of legal proceedings to halt Phase I of the James Bay Project. The James Bay Energy Corporation, the proponent at that time, was a most active party to the negotiations. The result was the inclusion of specific provisions intended to smooth the way for current and future hydroelectric development and an environmental and social protection regime more suited to small- or medium-sized projects.[220]

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[219] Canada, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development, "Bill C-9, *James Bay and Northern Quebec Native Claims Settlement Act*, Issue No. 6 at 13 and 14, (25 January 1977).

[220] The *James Bay and Northern Quebec Agreement*, *supra*, in s. 8, paragraphs 8.1.2 and 8.17 specifically recognizing the right to the James Bay Energy Corporation to construct the project and granting a release in favour of the Corporation in respect of "all claims, damages, inconvenience and impacts of whatever nature related to the hunting, fishing and trapping of the Crees and of the Inuit and related activities and to their culture and traditional ways that may be caused by the construction, maintenance and operations of Le Complexe La Grande 1975"; paragraph 8.1.3 which purports to exempt from social impact assessment the future NBR and the Great Whale Complexes as well as any additions or substantial modifications to the Complexe La Grande [1975]; in s. 5, subsection 5.5, specifically recognizing the right of the James Bay Energy Corporation, Hydro-Québec and

The passage of time has resulted in what some might consider a tragic irony in regard to the environmental and social provisions in the *James Bay and Northern Quebec Agreement*.

The environmental and social protection regimes were negotiated and set out in Sections 22 and 23 of the *Agreement*. Substantial amendments were brought to the Quebec *Environmental Quality Act*[221] through the addition of Chapter II, "Provisions Applicable to the James Bay and Northern Quebec Region", incorporating the provisions of Sections 22 and 23. These legislative provisions were negotiated by the parties. While these regimes represented a substantial accomplishment in the Quebec of 1974-75, considerable evolution has taken place in public interest and government commitment toward environmental and social protection since that time.

The result has been that Chapter I of the *Environment Quality Act* containing the regime of general application for southern Quebec has been amended a number of times resulting in an increasingly strong (but, I hasten to add, not perfect) regime. The regime applying to James Bay Territory set out in Chapter II, however, is frozen in time. No changes can be made to the legislation until amendments are brought to the *Agreement*. While the aboriginal and non-aboriginal government parties have acknowledged the need to strengthen the regimes and have at length discussed revisions, no formal amendments have resulted.

There is, nevertheless, a silver lining in this particular cloud. It consists in using the political and legal authority provided by land claims agreements to influence legislation and policy. Let me provide one example of this process at work in Northern Quebec.

The *James Bay and Northern Quebec Agreement* is weak in regard to the protection of forest resources. This is a reflection of the relative negotiating strength of the Quebec Department of Lands and Forests in 1974-75. Notwithstanding this problem, however, during a recent comprehensive reform of legislation relating to public lands and forests in Quebec, the James Bay Crees succeeded in negotiating specific and favourable provisions to be included in the legislation of general

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the James Bay Development Corporation to develop lands and resources in Category III lands.

[221] R.S.Q., c. -2

application, The *Forest Act*[222] now provides that every holder of a forest management permit must comply with standards of forest management to ensure the preservation of all forest resources and the compatibility of forest management activities with the use of public land provided for in a plan prepared pursuant to the *Act respecting the lands in the public domain.*[223] We were able to have incorporated into that Act provisions ensuring that the activities, rights, and interests of the Cree and Inuit communities are taken into account in land use plans affecting Cree or Inuit territories and that Cree and Inuit governments participate in the development of these plans.

The interaction of these statutes and the provisions relating to Cree interests may, if wisely used, provide substantial protection from forestry activity and supplement the provisions of the *Agreement.* No other aboriginal nation in Quebec received this treatment. There is no doubt that the Crees and Inuit were able to negotiate this legislative regime as a result of their status as signatories to a major land claims agreement without having to depend upon any participant provision of that agreement.

The lesson here is to recognize environmental and social protection as a dynamic process that must be able to adopt to changing situations, indeed a changing world. **It is not the process that should be entrenched; it is the right to an appropriate effective process.** Thus constructed, land claims agreements could foster convergence and cooperation between aboriginal and environmental interests rather than isolate and separate these constituencies.

Fallacy No. 4: Inappropriate Reliance on Standard Environmental Impact Assessment Processes

In 1975, we congratulated ourselves for having negotiated not only the first mandatory environmental and social impact assessment process in Quebec, but also a unique non-discretionary regime. Section 22 of the *Agreement* includes an enumeration of categories of projects that must

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[222] R.S.Q. F-4.11)

[223] R.S.Q., c. T-8.1. See ss. 24 and 25.

go through Environmental Impact Assessment. An enumeration of projects automatically exempt from the procedure also is included. Discretion remains in the "grey zone" – those categories of projects not specifically enumerated. To introduce some flexibility into the system, it was provided that the parties could review this enumeration every five years and by mutual consent modify it "in the light of technological changes and experience with the assessment and review process".[224] Despite recognition by aboriginal and non-aboriginal government parties that the enumeration is in dire need of adjustment (especially with respect to the automatically- subject category of project), no changes have been made after fourteen years.

But perhaps a more fundamental error was committed, inspired by the aspirations attendant on the U.S. NEPA regime of the early 1970s, we hooked our star to environmental impact assessment as the bulwark against environmental degradation and social disruption.[226]

It was, however, a process foreign to all participants, aboriginal and non-aboriginal, and, being misunderstood, has been mishandled and maligned.

Government and industry appeared to view environmental impact analysis as a simple extension to the permit-granting process – more bureaucratic foreplay prior to consummation. The Cree and Inuit signatories considered it to be "much ado about nothing" – much time, much paper, much expense – with the project in question finally proceeding as planned.

The *Agreement's* Environmental Impact Assessment process involves the classic structure of a screening body at the pre-assessment stage and review bodies at the assessment stage. It was believed that with Cree representation assured on those bodies, Cree interests and a Cree perspective would be introduced into deliberations of these entities. This hope has not been realized. The structures and processes are still considered foreign by the Crees. The subject matter is technical – often responding to and drafting critiques of proponent proposals, under pressure of deadlines, without adequate resources, often in the French language, always outside Cree communities.

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[224] Paragraph 22.5.2), *James Bay and Northern Quebec Agreement*.

[226] Paragraph 22.2.2(b), *ibid*.

The Quebec and federal governments have done little to render the process meaningful. The alienation of resources by the parties is revealing. At the present time in the James Bay territory where over the next four years approximately 18 powerhouses and their associated fore bays and several major storage reservoirs – together with transmission lines, access roads, airports and related infrastructure are proposed, Quebec is allocating approximately 1.5 person/years, Canada less than 0.5 person/years, and the Cree Regional Authority approximately two person years to this work. On the other side, Hydro-Quebec employs a staff of approximately 300 for the preparation of documents for environmental approval.[228]

On the proponent side, environmental impact assessment is perceived as a one-time review and approval process. Impact statements are produced (which in most cases have tended to be descriptive rather than analytical), a review is expected within the delays stipulated in the regime (although these were intended to be guidelines to be extended when appropriate) and authorization to proceed is anticipated. It is perceived that governmental or third-party scrutiny stops at this point. The proponent is honour-bound to respect the conditions attached to authorization.[229]

One of the features of environmental impact analysis (certainly in the *James Bay and Northern Quebec Agreement* process) that encourages proponent optimism is the fact that the process is "proponent driven'. The proponent determines when to submit the project, how to describe it, does the background research and analysis on impacts, and drafts the impact statements. The proponent controls the timing of review and the quality of analysis.

We found that drafting a provision to describe at what moment any given proponent must submit a project for review was the ultimate challenge. In s. 22, we used the expression "preliminary planning stage".

In drafting the legislation, we decided to get a little more sophisticated and introduce a pre-notice stage requiring proponents to

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[228] Penn, above, and personal communication.

[229] Paragraph 22.6.19, *Agreement*.

submit their concepts very early and receive recommendations as to when to submit the project for formal review.[230]

In the years of operation of the regime, virtually not one proponent has complied with this procedure, perhaps through genuine ignorance, more likely through studied ignorance. In any event, a recent joint review of the legislation has led all parties to conclude that the section has died from neglect and should be removed.

If assessment is to be effective, if project design is to be influenced, review must be undertaken and decisions made in a timely fashion – early in the planning stage. A proponent who does not believe hard decisions will result from environmental impact analysis can ensure this by delaying submission and then pleading balance of convenience – the public interest, too much money already spent, too many jobs committed, too many contracts signed.

Quality of impact statements is another problem. The proponent controls the data; no independent research is conducted. The administrators respond to proponent studies. It is all very well to say that the studies can be returned as inadequate, but how many times can this be done before allegations of harassment arise? In the case of large projects, this drama unfolds under growing political and economic pressure to proceed and with government and aboriginal forces vastly outnumbered and outworked.

Finally, and surprisingly, it has been assumed that the proponent not only determines the time of submission, but also the jurisdiction (federal, provincial or Cree) to be dealt with. Because of rigid interpretations already discussed, once a proponent submits a project description to one of the processes, we have been unable to force cross-jurisdictional review. In Quebec, for many reasons, not the least being

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[230] S. 155 of the Act reads: "Every person intending to undertake a project that is automatically subject to the assessment and review procedure must, at the stage of the consideration of the possible options and of the technical, economic and social implications of the said project, give written notice of his intention to the Deputy Minister and briefly indicate the nature of the process, the place where the project is to be undertaken, and the date foreseen for the start of the work. The Deputy Minister shall notify the Evaluating Committee of the same and the Committee may make recommendations respecting the stage at which the proponent of the project should submit to the Deputy Minister the information contemplated in section 156. The Deputy Minister shall transmit these recommendations, which we may modify, to the proponent of the project."

the invisibility of the federal review process,[231] virtually every project is submitted to the provincial review process.

The *Act's* environmental impact assessment was not specific as to the scope of conditions that can be attached or to post-authorization and construction monitoring. We assumed that the common sense and good faith would result in a broad interpretation of conditions and that these could include monitoring. After all, conditions change, proponents are fallible in their predictions for project impacts. The experience has been, however, that the legal advisors of both proponents and government have applied the narrowest construction. Only conditions touching matters within the jurisdiction of the Department of Environment may be imposed. The proponent, once authorized, cannot be called to account. Phased authorization is considered not possible under the doctrine of fettered discretion.

Attempts to have these matters clarified through amendments to s. 22 and to the *Environment Quality Act* have not yet succeeded. There is some belief that proponents enjoy acquired rights, or rights as contracting parties, and that one cannot simply improve the regime from the environmental or regulatory point of view. Frankly, as an advisor on the aboriginal side, I have experienced some frustration in trying to interest our clients and obtaining the necessary commitment to do battle over environmental impact assessment esoterica.

The result of all this is frustration and alienation. In this, aboriginal and environmental constituencies are not well served. The experience in the past has been, however, that the frustration and alienation on the aboriginal side has encouraged short-circuiting the process through direct negotiations between the aboriginal communities and the proponents, negotiations usually involving cash or in-kind settlements – not project modification or environmental enhancement. Environmental impact assessment is actually contributing to this process.

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[231]After years of trying to induce the federal government to legislate its s. 22 regime and apply it to large-scale development in Northern Quebec, the Crees have been forced to institute legal proceedings in an attempt to force the application of federal Environmental Impact Assessment to Phase 2 of the James Bay Project. *Grand Chief Matthew Coon Come et al. v. Her Majesty the Queen in Right of Canada et al.,* Federal Court of Canada, Trial Division, Statement of Claim filed 10 May 1989.

If one is to stay with environmental impact assessment, I am not sure that there are many drafting solutions to these operational problems. The issue is credibility. If a proponent believes that he is faced with a serious process and a well-informed strong decision-maker, he is likely to submit early to avoid costly redesign, to submit quality assessments again to avoid delays, and not try to manoeuvre jurisdictional issues. Governments (aboriginal and non-aboriginal) must be prepared to establish and support the infrastructure necessary to conduct impact review. Decision-making authority must be unequivocal: words, albeit written and entrenched, are not enough.

The First lesson appears to be that it is an illusion to expect institutions or people to embrace and work effectively within culturally foreign structures or institutions. This applies equally to aboriginal and non-aboriginal societies. We must look to indigenous solutions. One alternative is Tom Berger's Mackenzie Valley Pipeline Inquiry model and the later Alaska Native Review Commission[232] with their emphasis on taking proposals to the people, listening to the people rather than responding to and analysing technical submissions from proponents, is short, depending more upon human intuition than upon scientific knowledge lagging well behind the proposed technology.[233]

The second lesson is specificity. Whatever the process, it should be fully described. Authority to halt, modify or attach substantive conditions to development must be un equivocal.

Finally, classical environmental impact assessment must not be the only tool. Community hearings, the exercise of aboriginal government jurisdiction, ongoing joint management structures must all be considered.

Fallacy No. 5: The Oasis Fallacy

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[232] See Berger, above; Thomas R. Berger, *Ville Journey: The Report of the Alaska Native Review Commission*, New York: Hill and Wang, 1985. Note: for example, the following from the preface: "Yet I am convinced that in the villages of Alaska I have heard the authentic voice of the Native peoples", p. vii.

[233] In 1974-1975, neither Crees nor government technical experts foresaw the serious problem of mercury contamination of reservoirs in Northern Quebec. The difference, however, was that the Cree hunters believed they were threatened without perhaps being able to be specific; the government scientists smugly denied a problem.

This fallacy assumes that adequate environmental and social protection may be achieved through the existence of "green" cases scattered throughout the desert of development.

We may speak in terms of two broad, but certainly not mutually exclusive, approaches to environmental protection. The first is aimed, in general, at preventing or modifying environmental destructive projects or processes, wherever proposed. The other involves establishing networks of specially protected areas in which environmentally destructive activities are excluded.[234] Unfortunately, aboriginal activities have, on occasion, been associated by conservationists, if nor by environmentalists, with these activities.

> "To varying degrees throughout the world, there are three principal causes of divergence between the interests of indigenous peoples and certain conservation interests:
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> "Competition from nonnative sports hunters, once expressed in expulsions from game (hunting) reserves; now also by attacks on the principle and exercise of aboriginal hunting rights.
>
> "Uneasiness on the part of wildlife management agencies that indigenous people will exercise aboriginal hunting rights without respect for the effects upon animal populations.
>
> "The need to sustain the powerful and symbolic image the national parks have acquired as the antithesis to the commercial exploitation of natural resources and which cannot accommodate any deviations from a primitive image of indigenous societies."[235]

The establishment of these specially-protected areas either in the form of parks, ecological reserves, or other forms has been viewed by aboriginal peoples with skepticism and concern – skepticism because resource development is not necessarily excluded, and concern because of threatened restrictions on evolving aboriginal use of wildlife resources in the park area. Aboriginal peoples are perceived as part of

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[234] See the Law Reform Commission of Canada, *The Interaction Between Environmental Law Enforcement and Aboriginal and Treaty Rights in Canada,* (draft study paper not approved by the Commission, by David Nahwegahbow, Brad Morse, April 1986, pp. P, 79, 80.

[235] World Bank, above, at 34.

the flora and fauna of the park to be preserved in what the World Bank study has termed "evolutionary self-arrest".[236]

> It cannot have escaped the notice of some indigenous communities and organizations and organizations that in some cases park authorities have been far more diligent in regulating the practice of indigenous residents than the activities of resource corporations. In one sense, this merely reveals the relative impotence of park agencies, but it also reflects a view of what is considered appropriate behaviour in national parks. This view is ultimately at odds with the proposition that the interests of environmentalists and indigenous peoples can be reconciled to their mutual benefit, at least in the context of national parks.
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> "The examples reviewed in this and the following chapter provide some indications of what happens after indigenous people have been living in a national park or other reserve for a long period. The condition for their remaining is they place themselves in evolutionary self-arrest."[237]

The World Bank study is critical of Parks Canada policy. An extraordinary statement on "evolutionary self-arrest" from a 1979 Parks Canada policy statement is quoted in the Bank's study:

> "Selected activities which are of cultural value in portraying to visitors traditional relationships between men and the land in the park area as part of the park experience may be permitted."[238]

To the extent that continued aboriginal proprietary interest and activities are perceived as a threat to the park system, the system will be a threat to aboriginal peoples. Perhaps nowhere is the aboriginal environmentalist convergence/divergence paradigm presented in more stark terms than in Canada's park system.

The aboriginal position is clear. Parks and other protected areas must recognize aboriginal and treaty rights and must involve aboriginal peoples in joint management arrangements. As the Assembly of First

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[236] Ibid.

[237] Ibid. at 48-49.

[238] Ibid at 31.

Nations submitted during hearings on Bill C-30, *An Act to amend the National Parks Act:*

> "There are many positive aspects to the proposed amendments. However, we believe that the National Parks Act and Bill C-30 fail to recognize the special role of aboriginal peoples in relation to conservation management as well as our unique rights to practice traditional harvesting activities. It also fails to honour our rights to unceded lands or to put in place the legislative recognition of treaties and other agreements.
>
> "In fact, the Minister of Environment, the Honourable Thomas McMillan, asserted in his opening presentation to the House of Commons legislative committee that it was 'social justice' to allow the traditional subsistence activities of local residents to continue where new national parks are established.
>
> It is more than social justice. It has to do with rights.
>
> . . .
>
> We want to emphasize the importance which First Nations attach to the preservation of wilderness areas. This is a goal that we share with Canadians and the government of Canada.
>
> "Nevertheless, we believe that this can be achieved without restricting or eliminating First Nations' traditional activities. We have always made use of the land in equilibrium with nature and we consider ourselves as part of the 'wilderness ecosystem'.
>
> . . .
>
> "What about Joint Management?
>
> "This is a very important issue to First Nations. Since 1979, it is part of Parks Canada policy to engage in joint management regimes with native communities in relation to new national park reserves.
>
> "Unfortunately, experience proves that this has not been put into practice in all cases and there appears to be a certain degree of reluctance on the part of Parks Canada to engage in any kind of parks planning and management of renewable resources in cooperation with First Nations."[239]

The Minister of Environment has received from his own Task Force on Park Establishment a strong endorsement for recognition of

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[239] Assembly of First Nations, *Submission to the Senate Committee on Energy and Natural Resources on Bill C-30 (An Act to Amend the National Parks Act).* Ottawa, 15 August 1988, pp. 2-3, 9, 12. See also Ross Howard, above.

the rights of aboriginal peoples and their involvement in joint management of parks.[240]

> "The aboriginal claims process provides Environment Canada - Parks with a unique opportunity to negotiate not only the creation of parks capable of meeting national and international standards, but also cooperative arrangements with aboriginal groups that will ensure their support and participation in the creation and management of parks. Such joint management mechanisms should continue to include harvesting rights and guaranteed management roles for aboriginal people in parks planning and management, wildlife management, economic and employment opportunities, and training. Furthermore, now that the precedent has been established, Environment Canada - Parks should agree that management and harvesting provisions of the claims, which allow native people to continue wildlife harvesting and subsistence use of the land and resource, should take precedence over the *National Parks Act*."

Yet officially, a fear exists that the exercise of aboriginal and treaty rights pose a threat to the park system. Last year I was involved in trying to have a non-derogation clause inserted into Bill C-30. The then Minister, Tom McMillan, and his legal counsel, protested vigorously. Mr. McMillan reacted to our position as follows:

> "I do not think this particular representation changes, fundamentally, the thinking of the government on the question. If you want to hamstring the Minister of the Environment and make it almost impossible for him or her to protect parks values and natural heritage values in the national parks in the name of amplifying aboriginal rights in the Constitution Act of 1982, I can think of no better way to proceed than what is suggested here."[241]

Issuing from the mouth of the federal Minister responsible for the preservation and enhancement of the quality of the natural environment,[242] this is not encouraging for the convergence of

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[240] Task Force on Park Establishment, above, at 53-54. Significantly, the Task Force member from industry, Ms. Laura Tupper, Suncor, Inc., chose not to sign the Report.

[241] Canada. Standing Senate Committee on Energy and Natural Resources, Hearing on Bill C-30, 15 August 1988, BB-7 (unrevised transcript)

[242] *Department of the Environment Act,* R.S.C. 1985, c. E-10, s. 4

aboriginal and environmental interests through the national park system.

The experience in the *James Bay and Northern Quebec Agreement* in regard to the oasis approach is mixed.

The decision to provide for three categories of land (Category I being lands set aside for or owned by aboriginal communities; Category II beong lands for the exclusive hunting, fishing, and trapping activity of aboriginal communities; Category III being lands subject to the general regimes) encourages a perception that aboriginal interests are being respected as long as Category I lands and perhaps Category II lands are protected. Category III lands are perceived as public lands open for development. While this is, to say the least, a simplistic interpretation of the regimes established under the *Agreement*, it has been encouraged by the existence of land categories.

On the other hand, the matter of parks, ecological reserves and other similar designations was dealt with quite effectively. Concerned about the jurisprudence relating to unoccupied Crown land, we ensured in s. 24 that the existence or establishment of parks, reserves, wilderness areas, ecological reserves would not be a restriction to the harvesting activity of the beneficiaries.[243]

Section 22, the environment and social protection regime, provides that the proposed land for parks, wilderness areas, ecological reserves or other similar land classifications constitutes "future development" and thus is automatically subject to environmental and social impact assessment.[2]

The issue is whether rights flowing from a land claims agreement prevail over the *Parks Act*, discussed by the Minister's Task force in 1987, was in fact settled in North Quebec ten years earlier by the *James Bay and Northern Quebec Agreement*.

Conclusion

It is to be hoped that we learn from our mistakes as well as our successes. I have identified certain conceptual and operational fallacies, not to discourage, but to alert.

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[243] Paragraph 24.3.6 of the *James Bay and Northern Quebec Agreement*

A new approach is required – one that appears to be emerging internationally and which suggests the possibility of convergence of aboriginal and environmental interests around the issue of protected areas – but protected areas in the broadest sense.

> "The essential difference is that the emerging approach takes account of social and economic needs of local people in planning and managing conservation areas, whereas the older approach tended to exclude human activity, or accept it only under certain conditions. The older approach is exemplified by national parks, the newer, by biosphere reserves.
>
> "Two significant ingredients typify this new approach: a) conservation initiatives by indigenous groups, b) the key role of conservation NGOs in Latin American countries, notably in managing specific conservation projects.
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> "These changes conform to the notion of "convergence" between the interests of indigenous peoples and conservationists that has been receiving much attention in recent years . . .
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> . . .
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> "Attitudes towards indigenous resource utilization vary widely across the spectrum of conservation organizations. At both extremes are groups opposed, though for different reasons: sportsmen's organizations object to the principle of aboriginal hunting rights; some preservationist groups object to animal utilization under any circumstances.
>
> "But the pragmatic centre has come to terms with indigenous practice and has endorsed it in the World Conservation Strategy which recognizes that a) conservation areas cannot be insulated from surrounding activities and attitudes, and b) some forms of sustainable development are compatible with wildland conservation.[245]
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> "The solution, it seems to me, is to accept a comprehensive responsibility for environmental protection. The creation of special protected areas is fine as long as it is not seen as an exoneration for *laissez-faire* practices elsewhere. At the same time, these areas and more particularly the aboriginal residents or claimants of these areas, must not bear the brunt of society's guilt or desperation over the plight of

[245] World Bank, above, at 1, 2

the environment. The *Bruntland Report*[246] has reminded us that there is no escape, no Victorian retreat, from our industrial excesses.

Protected areas may, nevertheless, instruct and inspire. In this,

[246] World Commission on Environment and Development, *Our Common Future*. Oxford: Oxford University Press, 1987.

aboriginal and environmental constituencies can come together to teach our jaded societies what we have lost and what we have to lose. Despite the tensions and institutional weaknesses identified in this paper, they share a spiritual bond. In the end, that bond should transcend the tensions brought about by our society's imperfect understanding of the aspirations of the aboriginal peoples and lawyers' imperfect skills in forging the appropriate institutional links between societies.

– *August, 1989*