Good Relations: An Alternative Paradigm for Natural Resource Governance in Eeyou Istchee

by

Shauna Troniak

Faculty of Law, Institute of Comparative Law

McGill University, Montreal

August 2010

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Master of Laws (LL.M.)

Table of Contents

Abstract

The parties to two modern agreements in Eeyou Istchee – the Crees of Eeyou Istchee and the Governments of Canada and Quebec – describe their treaty relationship in terms of a "new relationship" based on principles such as mutual recognition and reciprocity. Current perspectives on a new relationship in Eeyou Istchee are inadequate to understand the parties' complex normative interactions and political claims for recognition. An alternative paradigm is needed to conceptualize a new relationship, which emphasizes the political and legal processes that allow Aboriginal peoples and state actors to engage in reciprocal dialogue, and negotiate compromises to deep-seated normative disagreements. Formal and informal mechanisms for decentralized governance of natural resources – including community consultation processes, and institutions for co-management and community-based management – can provide forums for the parties to negotiate their political and normative interactions within an alternative paradigm.

Résumé

Les parties de deux accords modernes à Eeyou istchee – les cris d'Eeyou istchee et les Gouvernements du Canada et du Québec – expriment leur relation en tant que «nouvelle relation» fondée sur des principes de reconnaissance mutuelle et réciprocité. La perspective actuelle sur la nouvelle relation à Eeyou istchee est insuffisante pour comprendre les interactions complexes engendrées par les demandes politiques et normatives des parties. Un nouveau paradigme est donc nécessaire pour conceptualiser une nouvelle relation, en mettant l'accent sur les processus politiques et juridiques permettant aux Autochtones et à l'état de se livrer au dialogue réciproque et de négocier des compromis lors de désaccords normatifs de grande profondeur. Des mécanismes formels et informels pour la gouvernance décentralisée des ressources naturelles – y compris les consultations des communautés, et les institutions de co-gestion et de gestion communautaire – peuvent permettre un échange politique et normatif dans le cadre d'un nouveau paradigme.

Acknowledgements

Many thanks to those who helped me with this project and down this research path: Kirsten Anker (my excellent supervisor); Cree-Quebec Forestry Board; Intensive Program in Aboriginal Lands, Resources & Governments (Osgoode Hall Law School); IUCN Regional Office for Oceania; Tracey Lindberg; Roderick Macdonald; John-Paul Murdoch; and Colin Scott.

I am also grateful for all the support I received from the faculty, and in particular from Angela Campbell at the Institute of Comparative Law, Karen Crawley, Shauna Van Praagh, and the staff at the office of Graduate Programs in Law.

Very special thanks to my parents, Dennis and Laura, and to Kevin.

Introduction

> When you look at First Nations people on this land, in the past, even today, we are careful about what we were given to do. We were given the uses of everything on the land and Creation. We had … our own teachings, our own education system teaching children that way of life, and how children were taught how to view, to respect the land and everything in Creation. Through that, the young people were [educated about] what were the Creator's laws, what were these natural laws. What were these First Nations laws. And talk revolved around a way of life based on these values. For example: respect, to share, to care, to be respectful of people, how to help oneself. How to help others. How to work together …[1]

This is an excerpt from the oral commentary of Elder Peter Waskahat of the Frog Lake First Nation, which was published in a notable book called *Treaty Elders of Saskatchewan* by Harold Cardinal and Walter Hildebrandt.[2] The book explores a "First Nations perspective"[3] on the historic numbered treaties[4] through the words of Elders (of which this quotation is an example), and discusses the background and context of the Elders' perspectives. By the time a reader comes across this quotation in the book, the Elder's original message has already gone through at least three stages of conceptual and linguistic translation: first, the Elder has framed his thoughts to communicate them to non-Aboriginal readers; second, the translator has translated the quotation to written English from the original spoken in Cree; and third, the authors or editors of the book have edited the quotation, with ellipses and parentheses, for readability. The reader

---

[1] Elder Peter Waskahat, in Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) at 15.
[2] *Ibid*.
[3] *Ibid*. at x.
[4] These are the eleven treaties signed between Aboriginal peoples and the Crown between 1871 and 1921. They cover most of the present-day prairie provinces (Manitoba, Saskatchewan and Alberta), northern Ontario, and parts of British Columbia, the Yukon and the Northwest Territories.

completes a fourth stage of translation. At this stage, the reader attributes meaning to the words in relation to their own perceptions and understanding of the world.

For those readers whose perspectives are informed by the common law, such as its practitioners and most state[5] actors, the Elder's comments might raise particular questions. In the common law, a general distinction is made between substantive law and procedural law: broadly speaking, the substantive law defines and regulates our rights and obligations, while the procedural law sets out methods and processes to ensure the observation of these rights and obligations. In interpreting the Elder's comments with this distinction in mind, a state actor or practitioner of the common law might wonder why the Elder's discussion of "First Nations laws" is prefaced by, and embedded within, a discussion of the processes by which these laws are imparted, and further, why these laws are taught through, and as components of, a certain "way of life."

Cardinal and Hildebrandt approach an answer to these questions when they reference the "formal and long-established ways, procedures and processes" that Aboriginal persons must follow in order to gain "particular kinds of knowledge that are rooted in spiritual traditions and laws."[6] When one considers the content of these Aboriginal laws, one must therefore also consider the learning processes by which they are acquired, and the ways of life of which these laws are a part. The common law distinctions between substantive and procedural law do not apply; instead, one should see these two aspects of the law as blended together, and that one depends on the fulfillment of the other.

[5] Throughout this thesis, I will use the term "state" to refer to an apparatus of a centralized (federal or provincial) governing authority, including a legislative body, government administration, or court system.
[6] *Cardinal & Hildebrandt*, *supra* note 1 at 2.

This thesis is concerned with understanding and improving upon the political and legal relationship between the parties to a modern treaty, the *James Bay and Northern Quebec Agreement* (*James Bay Agreement*),[7] and a later addition to the treaty known as the *Agreement Respecting a New Relationship Between the Cree Nation and the Government of Quebec* (*New Relationship Agreement*).[8] This latter agreement, as its title suggests, holds out the promise of a "new relationship" between the parties; and indeed, the *New Relationship Agreement* is just one example of a broader movement toward reframing modern Aboriginal-state relations in these terms. Since the 1996 *Royal Commission on Aboriginal Peoples* (RCAP) articulated a vision of a "renewed relationship" based on four core principles – mutual recognition, mutual respect, sharing, and mutual responsibility[9] – a "new" or "renewed" relationship between Aboriginal and non-Aboriginal peoples has been evoked across contemporary Canadian political culture.[10] While a new relationship can provide a frame for understanding Aboriginal-state relationship under modern agreements, including the two above mentioned agreements in Eeyou Istchee, the conceptual elements of this new relationship remain

[7] (1975), online: Grand Council of the Crees: <http://www.gcc.ca/ > [*James Bay Agreement*].
[8] (2002), online: Grand Council of the Crees: <http://www.gcc.ca/ > [*New Relationship Agreement*]. The agreement is also known colloquially as the *Paix des Braves*.
[9] Canada, Royal Commission on Aboriginal Peoples, "Chapter 16: The Principles of a Renewed Relationship," in *Report of the Royal Commission on Aboriginal* Peoples, *Vol.1: Looking Forward, Looking Back* (Ottawa: Canada Communications Group, 1996), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ap/rrc-eng.asp>.
[10] An important aspect of this influence has been in the policy arena at the provincial level. For example, in 2005, the *Transformative Change Accord* brought the Governments of British Columbia and Canada together with the First Nations Leadership Council to articulate the principles of a "new relationship based on mutual respect and recognition." Ontario has also recently articulated a broad policy approach to Aboriginal affairs "based on mutual co-operation and respect." See: British Columbia, "The Transformative Change Accord," online: Government of British Columbia <http://www.newrelationship.gov.bc.ca/>; and Ontario, Ontario's New Approach to Aboriginal Affairs (Toronto: Ontario Native Affairs Secretariat, 2005), online: Ontario Ministry of Aboriginal Affairs <http://www.nativeaffairs.jus.gov.on.ca>.

under-theorized, and its potential to bring about practical advances in Aboriginal-state relations remains under-explored in this context.

The conceptual issues surrounding the development of a new relationship between Aboriginal and non-Aboriginal peoples are very complex, but the Elder's comments provide some clues on how to approach these issues. Recall the emphasis placed on learning processes as means of access to, and indeed as indelible parts of, the substance of Aboriginal laws. In the first chapter of this thesis, I argue for a broad conceptual approach to a new relationship that emphasizes the *processual* aspects of this relationship, that is, the political and legal processes that allow Aboriginal peoples and state actors to engage in reciprocal dialogue, share normative[11] experiences, and negotiate provisional compromises to deep-seated normative disagreements. I will contrast this "alternative paradigm" (or broad conceptual approach to a new relationship) with the current "dominant paradigm," favoured by most current state actors, which seeks to understand the differences of Aboriginal peoples within their own categories of perception, and expand the state apparatus to accommodate Aboriginal peoples based primarily on this perception. The basic contrast here is between processes of recognition and accommodation that are defined together by Aboriginal and non-Aboriginal participants, and those that are defined primarily by the (non-Aboriginal) state.

Relations between Aboriginal peoples and the state are most often structured around rights to lands and resources, and thus routinely involve issues related to natural resource governance and management;[12] and decentralized forms of governance between

[11] In this thesis, "norm" refers to a broad range of concepts and standards that are experienced as authoritative within a collectivity, including laws, rules, conventions and customs.
[12] In this thesis, "governance" of a natural resource will generally refer to types of ownership or management authority, while "management" of a natural resource will refer to approaches to its

Aboriginal peoples and state actors are relatively well known and well entrenched in this context. The second and third chapters of this thesis will address the practical potential of a new relationship – as conceived under either the dominant or alternative paradigm – to manifest within institutions for shared or delegated governing authority over natural resources, with particular reference to the experience of the Crees of Eeyou Istchee under the *James Bay Agreement* and the *New Relationship Agreement*. The second chapter will, in particular, look at two institutional arrangements for decentralized governance of natural resources – co-management and community based management arrangements – and how decentralized governance of natural resources has been formulated in Eeyou Istchee under the two above referenced agreements. The third chapter will explore, in more detailed case studies, three particular aspects of the treaty relationship in Eeyou Istchee that are connected to issues of decentralized governance of natural resources: consultations of Cree communities on proposed industrial and resource developments; co-management of forest resources; and the potential for shared or delegated forms of governance in relation to protected areas. The focus of the analysis in the third chapter will be on the capacity of the dominant and alternative paradigms to outline appropriate forms of natural resource governance in Eeyou Istchee, and to influence the development of current and future institutions in this regard.

The analytical approach in this thesis requires a perspective that is attuned to both the presence of cultural, linguistic, cosmological etc. differences between Aboriginal and non-Aboriginal peoples, and problems of cross-contextual translation in attempting to understand these differences. But rather than attempting to explain the multi-faceted

---

conservation and use. Later chapters in this thesis will discuss governance arrangements for natural resource management, such as "co-management" and "community-based management."

differences between the parties to the modern treaty relationship in Eeyou Istchee, this thesis will attempt to define institutional planes for the parties to negotiate and work out their differences for themselves in a spirit of mutual compromise. This approach requires an awareness of some of the presumptions of one's own conceptual framework, such as the substantive-procedural binary referenced previously, and openness to the possibilities that other frameworks present for understanding the world and our place in it, both individually and collectively. Such an approach can help to defined more equitable forms of governance, including natural resource governance. It may, in fact, help to understand the reality of multi-faceted influences that already apply in our existing framework of governance. In *A Fair Country*, John Ralston Saul makes this latter point when he argues that we are, in fact, "a métis civilization."[13] The profound Aboriginal influence on Canadian civilization has, however, Saul argues, not yet fully entered our national consciousness. We are, and always have been, a "complex family within an ever-enlarging circle."[14] Only by coming to terms with our Aboriginal nature, and thus "widening the circle,"[15] can Canadians fully actualize our cultural, political, and economic potential as a country. Saul's end goal – to unlock Canada's potential as a nation and on the world stage – differs from that of the present study, which is rather to set out a conceptual and practical basis on which to develop a new relationship between Cree and state parties to the *James Bay Agree*ment and *New Relationship Agreement* in the context of natural resource governance. Saul's analytical approach is, however, relevant here; in particular, the idea of drawing inspiration for a new era in Aboriginal-

[13] John Ralston Saul, *A Fair Country: Telling Truths About Canada* (Toronto: Penguin, 2008) at 3. "Métis" is derived from the old French word, meaning "mixed," and is used to refer to an individual of Aboriginal-European descent. Saul uses the idea to describe the dual Aboriginal-European influences on Canadian society and political culture.
[14] *Ibid*. at 98.
[15] *Ibid*. at 103.

state relations from our dual Aboriginal/non-Aboriginal influences; this must include governance arrangements that allow us to work together, respectfully, equitably and harmoniously.

The Elder's above referenced comments touch on concepts of how to work together and respect one another; and indeed, the Cree language[16] contains many concepts that describe how to establish and maintain sustainable working relationships both individually and collectively. One such concept provides a glimpse into the Cree legal principles that might inform the development of a new relationship. "Miyo-wicehtowin,"[17] or "good relations,"[18] is a principle said to originate in the laws and relationships between the Cree Nation and their Creator. "It asks, directs, admonishes or requires Cree peoples as individuals and as a nation to conduct themselves in a manner such that they create positive good relations in all relationships."[19] Miyo-wicehtowin describes a situation of peace between peoples who do not necessarily come from the same place or perspective, and the maintenance of mutual good relationships between peoples through positive support and assistance.[20] It is also "the foundation upon which new relationships are to be created."[21] Miyo-wicehtowin may also be understood as a principle of treaty interpretation, which describes the relationship between the treaty peoples on which the treaties are based. As stated by Cardinal and Hildebrandt in

---

[16] The Cree language is a diverse language that is spoken in a wide geographic range across Canada and in several dialects, including: Attikamek; Eastern; Moose; Plains; Swampy; and Wood.
[17] "Miyo-wicehtowin" is translated from Plains Cree and into the Latin alphabet.
[18] *Cardinal & Hildebrandt*, *supra* note 1 at 14. Their translation of miyo-wicehtowin also includes "getting along well with others" and "expanding the circle." See also: Shalene Jobin, *Guiding Philosophy and Governance Model of Bent Arrow Traditional Healing Society* (M.A. Thesis, University of Victoria, 2005) at 16; and John Borrows, *Justice Within: Indigenous Legal Traditions in Canada* (Ottawa: Law Commission of Canada, 2006) at 49.
[19] *Cardinal & Hildebrandt*, *supra* note 1 at 14.
[20] The root "wicehtowin" is "wiceht," meaning to come along side or to support.
[21] *Cardinal & Hildebrandt*, *supra* note 1 at 15.

reference to the historic numbered treaties, relationships formed under miyo-wicehtowin "were, in part, to consist of mutual ongoing caring and sharing arrangements between the treaty parties, which included a sharing of the duties and responsibilities for land, shared for livelihood purposes with the newcomers."[22] Moving forward, the political and legal aspects of a modern treaty relationship in Eeyou Istchee may be based in principles like "good relations;" but still required to draw out these principles are the appropriate conceptual approaches and institutional configurations to support such a possibility for new relationship.

[22] *Cardinal & Hildebrandt*, *supra* note 1 at15.

1 – Ways of Knowing

Over the past few decades, the relationship between Aboriginal and non-Aboriginal peoples in Canada has been increasingly defined by a concept of "recognition." An early reference to recognition by an Aboriginal nation in Canada was in 1975, when the Dene Nation of the Northwest Territories declared: "Our struggle is for the recognition of the Dene Nation by the Government and people of Canada and the peoples and governments of the world."[23] 20 years on, the RCAP final report concluded that the "mutual recognition" of equal, co-existing, and self-governing peoples was a core principle of a "renewed relationship" between Aboriginal peoples, the Canadian government, and Canadian society as a whole.[24] In *R. v. Van der Peet*,[25] Lamer C.J. held that the central purposes of s. 35(1) of the *Constitution Act, 1982*, were the recognition of Aboriginal rights and reconciliation between Aboriginal peoples and the Crown.[26] The parties to land claims settlements, or "modern treaties," also use the concept of recognition to help define their relationship. In the preamble to the *Nisga'a Final Agreement*,[27] for example, the parties to the agreement express their intent to work toward a relationship "based on a new approach to mutual recognition and sharing."[28] The Cree political leadership in Quebec has described the *New Relationship Agreement* as an agreement "based upon the significant recognition of the rights of Indigenous

---

[23] Dene Nation, "The Dene Declaration," in Mel Watkins, ed., *Dene Nation: The Colony Withi*n (Toronto: University of Toronto Press, 1977) at 3-4.
[24] *RCAP*, *supra* note 9.
[25] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (QL) [*Van der Peet*].
[26] *Ibid*. at para. 31: "…what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."
[27] signed April 27, 1999, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nsga/nis/nis-eng.asp>.
[28] *Ibid*. at 2.

peoples."[29]

Although recognition is widely applied and acknowledged in particular as a core principle of a "renewed" or "new" relationship between Aboriginal and non-Aboriginal peoples in Canada, neither the concept of recognition nor the models to execute it are well defined in this context. Nor, by extension, is the nature of the "new relationship" itself. The above references by RCAP, the Supreme Court of Canada and the parties to the *Nisga'a Final Agreement* and the *New Relationship Agreement* associate recognition with equality, respect, self-government, sharing and co-existence. These positive associations, along with the parties' positive articulations, create the impression of a relationship on a progressive course, based on shared understandings and common goals. However, this impression belies the existence of unresolved and potentially contentious conceptual issues that may, if left unchecked, undermine the potential for the development of a relationship between Aboriginal and non-Aboriginal peoples that is genuinely "new."

This chapter is concerned with better understanding the development of a new relationship by examining the concepts that underlie it. "Recognition" in general is concerned with how to appropriately balance the demands of a minority group for accommodation within a wider society or polity. While recognition is the concept of choice among stakeholders concerned with the development of a new phase in Aboriginal/non-Aboriginal relations in Canada, it is not the only way to conceptualize these issues. "Legal pluralism," a concept developed within a branch of legal theory, deals with issues of legal and normative diversity within a given social or political space.

[29] Romeo Saganash, "The Paix des Braves: An Attempt to Renew Relations with the Cree" in Thibault Martin and Steven M. Hoffman, eds., *Power Struggles: Hydro Development and First Nations in Manitoba and Quebec* (Winnipeg: University of Manitoba Press, 2008) at 205.

This chapter will focus on how both "recognition" and "legal pluralism" can assist in conceptualizing a new relationship between Aboriginal and non-Aboriginal peoples in Canada. A concluding section in this chapter will set out a preferred theoretical approach to understanding recognition and pluralism in the law in this context, to carry forth and apply in the following chapter.

1.1 – Understanding "Recognition"

Recognition is a term in heavy usage by stakeholders implicated in the development of a new relationship – from Aboriginal groups, to Canadian courts, to legislative assemblies, to the public at large – but the meaning of recognition in this context remains under-theorized. Two related issue areas will be examined here by way of explaining the meaning of recognition and its significance to the development of a new relationship. The first issue area concerns the main theories that have developed around recognition as a means to accommodate Aboriginal difference in the development of a new relationship. An examination of this will involve situating theories within distinct theoretical approaches to recognition – including dominant and alternative approaches – examining their main criticisms, and setting out their main benefits and disadvantages. The second relates to what is being recognized – or the "object of recognition" – which may be variously understood as a culture, nation, government, right, custom, practice, tradition, people, or a combination thereof. A discussion of the objects of recognition will include the normative problems that exist in conceiving of an appropriate object of recognition, and some of the potential effects when the parties to a new relationship perceive these objects differently. Each of these issue areas – theories of recognition and objects of recognition – will be set out in the two following subsections.

1.1.1 – Theories of Recognition

In *Phenomenology of Spirit*, originally published in 1807, Hegel developed a paradigm of recognition in social relations based on a view that the desire for recognition by others was a fundamental aspect of human consciousness.[30] Hegel argued that a fundamental human want is to be recognized for one's human value, that is, as a human individual. Further, the universal desire for recognition leads to confrontation between human individuals, in which one adversary prevails in being recognized, and another adversary must submit to recognize the other. This confrontation in the human desire for recognition, in which one is recognized and another must recognize, is the basis of a "dialectic" of "master and slave."[31] This base concept has endured to influence many contemporary theorists concerned with how to respect and represent within the public sphere the distinct identities of members of a pluralistic society. These theories attempt to respond to the articulated claims for recognition by a variety of minority groups: nationalist movements seek forms of constitutional entrenchment of their independence as nation states or as autonomous political associations; linguistic and ethnic minorities make claims for recognition and protection of cultural difference; and, as will be further explored in the next section, Aboriginal peoples' struggles for recognition encompass both claims of cultural protection and collective self-determination.

Recognition is a concept situated within liberal democratic political theory. In the context of Aboriginal claims in particular, Coulthard has referred to recognition as a range of "liberal pluralis[t]" models that attempt to "reconcile Indigenous nationhood

[30] G.W.F. Hegel, *Phénoménologie de l'esprit* (Paris: Aubier, Ed. Montaigne, 1941) at 201.
[31] Alexandre Kojeve, *An Introduction to the Reading of Hegel* (Ithaca, N.Y.: Cornell University Press, 1980) at 1-15.

with Crown sovereignty" through the "accommodation of Indigenous identities."[32] Liberal models of recognition are centrally concerned with how to find ways to accommodate the demands of various groups within the existing political and constitutional mould. The liberal principle of universalism, according to which certain fundamental individual rights are immovable, requires liberal models of recognition to "stretch the dominant traditions and institutions"[33] in order to accommodate the demands of minority groups within their parameters. There is one universalistic liberal principle that influences liberal models of recognition: "treat all people as free and equal beings." But this principle may be viewed in two different ways.[34] The first view emphasizes individual rights and personal freedoms, and requires the neutrality of the state with regard to any cultural, religious or other type of collective interest.[35] The second view allows public institutions to accommodate the demands of a particular culture, nation or religion, provided that the basic rights of all citizens – including the freedoms of thought, religion, and association – are preserved. These universal rights inform majority societal perceptions about acceptable levels of tolerance and political responses to the accommodation of minority groups.

An example of the second view is contained in Charles Taylor's influential essay "The Politics of Recognition." Taylor views the politics of recognition as "dialogical" in

---

[32] Glen Coulthard, "Subjects of Empire: Indigenous Peoples and 'The Politics of Recognition' in Canada" (2007) 6 Contemporary Political Theory at 438.
[33] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (New York: Cambridge University Press, 1995) at 53.
[34] Amy Gutmann, "Introduction" in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1992) at 10.
[35] *Ibid*. at 10-11. Gutmann uses the example of the American doctrine of separation of church and state, which requires the state to protect the religious freedom of individuals without affiliating its institutions to a particular religion. An extreme version of this view of state neutrality is on debate in Western Europe, where France and Belgium have recently banned the wearing of the burqa and niqab in all public places, with similar bans contemplated in Spain and some areas of Italy. See: Henry Samuel, "French MPs Vote in Favour of Banning Burka" The Daily Telegraph (13 July 2010), online: The Telegraph Group: <http://www.telegraph.co.uk/>.

nature, that is, an aspect of an ongoing internal and public dialogue that affects the identities of those who engage its processes. Identity – which Taylor defines as an individual's understanding of the self – is "partly shaped by recognition or its absence, often by *mis*recognition by others …"[36] Further, "[n]onrecognition or misrecognition" can be harmful to individuals or groups of people who experience the imposition of an inferior view of themselves as a form of oppression.[37] Thus the politics of recognition implies "the politics of difference" – what we are asked to recognize is the unique identity of an individual or group.[38]

Taylor envisions a liberal democratic state that provides a governing framework malleable enough to accommodate differences in identity, and continue a public discourse of recognition, without compromising fundamental rights:

> A society with strong collective goals can be liberal … provided it is also capable of respecting diversity, especially when dealing with those who do not share its common goals; and provided it can offer adequate safeguards for fundamental rights.[39]

The operation of the politics of difference in public discourse, and the various accommodative measures by the state, means that different groups will experience recognition differently. Aboriginal peoples, in particular, will be entitled to "certain rights and powers not enjoyed by other Canadians …",[40] including rights of "self-government"[41]

Will Kymlicka also maintains that rights of self-government can accrue to "national minorities" – which, for Kymlicka, includes Aboriginal peoples – within

---

[36] Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1992) at 25.
[37] *Ibid*.
[38] *Ibid*. at 38.
[39] *Ibid*. at 59.
[40] *Ibid*. at 40.
[41] *Ibid*. at 40.

multinational federal systems.[42] Kymlicka notes that national minorities typically self-identify as "peoples" who collectively pre-date the existence of the federal state, and thus claim inherent rights of self-government. However, he cautions, rights of self-government cannot alter the sovereign authority of the federal state to govern all of its citizens, which is a power that was not delegated and cannot be unilaterally revoked. The federal state may "recognize and affirm" the demand for self-government, but in doing so it will "strengthen the sense that these minorities are separate peoples with inherent rights of self-government, whose participation in the larger country is conditional and revocable."[43] This creates a kind of political tension between the national minority and the federal state that, for Kymlicka, ensures secession will remain a salient question within the national minority.[44]

Various critical views on the liberal models of recognition challenge many of its basic assumptions, including the centrality of the state and the universality of certain liberal values. Their common argument is that liberalism reflects a cultural bias, and that liberal models of recognition have been used by the liberal democratic states to continually colonize historically disadvantaged groups. Colonialism masked as recognition occurs when a minority people is recognized entirely according to the perspective of the majority society. Frantz Fanon argued that the colonizer's main means of gaining an advantage in the colonial relationship was to exact their image of the colonized onto the subjugated people. Fanon therefore warned of the dangers inherent

[42] Will Kymlicka, *Multicultural Citizenship* (New York: Oxford University Press, 1995) at 27-32.
[43] Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (New York: Oxford University Press, 2001) at 115.
[44] *Ibid*. at 114-15.

when subjugated peoples "assimilate the culture of the oppressor,"[45] including the oppressor's image of the subjugated people, and that freedom required the renunciation of this diminishing self-image. Elizabeth Povinelli has described the "political cunning and calculus" of recognition in liberal democracies as a "form of domination" of indigenous peoples.[46] In her view, "[h]egemonic domination … works primarily by inspiring in the indigenous subject a desire … to be the melancholic subject of traditions."[47] In other words, indigenous peoples who are recognized in nostalgic terms will metabolize this view of themselves as static, oriented toward the past, and in need of protection by the majority society, thus reinforcing the dynamics of the colonial relationship. Alfred, writing about the experience of Aboriginal peoples in Canada, has argued that in these "imperial" conditions, "[o]ppression has become increasingly invisible; [it is] no longer constituted in conventional terms of military occupation, onerous taxation burdens, blatant land thefts, etc," but rather through "a fluid confluence of politics, economics, psychology, and culture."[48]

James Tully refers to a body of "intercultural" scholarship, which reflects the "experiences of crossing and living in more than one culture."[49] This type of scholarship "has come from intercultural citizens: Aboriginal peoples, members of suppressed and divided nationalities, linguistic and visible minorities, and citizens who seek constitutional recognition of intercultural cultural relations among peoples." The claim for recognition advanced here goes beyond the right to cultural recognition within the

[45] Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1963) at 13.
[46] Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham & London: Duke University Press, 2002) at 7 and 30.
[47] *Ibid*. at 39.
[48] Taiaiake Alfred, *Wasase: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview Press, 2005) at 30.
[49] *Tully*, *supra* note 33 at 53-54.

dominant institutions of the state, toward recognition of "suppressed Indigenous and non-European traditions of interpretation and corresponding degrees of self-rule."[50] Such arguments push for the recognition of the equality of one's own tradition and cultural identity through a "distinctive vocabulary of voice, narrative, recovery and struggle."[51] The claims of Aboriginal peoples in particular emanate from traditions that precede liberal constitutional arrangements by thousands of years, and which directly call into question the latter's presumed sovereignty and universality.[52] John Borrows argues that the Canadian courts indeed apply Aboriginal customs and conventions as a source of law in respect of the common law on Aboriginal rights, and proposes ways to more fully receive Aboriginal laws and their principles into the Canadian legal framework.[53] As well, Mary Ellen Turpel argues that self-determination for Aboriginal peoples is not synonymous with the right to participate within the dominant frameworks of the nation-state; rather, popular participation may require "reshaping the framework of government (or federalism) to reconceive the 'nation' itself."[54] This would likely require, Turpel notes, "structural changes to national political institutions."[55]

Tully's own position on recognition has been described as somewhere in the middle on a spectrum of liberal universalism to cultural particularism.[56] Tully argues that the focus of recognition should be placed on the "field of interaction in which the conflict

---

[50] *Tully*, *supra* note 33 at 53.
[51] *Tully*, *supra* note 33 at 54.
[52] *Tully*, *supra* note 33 at 54.
[53] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).
[54] Mary Ellen Turpel, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 Cornell Int'l L.J. at 592.
[55] *Ibid*. at 594.
[56] David Scott, "Culture in Political Theory" (2003) 31(1) Political Theory at 96.

arises and needs to be resolved."[57] In this processual idea of recognition, institutional features of the modern liberal democratic state – such as constitutions or state-sanctioned governing authorities – can accommodate cultural diversity by creating the conditions for continuous and inclusive dialogue.[58] Tully maintains that, in this dialogue, "struggles over recognition are struggles over the intersubjective norms under which the members of any system of government recognize each other as members and coordinate their interaction."[59] Norms of mutual recognition are thus "the prevailing intersubjective norms … through which the members (individuals and groups under various descriptions) of any system of action coordination (or practice of governance) are recognized and governed."[60] Prevailing norms and institutions may become contentious when some of the participants call into question their legitimacy, for example, because they exclude some participants, or misrecognize and assimilate them.[61] These prevailing norms and institutions are thus legitimate so long as they are accepted as such by the parties that participate in their formulation and application. These norms of mutual recognition must therefore exist in a state of impermanence and constant re-negotiation.

The landscape of theories of recognition surveyed above features a liberal democratic view, here represented as the belief that the liberal democratic state can adequately adapt in order to accommodate groups and their demands for recognition within the parameters set by state actors, with reference to universal individual rights and principles. Critical approaches challenge the assumption that a liberal democratic state can expand its institutions to appropriately accommodate others' differences without on

[57] James Tully, "Recognition and Dialogue: The Emergence of a New Field" (2004) 7(3) Critical Review of International Social and Political Philosophy at 86.
[58] *Ibid*. at 92.
[59] *Ibid*. at 86.
[60] *Ibid*. at 86-87.
[61] *Ibid*. at 89.

some level replicating colonial relations between dominant and subordinate peoples. In other words, they challenge the assumption that liberal models can lead to a type of recognition that is truly "mutual," and not unilaterally imposed by one party onto another. The view advanced by Tully combines the institutional features of modern liberal democracies but, instead of concentrating the power to determine the norms of recognition within the state itself, envisions the development of institutional planes on which the parties can jointly devise norms of mutual recognition. In this model of recognition, perspectives from the groups claiming recognition, along with intercultural perspectives, become important in the development of intersubjective norms that reflect the interests and claims of different communities.

As noted previously, the idea of a "new" or "renewed" relationship between Aboriginal and non-Aboriginal peoples is evoked frequently, but its nature remains under-theorized. One of the adjectives to describe a new relationship, applied by RCAP and others, is "mutual." But while "mutual recognition" implies two-way action, its use in Canadian political discourse, and its indeed application by many state institutions (which will be examined in more detail below), suggests that recognition is a means to address the unilateral claims of Aboriginal peoples. In other words, recognition is something that Aboriginal peoples claim, and that the rest of Canada claims to be able to provide, through mechanisms such as self-government agreements or legal affirmations of Aboriginal rights. How can this implementation of recognition reconcile with the claim that it is "mutual"? How can theories of recognition account for this discrepancy? The difference between the liberal model of recognition advanced by Taylor and Kymlicka and the model advanced by Tully (which I will call the

"processual/intersubjective model" for the sake of efficiency) may seem subtle, since both are concerned with finding reasoned bases for accommodation that take into account the interests and perspectives of those seeking recognition within a modern constitutional state. Taylor's is a benevolent seeming type of liberal recognition that acknowledges the importance of working out differences, and indeed forming our own identity, through dialogue with others. These models do, however, feature at least one fundamentally important difference: While the liberal model posits the centrality of the state and its capacity to expand to include others, the processual/intersubjective model proposes planes of interaction, within state-sanctioned but decentralized institutions, that can create the conditions for more mutual processes of interaction, and thus the conditions for the development of "norms of mutual recognition." At the base of the two models of recognition is a question: Who has the power to decide the forms and limits of recognition? The locus of control over norm development shifts from the state under the liberal model, to both the state and minority groups engaged in continuous dialogue within state-sanctioned institutions under the processual/intersubjective model.

The connection between the processual/intersubjective model of recognition and institutions for resource management, in particular co-management and community-based management institutions, will be explored in the two following chapters. It will suffice at this point to note that co-management and community-based management institutions, which are decentralized natural resource governance institutions, are potentially illustrative of the processual/intersubjective model of recognition by creating the conditions for the development of norms of mutual recognition; but whether these conditions actually materialize will depend on how relations between groups within these

institutions play out. These resource management institutions, in other words, provide the potential forums for a new relationship based in processes of mutual recognition, but it is up to the parties themselves to define a new relationship within these institutions.

1.1.2 – Objects of Recognition

When recognition is evoked in the context of Aboriginal-state relations, a basic but important question to ask is: What is being recognized? It is important to have a clear picture of the object of recognition – such as a custom, culture, nation, people, tradition, or practice – because it indicates the extent or breadth of recognition granted by the state to an Aboriginal group, and shows whether there is a connection or discrepancy between the kind of recognition sought by the Aboriginal group and the kind of recognition granted by the state. Aboriginal peoples in Canada have sought and received various types of recognition in various state forums. For example, in Aboriginal rights claims, the courts have seen fit to recognize Aboriginal "culture" or, as Christie puts it, "Aboriginality."[62] Negotiated self-government and land claims agreements between the Crown and Aboriginal peoples have also recognized a right of self-government, in the form of delegated governing authority, the scope of which varies by agreement.

A notable recent example of the recognition of Aboriginal nationhood was in the agreement known as the *New Relationship Agreement*, signed between the Government of Quebec and the Grand Council of the Crees (Eeyou Istchee) in 2002.[63] At the time the agreement was signed, what drew a lot of attention was the "new relationship" alluded to in the title of the agreement, and developed further in its text:

---

[62] Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" 6 Indigenous L.J. at 16.

[63] The *New Relationship Agreement* was signed in early 2002 by, among others, Ted Moses, then Grand Chief of the Grand Council of the Crees, and Bernard Landry, then Prime Minister of Quebec.

> This Agreement marks an important stage in a new nation-to-nation relationship, one that is open, respectful of the other community and that promotes a greater responsibility on the part of the Cree Nation for its own development within the context of greater autonomy.[64]

This "nation-to-nation" phrase, which was repeated during the signing ceremony, in media coverage, and in subsequent descriptions by the Cree and Quebec leadership, became so prominent as to indicate a seminal moment in Quebec's recent history.[65] What seemed remarkable at the time was that the explicit object of recognition was the Cree Nation, as a nation, on par with the nation of Quebec. Recognition of an Aboriginal "nation" is in itself not novel; rather, it is the implication of equality and reciprocity between the Cree and Quebec nations that likely made the "nation-to-nation" phrase so memorable.

In contrast to the view of "nation" as the object of recognition, Aboriginal rights jurisprudence in the Supreme Court of Canada has consistently held that central to the purpose of s. 35(1) of the *Constitution Act, 1982* is the protection of Aboriginal "culture."[66] The importance of culture in determining the scope and extent of Aboriginal rights was first set out in *R. v. Sparrow*,[67] when the Court affirmed that the Aboriginal practices and traditions to be recognized are those that have "always constituted an integral part of their distinctive culture … for reasons connected to their cultural and physical survival."[68] In *Van der Peet*, the Court held that, in order to prove the existence of an Aboriginal right, an Aboriginal group must show that such a practice is an "integral part" of their "distinctive culture," which began prior to the arrival of Europeans, and

---

[64] *New Relationship Agreement*, *supra* note 8 at s. 2.3.
[65] Martin Blanchard, "Looking Ahead: A Pragmatic Outlook on Aboriginal Self-Rule" in John D. Whyte, ed., *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing, 2008) at 68.
[66] *Christie*, *supra* note 62 at 16.
[67] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (QL).
[68] *Ibid*.at para. 40.

endured for a sufficient length of time thereafter.[69] "Practices, customs and traditions"[70] become objects of recognition as part of the larger project of cultural protection.[71]

The courts also consider Aboriginal culture as the object of recognition in determining Aboriginal peoples' ability to influence developments that may affect their traditional rights or lands. In *Delgamuukw v. British Columbia*,[72] the Court introduced the idea of a duty to consult and accommodate, which obligated the Crown to conduct consultations in good faith "with the intention of substantially addressing the concerns of Aboriginal peoples." The Court also said that, in most cases, this duty would be "significantly deeper than mere consultation" and that in some cases "may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."[73] In *Haida Nation v. British Columbia (Minister of Forests)*,[74] the Court set out a spectrum of "duties to consult and accommodate" that depend on the strength of the Aboriginal group's claim to the right or title, and the significance of the right and its potential infringement to the Aboriginal peoples concerned. At the weak end of the spectrum, the Crown must give notice, disclose information, and discuss any issues raised in response to the notice. At the strong end of the spectrum, the Crown may be required to engage in a process of "deep consultation… (which) may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to

---

[69] *Van der Peet*, *supra* note 25 at para. 45.
[70] *Van der Peet*, *supra* note 25 at para. 46: "…in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."
[71] *Christie*, *supra* note 62 at 16.
[72] [1997] 3 S.C.R. 1010 (QL) [*Delgamuukw*].
[73] *Ibid*. at para. 168.
[74] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (QL) [*Haida Nation*].

show that Aboriginal concerns were considered and to reveal the impact they had on the decision."[75] Culture features here in the sense that this test hearkens back to the "integral to a distinctive culture" test, at least in the case of Aboriginal rights. More generally, the "duty to consult and accommodate" requires some inquiry into the importance of the right to the group concerned.[76]

Another issue relates to the manner in which the Court perceives the object of recognition. The Court maintains that Aboriginal cultures – and the traditions, practices, customs and laws that make up these cultures – should be used in the determination and interpretation of Aboriginal rights.[77] But how does the Court ascertain "Aboriginal cultures"? In Aboriginal title and rights cases, the laws of evidence are adapted to admit oral evidence, "so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts."[78] Despite their stated respect for and acknowledgement of the constitutional significance of "the aboriginal perspective,"[79] the Court does not actually engage with the nature or meaning of this perspective in its jurisprudence.[80] Indeed, Henderson argues that the ambiguous treatment of "the aboriginal perspective" within the Court's jurisprudence indicates a lack of engagement with aboriginal perspectives, and a certain vulnerability to

---

[75] *Ibid*. at paras. 39 to 44.
[76] *Haida Nation* concerned a duty to consult and accommodate with respect to rights and title that were not yet formally proven. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, the Court expanded the reach of the duty to consult and accommodate to treaty rights. See: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 (QL).
[77] *Borrows*, supra note 53 at 12.
[78] *Delgamuukw*, *supra* note 72 at para. 84.
[79] See, for example: *Sparrow*, *supra* note 67 at para. 69: "…it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake;" and *Van der Peet*, *supra* note 25 at para. 50: "… the notion of 'reconciliation' does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is … one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law."
[80] However, see: *Delgamuukw, supra* note 72 at paras. 147-148; and *Van der Peet*, *supra* note 25 at para. 41. Here, the Supreme Court indicates that the Aboriginal perspective can be partially gleaned from traditional laws.

misunderstanding the content of these perspectives.[81] Nor is the Aboriginal perspective reliably well reflected in the analyses or tests developed by the Court to adjudicate Aboriginal rights claims.

The Court has approached the recognition of Aboriginal culture by attributing content according to its own view of Aboriginal culture. One example of this approach is in the test for an Aboriginal right in *Van der Peet*. includes its importance to pre-contact Aboriginal culture. The Court reasons that the point of contact between Aboriginal and European peoples is legally significant because "the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[82] The type of culture afforded legal protection – the object of recognition – is therefore not Aboriginal culture *per se*, but rather Aboriginal culture in its pre-contact state. Aboriginal culture is therefore, by implication, defined in large part by its past.

Another example from *Delgamuukw* will illustrate in more detail the way in which the Court has attributed content to Aboriginal culture in the course of according it recognition. In this case, the Court defined an "inherent limit" to aboriginal title that prohibits the use of the land "in a manner that is irreconcilable with the nature of the claimants' attachment to those lands"[83] and would be "inconsistent with continued use by future generations of aboriginals."[84] The idea of an inherent limit appears to have

---

[81] James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006) at 124.
[82] *Van der Peet*, *supra* note 25 at para. 31.
[83] *Delgamuukw*, *supra* note 72 at para. 125.
[84] *Delgamuukw*, *supra* note 72 at para. 154. Aboriginal nations claiming title to territories on which they hunted prior to Crown sovereignty would, for example, be prohibited from using the land in ways inconsistent with pre-contact hunting activity, such as activities that would precipitate habitat destruction. The Court used the example of strip mining, which, at the extreme end of possible activities, would have

originated in the *Delgamuukw* case, since it has no precedent in earlier jurisprudence on Aboriginal title, and the judgment does not indicate that the inherent limit was derived from Aboriginal perspectives or laws.[85] By expressly restricting the uses to which aboriginal lands may be put, the Court has in effect mandated "a sustainable development standard"[86] on Aboriginal lands or, in other words, "a fiduciary standard on Aboriginal use for future generations."[87] In effect, however, such usage restrictions are counterproductive as measures to preserve Aboriginal culture, since they limit the directions in which the culture might develop, and undermine the ability of Aboriginal collectivities to achieve the type of economic development that would lead to sustainable and self-sufficient communities.[88]

The preceding arguments have noted the significance of culture as an object of recognition, and some of the ways in which culture as the object of recognition has manifested in cases involving Aboriginal title, Aboriginal rights, treaty rights, and the duty to consult and accommodate. Two main questions about this arrangement remain to be examined: First, why has the Court chosen to focus on Aboriginal culture as a factor in adjudicating Aboriginal claims over other factors, such as nationhood? And second, what is the significance of the Court's focus on culture to the claims for recognition made by Aboriginal peoples themselves? By extension, what does it signify to the development of a "new relationship"?

---

this effect, but so would more moderate activities such as increased human settlement or commercial development. The restrictions on activities on aboriginal lands are therefore potentially quite extensive.

[85] Kent McNeil, ""The Post-Delgamuukw Nature and Content of Aboriginal Title" in Kent McNeil, ed., *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, University of Saskatchewan, 2001) at 119-124.

[86] Marie Battiste & James (Sa'ke'j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing, 2000) at 209.

[87] *Henderson*, *supra* note 81 at 125.

[88] *McNeil*, *supra* note 85 at 124-25.

The first question may be addressed at least in part by the prominence of culture as a concept in the liberal democratic political theory of diversity in modern constitutional democracies. Concepts such as "cultural rights," and the often-used term "multiculturalism," are indicators of culture's currency in political discourse.[89] Multiculturalism is a familiar term in the Canadian political context where it is used to describe the post-1970 government policy of promoting ethnic diversity over the assimilation of immigrant communities. A multitude of voices in modern society now strive for cultural recognition, via measures that range from social services in one's native language, to changes to dominant curricula and national histories, to affirmative action.[90] The Court's approach to recognizing and accommodating Aboriginal difference through culture is likely an extension of this political discourse. Making culture the object of recognition also likely has to do with understandings, or misunderstandings, of the effects of making the "nation" the object of recognition. In the aftermath of the revolutions of central and eastern Europe in the late 1980s, the peoples who demanded recognition framed their cultures as "nations," logically inferring that the natural form of constitutional recognition of a nation is an independent nation state. In this way, national recognition is "the most prestigious form of cultural recognition,"[91] and implies the independence of a nation state. In Canada, and in Quebec in particular, this perception of indelible association between nationhood and statehood is fuelled by Quebec nationalist ideology, which views the preservation cultural integrity as central to a strong sovereign state. However, Cree nationalism and claims for national recognition are different, with

[89] *Scott*, *supra* note 56 at 93.
[90] *Tully*, *supra* note 33 at 2.
[91] *Tully*, *supra* note 33 at 8.

different consequences. Ramos argues that the objective of Cree recognition in particular is for a right to "self-determination or self-government" within the Canadian state.[92]

The line between "culture" and "nation" and the consequences of using either term to characterize Aboriginal peoples' claims for recognition, are therefore not clear-cut. Nor are such demands fully cognizable within categories of "culture" or "nation." "Culture" may be understood generally as "the distinct customs, perspectives or ethos of a group or association."[93] But culture also has a political dimension. In this sense, "a culture" may be akin to "a nation" or "a people,"[94] that is, "an intergenerational community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and history."[95] Culture is "a source of identity" that "comes to be associated … with the nation or the state,"[96] and which "may help to define the boundaries of the relevant 'other.'"[97] Therefore, in choosing to make a culture the object of recognition, nothing inherently obscures political demands for autonomy, secession or self-determination by other political means. Further, concepts of "multiculturalism" and "multinationalism" project culture and nation into the realm of political association. Multiculturalism generally concerns ethnic diversity within a democratic polity, and has been used to describe "whether and how its public institutions

[92] Howard Ramos, "National Recognition Without a State: Cree Nationalism *Within* Canada" (2000) 6(2) Nationalism and Ethnic Politics at 100.
[93] *Kymlicka*, *supra* note 42 at 18.
[94] Although I will use the terms "nation" and people" interchangeably here, I acknowledge that a distinction can be understood to exist between these two interrelated concepts, on the basis that "nation" is more associated with nationalist movements and asserted rights of self-determination in this type of context.
[95] *Kymlicka*, *supra* note 42 at 11 and 18.
[96] Edward Said, *Culture and Imperialism* (New York: Vintage Books, 1993) at xiii.
[97] *Ibid*. See also: Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, UK: Cambridge University Press, 1989) at 5.

should better recognize the identities of cultural and disadvantaged minorities."[98] Multinationalism describes associations of two or more nations or peoples in a given polity,[99] which may raise issues of collective self-determination, either by secession or by processes of accommodation.[100] Therefore, nothing inherently suggests that making a "nation" the object of recognition would galvanize demands for greater political independence outside an existing union. Demands for collective self-determination may equally manifest as demands to negotiate processes of accommodation within an existing union.

With respect to the second question – which relates to the significance of the focus on culture to the claims for recognition made by Aboriginal peoples and the development of a new relationship – it is clear that the type of recognition dispensed by the courts or the Crown via its federal claims policies may not necessarily align with the aspirations of Aboriginal peoples themselves for recognition within the wider polity. For their part, many Aboriginal leaders and scholars concerned with the decolonization of Aboriginal peoples emphasize both cultural protection and collective self-determination as components of an overall process of decolonization based in traditional knowledge.[101] Alfred articulates this process in the following terms:

> … [t]he social ills that persist are proof that cultural revitalization is not complete; nor is it in itself a solution. Politics matters: the imposition of Western governance structures and the denial of indigenous ones continue to have profoundly harmful effects on indigenous people. *Land, culture, and government are inseparable in traditional philosophies; each depends on the others, and this means that denial of one aspect precludes recovery for the whole.* Without a value system that takes traditional teachings as

[98] *Gutmann*, *supra* note 34 at 3.
[99] James Tully, "Introduction" in James Tully & Alain Gagnon, eds., *Multinational Democracies* (Cambridge, UK: Cambridge University Press, 2001) at 2.
[100] *Ibid*. at 3.
[101] Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Ont.: Oxford University Press, 1999) at 2-3.

> the basis for government and politics, the recovery will never be complete.[102] (*my emphasis*)

Understood in this context, neither "multiculturalism" nor "multinationalism" satisfactorily describes the aspirations of Aboriginal peoples for cultural revitalization and collective self-determination in a process of decolonization. In this view, cultural and national recognition are pieces of the bigger puzzle of self-determination. The particularities of these aspirations and the laws that give them content will vary from nation to nation, and greater attention to Aboriginal peoples' aspirations – including those articulated through demands for cultural and/or national recognition – will allow for the development of an analysis of culturally diverse democracies that is centred on Aboriginal peoples themselves. The consequence of this approach will be to cease attributing compartmentalized forms of recognition that do not meet with Aboriginal peoples' aspirations, and thus create conditions to develop more fulfilling, accurate and mutual forms of recognition.

1.2 – Concepts of Legal Pluralism

The previous discussion of recognition was concerned with the cultivation of a "new relationship" aimed at "mutual recognition" between Aboriginal peoples by the state. The following discussion will focus on the "legal" dimensions of this relationship, that is, the interaction of the laws, customs, practices, and traditions of the parties to the relationship.

"Legal pluralism" is a concept in legal theory that describes the interactions of multiple kinds of "law." According to this line of thinking, law is "plural" in the sense that it can have various origins (from both within and outside the state apparatus) and take on

[102] *Ibid*. at 2.

various forms (including legislation and jurisprudence of the state, or the customs and practices of a non-state group). Legal pluralism attempts to account for the ways in which these "laws" interact and adjudicate the normative claims of various actors in a society or polity. The basic premise is that "law" exists beyond the realm of state law, and legal pluralism attempts to explain the reality of multiple-source normative interactions in social and political life.

Legal pluralism adds another dimension to the previous discussion on recognition in the context of Aboriginal-state relations in Canada. As previously argued, the Court considers Aboriginal "customs, practices and traditions" to be important objects of recognition as part of an overall project of cultural reinvigoration and protection. Self-government and land claims agreements can also, to varying degrees, recognize the laws, as part of arrangements to delegate governing authority over a given territory and/or resource. Two such agreements – the *James Bay Agreement* and the *New Relationship Agreement* – will be examined in more detail in the following chapters, including the aspects of the agreements that recognize traditional rule-making institutions for the management of the land and its resources. The following examination of legal pluralism will offer some insight into the integration of various types of "law" – both state law and non-state law – into these processes of recognition.

Concepts of legal pluralism have developed over time down a few main lines of inquiry. Early concepts of legal pluralism were largely occupied with stemming the misconception of legal centralism, that is, "law is and should be the law of the state."[103] Perhaps naturally, then, this early view of legal pluralism defines two types of legal orders in opposition to one another: state and non-state law. The "law" in this view is

[103] John Griffiths, 'What is Legal Pluralism?' (1986) 24 Journal of Legal Pluralism at 3.

something that is empirically identifiable according to certain formal criteria, and as part of complete and self-contained legal systems;[104] and legal pluralism is therefore concerned with explaining the interactions between these state and non-state legal systems. In this vein, Von Benda-Beckmann defines legal phenomena as "cognitive and normative conceptions that are qualified by a number of specific criteria," including the recognition of restrictions on the autonomy of individuals "to behave and construct their own conceptions."[105] Moore's anthropological study of legal pluralism views the law as existing within "semi-autonomous social fields" – meaning social spaces that "can generate rules and customs and symbols internally," but which are "also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded."[106] Griffiths adopts Moore's definition of the law and, building on this, defines legal pluralism as "that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs."[107]

In contrast to the view of the law as fully formed and self-contained legal *systems* reducible to certain universal and observable criteria, another line of inquiry views the law as embedded in radically decentralized legal *discourses*. In this vein, Santos articulates a "postmodern" concept of law,[108] in which the law can be observed in "discourses of a legal quality"[109] and in "multiple networks of legal orders" that can

[104] Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism" 13(1) Social & Legal Studies at 60.
[105] Franz von Benda-Beckmann, "Who's Afraid of Legal Pluralism?" (2002) 47 J. Legal Pluralism & Unofficial L. at 48.
[106] Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7(4) Law & Society Review at 742.
[107] *Griffiths*, *supra* note 103 at 2 and 38.
[108] Bonaventura De Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14(3) Journal of Law and Society at 297.
[109] *Melissaris*, *supra* note 104 at 72.

operate from the individual to the global level.[110] Following this understanding of law, legal pluralism becomes a concept of "dispersed normativities,"[111] which attempts to account for the relations of "different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our actions …"[112]

Kleinhans and Macdonald espouse the notion of a pervasive pluralism in law in their work on "critical legal pluralism." This concept highlights the inherent heterogeneity and multiplicity of normative orders, and does not attempt to reconcile or place them in hierarchical order. Rather, Kleinhans and Macdonald view the individual as the real site of law, with the power to construct law as they navigate between multiple affiliations and identities.[113] In this view, law is not an observable social fact, but rather a "process of creating and maintaining myths about realities."[114]

The above concepts of legal pluralism are subject to a few main critiques. The approach that stresses empirical inquiry and identifies law by applying formal criteria (which I will call the "empirical/formal approach") has been criticized for continuing to privilege the position of state law by, for example, modeling comparative criteria according to the features of state law.[115] In addition, a concept of law in closed systems – ie. "indigenous law," "folk law," "customary law," etc. – is potentially less helpful in understanding the law as it actually exists in any given context, because of the risk that participants will apply a conventional, stereotypical or essentialist[116] view of the "law"

---

[110] *Santos*, *supra* note 108 at 298.
[111] *Melissaris*, *supra* note 104 at 72.
[112] *Santos*, *supra* note 108 at 297-298.
[113] Martha-Marie Kleinhans & Roderick Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12 Can. J. L. & Soc. at 42.
[114] *Ibid*. at 39.
[115] *Ibid*. at 35.
[116] Brian Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27 Journal of Law and Society at 299. Tamanaha states that an "essentialist" view of the law as the view that "law is a

that may not match with its reality in any given context. By contrast, the approach to legal pluralism that emphasizes law as a collection of dispersed normative discourses poses challenges to understanding the real effect of multiple legal orders in society. The view of law as multiple and overlapping layers of subjectivity seems to defy categorization or institutionalization, and indeed Santos does not indicate what kind of institutional framework would comfortably contain these subjectivities.[117] By extension, this account makes it difficult to harness our understanding of multiple legal orders for any concrete social or political purpose.

Other views of legal pluralism attempt to overcome the above noted weaknesses of the empirical/formal approach and of the discursive/post-modern approach. Tamanaha argues that law exists when "sufficient people with sufficient conviction consider something to be 'law.'"[118] This concept of law as synonymous with belief in law is, as Tamanaha puts it, both "conventionalist" and "anti-essentialist," since it defies de-contextualized understandings of the law and presents a view of "law" that exists only within the social and linguistic conventions that constitute it. However, if there can be no universal sense of the "law," then the practical effect of this approach to developing a cross-contextual understanding of law, which applies beyond the sociological reality of one given context, is unclear.[119]

Melissaris offers another version of legal pluralism, which emphasizes the "institutionalization" of norms through the cultivation of expectations and commitment

---

fundamental category which can be identified and described" in pure and "de-contextualized" terms.
[117] *Melissaris*, *supra* note 104 at 70.
[118] *Tamanaha*, *supra* note 116 at 319.
[119] Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Surrey, UK: Ashgate Publishing Ltd., 2009) at 32-33.

among participants.[120] The reference here to "institutions" does not necessarily mean the formal institutions of the state, nor does it imply closed systems of rules within unifying institutional structures. Rather, normative discourses are institutionalized when they create "shared normative experiences" that entail "presuppositions on the part of participants concerning their ability in common to transform the world through their normative commitments."[121] Melissaris admits that the "universal sense of law" as shared normative experiences is "thin;"[122] and indeed it can only be given concrete meaning in particular contexts by particular communities.[123] Still, Melissaris' reference to the institutional aspects of legality hints at the utility of a universal concept of the law, however "thin," which does not purport to explain what that law "is" at any given point in space and time. Instead, understanding law as sites of shared normative experience applies a discursive approach to law. Importantly, however, these legal discourses are not the "dispersed normativities" of the discursive/postmodern approach. Rather, the requirement that these norms be "institutionalized" through mutual expectations anchors the law in a particular space and time.

In a similar vein, Webber argues that at the core of law is the "need to establish, at least provisionally, a single normative position to govern relations within a given social milieu, despite the continuing existence of normative disagreement."[124] These provisional norms allow us to live together despite continuing normative disagreements, until such time as the balance must again be re-negotiated. Webber argues further that, since the reality of legal orders are always more complex and dynamic than any current

[120] *Melissaris*, *supra* note 104 at 74.
[121] *Melissaris*, *supra* note 119 at109.
[122] *Melissaris*, *supra* note 119 at 5.
[123] Roger Cotterell, "Does Legal Pluralism Need a Concept of Law?" (2009) 19(10) Law and Politics Book Review at 777.
[124] Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44(1) Osgoode Hall L. J. at 169.

understandings of their content can hope to capture, recognition of non-state legal orders should instead focus on "that order's practices of normative deliberation and decision making."[125] These are "the processes by which normative claims are discussed, disagreement adjudicated … and the resultant norms interpreted and elaborated."[126] The results of this approach may not produce comprehensive or settled bodies of norms, but at the very least, Webber reasons, it will allow participants to provisionally produce some settlement between their normative disagreements, and thus avoid the imposition of one party's position onto the other.[127]

Similarities and complementarities are evident between Melissaris' and Webber's approaches to dealing with normative diversity. Both are also akin in important ways to the approach advocated by Tully, outlined in the previous section. First, all three advocate a "perspectival approach" to issues related to social, political or legal difference, which acknowledges the bias embedded in one's own specific tradition and experiences, and attempts to address this bias by engaging in dialogic processes with a view to balancing perspectives.[128] Second, this perspectival approach leads to views of norms as procedural and provisional. Recall the discussion, set out in the previous section, of Tully's "prevailing norms and institutions" and "norms of mutual recognition" that exist insofar as they are perceived as legitimate by participants.[129] Parallels can be drawn between this view of the law, Melissaris' concept of "shared normative experiences," and Webber's "provisional norms." These approaches to recognition and legal pluralism emphasize process and dialogue as a means of accounting for difference among

[125] *Ibid*. at 170.
[126] *Ibid*. at 170.
[127] *Ibid*. at 170.
[128] *Ibid*. at 191, and *Tully*, *supra* note 33 at 110.
[129] *Tully*, *supra* note 57 at 89.

normative orders, which are by their nature dynamic, unsettled and not fully knowable. In this way, legal "institutions" are significant, but not because they are formal institutions attached to state law. Rather, they are significant as an entry point into the discursive processes where the law resides.

Contrast these approaches with the empirical/formal approach to law and legal pluralism, which conceives of legal pluralism as the interaction of settled bodies of "state law" and non-state bodies of law such as "indigenous law" or "customary law." Since these bodies of law are posited as self-contained, settled and thus knowable, this approach is more likely to lead participants to attribute substance and content to a body of law. Recall the Supreme Court's "inherent limit" on the usage of land under Aboriginal title, which prohibits usage that is incompatible with the nature of attachment to the land, as viewed by the Court. A parallel can be drawn between this view of law and the Court's approach to the recognition of Aboriginal laws as a facet of Aboriginal culture. The legal tests to prove Aboriginal rights, or the existence of a duty to consult and accommodate, also compare to the empirical/formal approach to legal pluralism. Both tests rely on a concept of Aboriginal culture as static and embedded primarily in the past, and represented as pre-contact bodies of customs, practices and traditions.

The above surveyed works on legal pluralism are in the realm of legal theory and, by and large, do not expressly deal with the possible tangible outcomes of their views. Despite the lack of explicit connections between theory and practice in this area, the ways in which the processual and dialogic approaches to recognition and legal pluralism might manifest in practice will be the subject of the following two chapters. The importance of the following two chapters will be as practical scenarios and test cases for theories of

recognition and concepts of legal pluralism. A major point of inquiry will be, in particular, whether co-management or community-based resource management institutions can function as proper forums for the development of institutionalized "shared normative experiences" and intersubjective "norms of mutual recognition." Case studies from the experience of resource management in Eeyou Istchee under modern land claim and resource-sharing agreements will also examine how these experiences may implement the processual/intersubjective view of recognition and institutional/discursive view of legal pluralism.

1.3 – An Alternative Paradigm

This chapter was concerned with the conceptual challenges raised in the development of a "renewed" or "new" relationship between Aboriginal and non-Aboriginal peoples in Canada. The chapter began with an acknowledgement of the difficulty in defining this desired relationship, largely because several underlying conceptual issues remained under-theorized. As a means of addressing this knowledge gap, this chapter approached a better understanding of a new relationship from two conceptual angles: recognition and legal pluralism.

A liberal view of recognition influences, in the various ways outlined above, the judicial and legislative approaches to Aboriginal title and rights in Canada. This approach seeks to accommodate those of different cultures and nations within a modern constitutional state by expanding the institutions of the state, within certain limits defined by immovable rights and principles, and according to state authorities' perceptions of difference. The empirical/formal approach to pluralism in the law – which views the law

as, first, reducible to certain universal and observable criteria and, second, contained within closed systems of law – also informs the Court's take on these issues. In fact, the empirical/formal approach to legal pluralism is in some sense implied by the liberal model of recognition, since the latter seeks to incorporate whole cultures, traditions, customs, etc. within a legal framework expanded to accommodate difference. This view is united, at a basic conceptual level, by state authorities' confidence in the correctness of their own perceptions of others' laws, customs, traditions, and needs for accommodation within the central state. As a comprehensive and widely accepted account of the accommodation of difference that is influenced by a liberal view of the world, I will call this "the dominant paradigm."

Although the dominant paradigm influences the discussion of recognition/legal pluralism within the structures of the state, an alternative view has begun to emerge. In the context of recognition, this view emphasizes the need to orient potentially competing views of individuals and communities toward processes that facilitate the creation of intersubjective "norms of mutual recognition." In the context of legal pluralism, emphasis is on dialogic processes that create shared and provisional "normative experiences." This view of legal pluralism does not attribute or claim to know the substance of any law or body of laws; instead, it is more akin to a procedural definition of the law – ie. the law exists at institutionalized normative sites within ongoing discursive processes. At a basic conceptual level, this alternative view of both recognition and pluralism in the law is united by its emphasis on process. This comprehensive view of recognition and legal pluralism, which presents an alternative view to the dominant paradigm, is "the alternative paradigm."

The alternative paradigm answers to some of the main criticisms of the dominant paradigm. Among these criticisms is the tendency of the dominant paradigm to "universalize" concepts and assume their currency in all contexts. The alternative view circumvents the problems of spreading potentially non-universal concepts and of one-sided cultural and legal interpretation by focusing on processes of mutual and collaborative norm-building. Although it proposes alternative means to achieve mutual recognition and understand legal pluralism, an alternative view is not so radically counterposed to the dominant paradigm that it prescribes wholly new sets of political or legal institutions. The alternative paradigm does not, for instance, directly challenge the framework of the Crown's underlying title and sovereignty, nor many of the standard institutional features of the modern state. It does propose, however, reforms to current institutions, and perhaps the creation of new ones, to develop as forums for the creation of "shared" and "mutual" norms through dialogic processes.

2 – Ways of Doing

The preceding chapter examined the development of a new relationship from two conceptual angles: recognition and legal pluralism. The argument advanced was that the alternative paradigm, by focusing on processes that create conditions for shared normative experiences, and thus a "mutual" form of recognition, was a better approach to a new relationship than the approach prescribed by the dominant paradigm. The approach to building a new relationship within the alternative paradigm is informed by a perspectival approach, which attempts to come to a just accommodation between perspectives through engagement in dialogic processes. Of course, discussions of theories and paradigms describe things in abstract and often idealized terms. One can imagine a situation of perfect integration between two groups and their perspectives, in which they are informed by an awareness of their own respective biases, able to collaborate as equals and produce intersubjective norms that reflect their mutual expectations in a given space and time. The alternative paradigm implies that "the distorting lens of the state" can be counteracted by creating the conditions within state-sanctioned institutions for reciprocal dialogue and shared normative development. The objective of the alternative paradigm is not to find the perfect solution to normative disagreements, but rather to encourage processes of continuous and inclusive dialogue in order to come to mutually acceptable normative compromises.

How does the alternative paradigm manifest in practical terms? What types of state-sanctioned institutions can create the appropriate conditions to realize its objectives? Land claims and self-government agreements between Aboriginal peoples and the state routinely create both consultation processes and institutions for decentralized governance

of natural resources. Both types of institutions are the state-sanctioned forums that can facilitate the dialogic processes and shared normative development of the alternative paradigm. The formal structures of these institutions only matter to a certain degree, however; also important are the types of relationships that the parties form and develop within these institutions.

This chapter will explore both types of institutional arrangements – consultation processes and institutions for decentralized governance of natural resources – as they have been formulated in Eeyou Istchee. The first section will examine two distinct yet interrelated institutional models for decentralized governance of natural resources: collaborative management and community-based management. and explore the potential of these institutions to implement the alternative paradigm of recognition and legal pluralism. The second section will set out in more particular terms how both arrangements for co-management and consultation have been established under the *James Bay and Northern Quebec Agreement* and the *New Relationship Agreement*, the recognition that these arrangements indicate, and their practical potential to provide the plane for recognition and legal pluralism within the alternative paradigm. This latter section will also serve to set up further analysis of three case studies that focus on issues of implementation of the consultation and co-management regimes in Eeyou Istchee.

2.1 – Collaborative Management and Community-Based Management

Co-management and community-based management are types of institutional models for the governance of natural resources.[130] Both engage local users and government

[130] Throughout this thesis, "governance" has been used to refer to types of ownership or management authority, while "management" of a natural resource has referred to approaches to its conservation and use. The present discussion of "co-management" and "community-based management," as institutional

managers, and they also try to create arrangements to balance the rights and interests of these actors. The alternative paradigm is about recognizing processes for mutual dialogue and norm-building; and co-management and community-based management provide the institutional forums within which these processes can take place. In other words, to use Berkes' term, they can be "bridging" institutions that provide forums for knowledge exchange and trust building.[131] The focus of this section is to determine whether these institutional arrangements, as formal opportunities for dialogue, can create the forums and space to put the alternative paradigm into action. Are they appropriate settings for the dialogue and intersubjective normative development the alternative paradigm describes?

The basic premise of co-management and community based management arrangements is generally the same: by linking communities and governments in resource management processes, proponents believe that these models can lead to more equitable and efficient management outcomes than can traditional centralized, top-down types of approaches to resource management. Both models also have similarities in their institutional features. For one, they both engage local users and government managers to work together in these processes. They both can also, though they do not always, involve the formal delegation of responsibility from the level of government with constitutional or legislative authority over the land or resource. The fundamental difference between co-management and community-based management is at the point of decision-making authority. As will be outlined in the following section, co-management most often casts

---

arrangements for natural resource management, is primarily a discussion about how these resources are governed.

[131] Fikret Berkes, "Evolution of Co-Management: Role of Knowledge Generation, Bridging Organizations and Social Learning" (2009) 90 Journal of Environmental Management 1692–1702.

local resource users and indigenous peoples in a collaborative, but advisory, role with state institutions. Within community-based management arrangements, by contrast, these stakeholders have a decision-making role.

"Co-management"[132] generally refers to the institutional arrangements created for shared management of a territory, marine area or natural resource. The International Union for Conservation of Nature (IUCN), for example, describe co-management as a "partnership" in which stakeholders, including government agencies and local communities, "negotiate, as appropriate to each context," shared authority for management of a territory or resource.[133] According to the National Round Table on the Environment and the Economy (NRTEE), a federal sustainable development policy research program, co-management is: "[e]ssentially a form of power sharing... by degrees... through various legal or administrative arrangements... often implying a discussion forum and a negotiation/mediation process."[134] Berkes et al. describe co-management as simply "the sharing of power and responsibility between the government and local resource users."[135]

The above definitions of co-management – in which a very broad range of actors engage in "partnerships" or "power sharing" in various administrative forums – suggest a spectrum of possible administrative arrangements that reflect degrees of shared control between actors in various contexts. Co-management arrangements are constituted by law or agreement, and often feature a formal management institution – such as a co-

[132] Some of the literature also refers to co-management as "collaborative management" or "cooperative management."
[133] International Union for Conservation of Nature (IUCN), *Resolutions and Recommendations: World Conservation Congress, Montreal, Canada, 13-23 October 1996* (Gland, Switzerland: IUCN, 1997) at 43.
[134] National Round Table on the Environment and the Economy, *Sustainable Strategies for Oceans: A Co-Management Guide* (Ottawa: National Round Table on the Environment and the Economy, 1998) at 12-14.
[135] Fikret Berkes, Peter George & Richard Preston, "Co-Management: The Evolution in Theory and Practice of the Joint Administration of Living Resources" (1991) 18(2) Alternatives at 12.

management board – that has formal rules governing its composition, procedures and actions. The spectrum of possible power-sharing arrangements can vary widely, and can include decision-making by consensus, or mere public consultation in government-led processes no ability to affect outcomes.[136] They also usually have some type of advisory power over an area of land, territory and/or resource, but final decision-making authority usually with rests with a governmental authority, usually the federal or provincial ministry with formal jurisdiction over the area of land or resource in question.

Co-management is implemented in Canada and around the world as a means to balance the rights and interests of indigenous/local and government actors over an area of land, territory or resource. From an ecological and resource management perspective, proponents of co-management in particular argue their potential for more responsive and effective resource management over conventional top-down and command-and-control types of approaches. This is because, among other things, co-management integrates the added knowledge base of local communities, is more responsive to local social and environmental conditions, and creates a more legitimate form of management structure by involving local communities in important management functions. In Canada, co-management arrangements are often part of comprehensive land claims settlements; however, they can also result from ad hoc negotiations or during land claims negotiations in order to address disputes and safeguard the land claims process.[137] The *Gwaii Haanas Agreement*,[138] for example, was signed in 1993 during an ongoing comprehensive land

---

[136] See: Gerett Rusnak, *Co-Management of Natural Resources in Canada: A Review of Concepts and Case Studies* (Ottawa: International Development Research Centre, 1997) at 10; and Harvey Feit & Joseph Spaeder, "Co-Management and Indigenous Communities: Barriers and Bridges to Decentralized Resource Management-Introduction" (2005) 47 Anthropologica at 149.
[137] *Rusnak*, *ibid*. at 7.
[138] *Gwaii Haanas Agreement*, online: Parks Canada <http://www.pc.gc.ca/pnnp/bc/gwaiihaanas/plan/plan2a_E.asp>.

claim negotiation, and was conceived at once as a co-management agreement and alternative dispute resolution procedure.[139] The area – a part of the Haida Gwaii archipelago (formerly known as the Queen Charlotte Islands) – is constituted as a park under the *Canada National Parks Act*,[140] but is managed jointly by the Haida Nation and the Government of Canada. The main institutional feature of the agreement is the Archipelago Management Board (AMB), which is made up of two Haida representatives and two Parks Canada representatives, and which is responsible for the planning, operations and management of the park. The agreement states that the AMB must strive for consensus decision-making on all issues but, in the event the parties cannot agree on a measure, the matter is held in abeyance and can be referred to a neutral third party and/or to the next level of the Haida Nation and Government of Canada "to attempt to reach agreement on the matter in good faith."[141] Provisions for the continuation of certain enumerated "Haida cultural activities and sustainable, traditional renewable resource harvesting activities" are also set out in the agreement.[142] The AMB also funds the Haida Watchmen program, which employs Haida community members responsible for the protection and preservation of the various cultural sites within the protected area.[143]

In community-based management arrangements, authority and responsibility vest primarily with indigenous and local communities. Local-level institutions are in turn often held accountable through various mechanisms to state governments and other

---

[139] Suzanne Hawkes, "The Gwaii Haanas Agreement: From Conflict to Consensus" (1996) 23 Environments at 93.
[140] S.C. 2000, c. 32.
[141] *Gwaii Haanas Agreement*, *supra* note 138 at ss. 5.3 – 5.5.
[142] *Gwaii Haanas Agreement*, *supra* note 138 at s. 6.1.
[143] J.P. Gladu, *Aboriginal Experiences in Canada – Parks and Protected Areas* (San Francisco and Stockholm: Boreal Footprint Initiative and Taiga Rescue Network, 2003) 22.

stakeholders for the decisions they make.[144] Some of the main features of community-based management are: the presence of a community with an attachment to the area for the purpose of their culture and/or livelihood, and the role of the community as the primary decision-maker with powers of enforcement of regulations vested with community institutions.[145] IUCN has developed a typology of governance institutions for protected areas in particular, which defines "indigenous and community-conserved areas (ICCAs)" as natural areas "voluntarily conserved by indigenous, mobile and local communities" through "customary laws or other effective means."[146]

Limited examples of community-based management in Canada are on record, such as the experiences of community-based management of fisheries in Atlantic Canada,[147]and forests in British Columbia.[148] More examples of the application of a community-based management model are available around the world, although the type of information and analysis on the actual experience of community-based management around the world is also limited. Despite the acknowledged importance of community-based approaches to resource management within international development networks – including thematic work on ICCAs by IUCN through its "theme on indigenous and local communities, equity and protected areas" (TILCEPA),[149] financial support of

---

[144] Grazia Borrini-Feyerabend, "Governance of Protected Areas: Innovation in the Air" (2003) 12 Policy Matters at 98.
[145] Fikret Berkes, "Community Conserved Areas: Policy Issues in Historic and Contemporary Context" (2009) 2 Conservation Letters at 19.
[146] Grazia Borrini-Feyerabend, Ashish Kothari & Gonzalo Oviedo, eds., *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation* (Gland, Switzerland and Cambridge, UK: World Conservation Union (IUCN) 2004) at 23.
[147] Melanie Wiber & John Kearney, "Learning Communities and Legal Spaces: Community-Based Fisheries Management in a Globalizing World" in Franz von Benda-Beckmann et al., eds., *The Power of Law in a Transnational World: Anthropological Enquiries* (New York: Berghahn Books, 2009) 137.
[148] Ben Bradshaw, "Questioning the Credibility and Capacity of Community-Based Resource Management" (2003) 47(2) The Canadian Geographer 137.
[149] International Union for Conservation of Nature (IUCN), "Theme / Strategic Direction on Governance, Communities, Equity, and Livelihood Rights in Relation to Protected Areas (TILCEPA)" online: IUCN

community-based resource management by UNDP through its Equator Initiative,[150] and the inclusion of ICCAs in the Programme of Work on Protected Areas under the *Convention on Biological Diversity*[151] – there is little comprehensive documentation of the experience of community-based conservation or its wider implications.[152] Case studies have been published that outline the experience of ICCAs around the world.[153] However, most published information on community-based approaches revolves around general guidelines or best practices, with less information on the policy implications or conservation outcomes, or the policy and legal reforms needed to support their operation into the future.

The coastal fisheries in the Pacific Islands, and in particular the Fiji Islands, the site of previous fieldwork on my part, provide a case-specific example of a community-based approach to resource management.[154] In Fiji, a country-wide non-governmental network of locally managed marine areas (LMMAs) engages various partner organizations – including several NGOs and the national Fisheries Department – to work in tandem to support community-level institutions in the management of the coastal zones.[155] Due in part to a lack of action on marine conservation by the government

---

<http://www.iucn.org/about/union/commissions/ceesp/wg/tilcepa/>.

[150] See: United Nations Development Program (UNDP), *Learning from the Practitioners: Benefit Sharing Perspectives from Enterprising Communities* (October 2009) online: Equator Initiative <http://www.equatorinitiative.org/index.php>.

[151] 5 June 1992, 1760 UNTS 79; 31 ILM 818 (entered into force 29 December 1993) at Art. 8(j).

[152] *Berkes*, *supra* note 145 at 19-20.

[153] See, for example: *Borrini-Feyerabend*, *supra* note 146 at 77; and Ashish Kothari, "Community Conserved Areas" in Michael Lockwood, Graeme L. Worboys and Ashish Kothari, eds., Protected Areas Management: A Global Guide (London: IUCN/The World Conservation Union, 2006).

[154] Field visits were undertaken as part of a research project from January to March 2008.

[155] In particular, an LMMA begins with an expression of interest from a within a community to one of the partner organizations. The partner organization then facilitates a process of capacity building, which involves holding workshops in the community on management and action planning, biological monitoring, and socio-economic monitoring. The partner organization compiles the information, and with this information the involved community members and partner organization then develop a Marine Management Plan (MMP) for the site. After this stage the community members are responsible for the

through policy or legislation, the LMMAs operate largely outside the realm of state law, although the government department responsible for fisheries does engage as a partner in the network. The formal laws in Fiji provide limited and, at most, indirect support to community-based conservation and resource management. The *Fisheries Act*, which is a piece of legislation that leaves space for customary owners to engage in conservation and resource management, largely by way of gaps in the written law. Since this space for community-based management is left largely by omission, the legislation does not set out the nature or extent of the role of communities in these processes. Instead, the LMMAs currently operate to an extent within the gaps in the current state law, and in a sense fill those gaps with an approach to the coastal marine management that is based, in terms of day-to-day operations and planning, on non-state laws and institutions originating within indigenous collectivities.[156]

Critical perspectives on co-management and community-based management emphasize that these models replicate conventional concepts of resource management,[157]

---

implementation, monitoring and enforcement of the management plan. Community-level institutions carry primarily responsibility for managing the resource; often these are set up for the specific purpose of managing the marine area. The involvement of the partner organization continues through the management stage for planning and other types of technical assistance. See: Alifereti Tawake & Silika Tuivanuavou, "Community Involvement in the Implementation of Ocean Policies: The Fiji Locally Managed Marine Network" in Anne Caillaud et al., *Tabus or not Taboos? How to use traditional environmental knowledge to support sustainable development of marine resources in Melanesia* (December 2004) 17 SPC Traditional Marine Resource Management and Knowledge Information Bulletin at 26.

[156] *Ibid*. The LMMAs also employ an approach to community-based management informed by "adaptive management," the concept mentioned in the previous chapter. Following this approach, management activities are flexible and adaptable to changing circumstances. Tawake notes that this approach may entail converting a temporary marine protected area into a permanent protection measure, or encouraging a diversity of activities such as farming to reduce dependency on marine resources.

[157] Howitt argues that the "management" of natural resources is a concept in the dominant discourse of development, which, if left unquestioned, perpetuates "the epistemological dominance of Western liberalism." Within discourses of management, "[i]ndigenous self-determination is reconstituted as 'community management' … [e]xercising the rights and responsibilities to care for (and to be cared for by) country are reconstituted as 'environmental management,' or 'wildlife management' – and the ontological primacy of the human domain at the top of the hierarchical chain of being is surreptitiously embedded in the 'management systems' that are put in place to implement 'management plans.'" Richard Howitt,

assume the credibility and capacity of community-based institutions,[158] or extend the reach of the state while granting only limited recognition to indigenous laws and institutions. In this latter view, conventional approaches to resource management enlist indigenous peoples in a dominant discourse that may be dissonant with their own aspirations, and thus perpetuate unequal relationships between indigenous peoples and governments in the wider society.[159] Some critics argue that co-management arrangements in particular are in danger of reproducing unequal and unjust relations between Aboriginal and non-Aboriginal groups, if problems of knowledge integration and unequal power relations are not critically examined. Paul Nadasdy argues that the goal of knowledge integration in co-management is fundamentally flawed, since "the simple act of framing the problem as one of 'integration' automatically imposes a culturally specific set of ideas about 'knowledge' on the life experiences of aboriginal people," and "takes for granted existing power relations between aboriginal people and the state by assuming that traditional knowledge is simply a new form of 'data' to be incorporated into already existing management bureaucracies … "[160] This approach casts the challenges of co-management "as a series of technical problems (primarily associated with the question of how to gather 'traditional knowledge' and incorporate it into the

---

Rethinking Resource Management: Justice, Sustainability and Indigenous Peoples (New York: Routledge, 2001) 155-157.

[158] *Bradshaw*, *supra* note 148.

[159] Paul Nadasdy, "The Anti-Politics of TEK: The Institutionalization of Co-management Discourse and Practice" (2005) 47(2) Anthropologica 215.

[160] Nadasdy highlights the case of the Ruby Range Sheep Steering Committee, a co-management body comprised of government scientists/managers and members of the Kluane First Nation, which was set up under the Yukon land claim agreements to deal with populations of Dall Sheep in the southwest of the territory. In this example, a recommendation made by the First Nation members and based on a "conception of animals as intelligent social and spiritual beings" was not advanced by the Committee, because "government biologists and resource managers, regardless of their own personal beliefs and understandings, simply cannot implement management decisions based on such alternate conceptions of animals." A number of other recommendations based on First Nation concerns about the treatment of animals in captivity were rejected by the Minister and, in effect, "led many First Nation people … to lose faith in the co-management process." *Ibid*. at 226-230.

management process), rather than as a real *alternative* to the existing structures and practices of state management."[161] In this way, "[l]ike development, co-management actually helps extend the power of the state."[162] Similarly, Rodon argues that the Inuit cannot be said to have been empowered through the co-management regime under the Nunavut claim, "… if one believes that the empowerment of Aboriginal peoples is related to their ability to make choices within a framework that they themselves define. The answer is affirmative if one believes, as do the governments, that empowerment is based on the ability to make choices within the context defined by the Canadian system."[163] Nadasdy proposes that the solution to the problems of co-management is the creation of resource management regimes that return decision-making power over the land to local communities, and retain scientists and government managers as a resource to "help local people to deal with larger regional or global issues that cannot be well understood from a purely local perspective."[164] Thus Nadasdy calls for a form of community-based management.[165]

Both co-management and community-based management models necessitate the interaction of Aboriginal and state actors, along with their associated values, beliefs, laws and practices. Each co-management and community-based management arrangement thus provides an example of an understanding of "recognition" or "legal pluralism," concepts set out in the previous chapter. Co-management or community-based management will, naturally, to some extent define and thus constrain the ways in which

[161] *Ibid*. at 216 (emphasis in original).
[162] *Ibid*. at 224.
[163] Thierry Rodon, "Co-management and Self-determination in Nunavut" (1998) 22(2) Polar Geography at 132.
[164] Paul Nadasdy, "The Politics of TEK: Power and the 'Integration" of Knowledge' 36(1-2) Arctic Anthropology (1999) at 15.
[165] *Ibid*.

resource management is conceived and carried out; in particular, they both have the potential to create the conditions for either the dominant or alternative views of recognition and pluralism in the law.

However, consider the ways in which co-management may more naturally fit into a dominant paradigm of recognition and legal pluralism. In this model, the central governing authority retains final decision-making authority. Co-management structures are often set out in detail in the formal law, and often reflect a majoritarian type of decision-making that is common in liberal democracies. The state thus controls the structural aspects, and perhaps even the normative aspects, of the management of lands and resources and, by extension, the nature of the relationship between the parties in this sphere. Whether co-management can forge a new relationship between the parties based on mutual recognition and intersubjective norm creation will therefore depend heavily on how such arrangements are executed.

Critical approaches to co-management are geared toward the ways in which it is currently carried out. But what if an alternative paradigm for co-management is possible? Nadasdy is correct in that framing one of the main goals of co-management as "knowledge integration" is counterproductive to achieving the concurrent goal of empowering indigenous peoples in resource management. This is particularly so if "knowledge" is conceived as self-contained bodies of "indigenous knowledge" and "scientific knowledge," with the attendant risks, mentioned in the previous chapter, of misunderstanding or essentializing sources of knowledge and expertise. Nadasdy is less correct, however, in framing the problem of integration as one of intractable power imbalances, rectifiable only by granting Aboriginal peoples devolved spheres of

autonomy over the land, with limited involvement of scientists and government managers. Imbalances exist but the means to correct them should be conceived in terms of creating the conditions for productive, reciprocal and continuous dialogue between the parties, and thus potential for a new relationship in resource management, however imperfect or provisional the results may be. In other words, the choice is not between domination and autonomy, as argued in many critical approaches to co-management; but rather, between a dominant paradigm and an alternative paradigm in the exercise of co-management over a land, territory or resource.

How can such dialogue be assured to be productive and reciprocal given, as some critics of co-management would point out, the long-standing power imbalances brought on by neo-colonial epistemological and material dominance of one group over another? The response to this question begins with Webber's assertion that recognition of non-state legal orders must include respect of "that order's practices of normative deliberation and decision making."[166] One example would be decision-making by consensus, which is a feature of co-management of the Gwaii Haanas park; though other types of community-based institutions for decision-making and dispute resolution may be recognized as well. This approach would, among other things, safeguard against the imposition of terms unacceptable to one party.[167] In addition to ensuring the proper conditions for dialogue, measures are needed to protect autonomous domains of authority for indigenous peoples and communities over their traditional lands and resources. This involves, as Scott

[166] *Webber*, *supra* note 124 at 170.

[167] Scott and Webber note that developments in state management systems that are both external and internal to the co-management process itself can undermine its effectiveness as an institution inclusive of both parties. They highlight the example of the imposition of a sport caribou hunt on Aboriginal members of the Hunting, Fishing, Trapping Coordinating Committee (HFTCC) as an example of an internal type of interference. See: Colin Scott & Jeremy Webber, "Conflicts between Cree Hunting and Sport Hunting: Co-Management Decision-Making at James Bay" in Colin Scott, ed., *Aboriginal Autonomy and Development in the Canadian Provincial North* (Vancouver: University of British Columbia Press, 2001) 149.

argues, the protection of "certain spaces (both territorial and political) for self-management by indigenous institutions and knowledge," as well as controlling and limiting state authority "in relation to indigenous territories and institutions."[168] The Watchmen program in Gwaii Haanas, supported by the co-management board, is an example of the creation of a sphere of autonomy within which a traditional institution operates on co-managed lands. Such an approach indicates a version of co-management that potentially advances Aboriginal peoples' views and expectations for their lands and territories, and can be consistent with the alternative paradigm.

2.2 – Legal Frameworks for Natural Resource Governance in Eeyou Istchee

The main purpose of this section is to set out in detail the legal frameworks for decentralized governance of natural resources in Eeyou Istchee. Two major agreements govern natural resource management activities in the James Bay region of northern Quebec: the *James Bay Agreement*, and the *New Relationship Agreement*. Together they are important sources of law for natural resource management in the region, along with applicable common law rights and duties, constitutional provisions, federal and provincial statutes, and Cree legal orders.

The section will focus on setting out two main areas under the *James Bay Agreement* and the *New Relationship Agreement*: co-management institutions; and mechanisms for consultation of Aboriginal communities under formal environmental impact assessment procedures. Both of these types of institutional arrangements illustrate how the interaction between Aboriginal and non-Aboriginal peoples is handled under the

[168] Colin Scott, "Co-Management and the Politics of Aboriginal Consent to Resource Development: The *Agreement Concerning a New Relationship between Le Gouvernement du Québec and the Crees of Québec* (2002)" in Michael Murphy, ed., *Canada: The State of the Federation: Reconfiguring Aboriginal-State Relations* (Montreal & Kingston: McGill-Queen's University Press, 2003) 137.

agreements. Both the institutional arrangements for co-management and consultation therefore provide a sense of the type of recognition and legal pluralism envisioned under each agreement. Each of these points – the institutional arrangements for co-management and consultation, and what they say about the respective visions of recognition/pluralism under each agreement – will be the subject of the following analysis.

2.2.1 – The *James Bay Agreement* (1975)

The *James Bay Agreement* signed in 1975, was the first modern comprehensive settlement in Canada to be pursued under a federal policy for addressing Aboriginal land claims.[169] The parties to the *James Bay Agreement* – the Cree,[170] the Inuit,[171] the Government of Canada and the province of Quebec – undertook negotiations in the context of an ongoing legal battle for an injunction to stop the construction of the James Bay hydro-electric development project.[172] Justice Malouf of the Quebec Superior Court granted the injunction; and although the Quebec Court of Appeal overturned the lower court decision in short order,[173] the trial decision is now understood as having provided the momentum and incentive for the parties to commence negotiations on a settlement agreement. The legal uncertainty created by Justice Malouf's ruling prompted the

[169] At the time the agreement was signed, the common law of Aboriginal title was in its nascent stages. *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313, the first Supreme Court of Canada case on common law Aboriginal title, had been released earlier the same year. Soon after this ruling, the federal government adopted a policy of settlement, through negotiation, of Aboriginal territorial claims; the *James Bay Agreement* was the first agreement concluded under this federal policy.
[170] The Crees were represented by the Indians of Quebec Association, until the formation of the Grand Council of the Crees (of Quebec) in September 1974.
[171] The Inuit were represented by the Northern Quebec Inuit Association; the Makivik Corporation, which was established under the *James Bay Agreement*, took over as the legal representative of the Inuit people of Quebec in 1978.
[172] For a more detailed account of the proceedings and surrounding circumstances of the case, see: Boyce Richardson, *Strangers Devour the Land* (White River Junction, VT: Chelsea Green Publishing Co., 1991).
[173] The Quebec Court of Appeal suspended the injunction within a few days, and permanently overturned the injunction the following year. *Kanatewat v. James Bay Development Corporation*, [1974] Q.J. No. 14 (C.A.) (QL).

province to pursue negotiation in order to ensure the project would go ahead; indeed, Robert Bourassa, then Prime Minister of Quebec, submitted a settlement offer to the Crees in November 1973, while the temporary injunction was still in effect.[174] Some have noted that the Crees undertook the negotiations because of a "lack of alternatives or bargaining power,"[175] and "under duress" due to the status of aboriginal rights under the common law at the time, including a lack of constitutional protection for aboriginal rights, and "the perception within political élites that Aboriginal rights were vague, anachronistic and probably limited to certain hunting and fishing rights."[176] Others have noted that the chiefs and other elders, cognizant of the overall goals of political action, favoured a negotiated solution as a means "to achieve long-term reconciliation rather than ever-increasing confrontation."[177]

The parties reached an Agreement-in-Principle in November 1974, and signed the *James Bay Agreement* a year later. The *James Bay Agreement* is a comprehensive treaty that comprises 30 chapters and more than 450 pages of text, along with several subsequent amendments in the form of "complementary agreements."[178] Rights under the treaty are set out in provisions sections covering, *inter alia*: a land regime;[179] local and

---

[174] Paul Rynard, "Allly or Colonizer? The Federal State, the Cree Nation and the James Bay Agreement" (2001) 36(2) Journal of Canadian Studies at 12.
[175] Monica Mulrennan & Colin Scott, "Co-Management – An Attainable Partnership? Two Cases form James Bay, Northern Quebec and Torres Strait, Northern Queensland" (2005) 47(2) Anthropologica at 199.
[176] *Rynard*, *supra* note 174 at 12.
[177] Harvey Feit, "Legitimation and Autonomy in James Bay Cree Responses to Hydro-Electric Development" in Noel Dyck, ed., *Indigenous Peoples and the Nation-State: Fourth World Politics in Canada, Australia and Norway* (St. John's, NL: Institute of Social and Economic Research Memorial University, 1985) at 59; and Ronald Niezen, *Defending the Land: Sovereignty and Forest Life in James Bay Cree Society* (Upper Saddle River, NJ: Pearson Prentice Hall, 2009) at 52.
[178] See: Quebec, Centre de services partages du Quebec, *Non-Consolidated Agreement and Complementary Agreements*, online: Publications Quebec <http://www3.publicationsduquebec.gouv.qc.ca/produits/conventions/lois/loi2/pages/page3.fr.html>.
[179] *James Bay Agreement*, *supra* note 7 at ss. 4 – 7.

regional governments;[180] health and social services;[181] education;[182] administration of justice and policing;[183] environmental protection and development impacts;[184] hunting, fishing and trapping;[185] and economic and social development.[186] The *James Bay Agreement* also contains an Income Security Program for Cree hunters and trappers who are engaged in harvesting activities for roughly one-third or the year or more.[187]

The *James Bay Agreement* overlays the traditional Cree tenure system based on traplines (hunting territories) with a new land tenure system based on categories of land. "Category I" lands, comprising approximately 2,200 square miles of the treaty territory, are set aside for the "exclusive use and benefit of the James Bay Cree bands."[188] "Category II" lands, 24,899 square miles of territory, remain under provincial jurisdiction, and the Crees have exclusive hunting, fishing and trapping.[189] These lands can be taken up for development purposes[190] so long as "lands are replaced or, if the Native people wish, and an agreement can be reached thereon, they are compensated."[191] "Category III" lands, the remaining lands below the 55th parallel, are public lands that fall

[180] *James Bay Agreement*, *supra* note 7 at ss. 9 – 13.
[181] *James Bay Agreement*, *supra* note 7 at ss. 14 – 15.
[182] *James Bay Agreement*, *supra* note 7 at ss. 16 – 17.
[183] *James Bay Agreement*, *supra* note 7 at ss. 18 – 21.
[184] *James Bay Agreement*, *supra* note 7 at ss. 22 – 23. In addition, section 8.1.3, specifies that any future hydroelectric developments in the territory "shall be considered as future projects subject to the environmental regime only in respect to ecological impacts and that sociological factors or impacts shall not be grounds for the Crees and/or Inuit to oppose or prevent the said developments." In effect, this latter provision bars communities affected by hydroelectric development to raise the social, human or cultural effects of such projects.
[185] *James Bay Agreement*, *supra* note 7 at s. 24.
[186] *James Bay Agreement*, *supra* note 7 at ss. 28 – 29.
[187] *James Bay Agreement*, *supra* note 7 at s. 30.2.2.
[188] In 1984, the *Cree-Naskapi Act* created limited self-government institutions, in the form of band councils for the Cree communities in the treaty territory, which apply only to Category I lands. *James Bay Agreement*, *supra* note 7 at s. 5.1.2, and *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c. 18.
[189] *James Bay Agreement*, *supra* note 7 at s. 5.2.1.
[190] "Development is defined in this section as: "… any act or deed which precludes hunting, fishing and trapping activities by Native people, except for pre-development; and 'pre-development' shall be defined as any act or deed of an exploratory nature exercised during a limited time in view of researching information to decide if development will take place or not." *James Bay Agreement*, *supra* note 7 at s. 5.2.3.
[191] *James Bay Agreement*, *supra* note 7 at s. 5.2.3.

under provincial jurisdiction. Crees have exclusive rights to harvest certain species of wildlife;[192] while other wildlife populations are shared with sport harvesters, the Crees receive preferential and guaranteed levels of harvesting for all species in the territory.[193]

Section 22 of the *James Bay Agreement* sets out the regime of environmental protection below the 55th parallel.[194] This is the section that sets out the mechanisms for consultation as part of environmental impact assessment procedures. The guiding principles of the environmental protection regime are set out at s. 22.2.4, which include: the protection of Cree rights to hunt, trap and fish under the agreement; "[t]he protection of the Cree people, their economies and the wildlife resources upon which they depend;" and consultation of the Cree people where "necessary to protect or give effect to" their rights under the agreement.[195] Environmental impact assessments conducted under the agreement can be under federal or provincial jurisdiction or both, depending on the area(s) of jurisdiction under which a proposed project falls; in cases of shared jurisdiction, joint environmental reviews are allowed with Cree consent.[196] This particular provision has been the subject of litigation several times between the federal/provincial government and the Cree government; these legal cases and what they say about the status of a "new relationship" will be explored in the next chapter.

Other aspects of the environmental protection regime include the James Bay

---

[192] *James Bay Agreement*, *supra* note 7 at ss. 24.3 and 24.7.
[193] *James Bay Agreement*, *supra* note 7 at ss. 24.6, 24.8 and 24.12.
[194] The northern part of the territory (above the 55th parallel) is the present-day Inuit region of Nunavik, and the southern part includes approximately 140,000 square miles of James Bay Cree territory. The southern portion of the treaty territory corresponds with the Crees' notion of the area of Eeyou Istchee.
[195] Other guiding principles under this section include: "[t]he right to develop in the Territory;" the adoption of environmental and social measures to "minimize the impacts of development;"; and the minimization of negative environmental and social impacts on Aboriginal people through impact assessment and review procedures. *James Bay Agreement*, *supra* note 7 at s. 22.2.2.
[196] *James Bay Agreement*, *supra* note 7 at ss. 22.6.1, 22.6.4, and 22.6.7.

Advisory Committee on the Environment (JBACE)[197] – which is a composed of representatives of the governments of the Crees (Eeyou Istchee), Quebec and Canada – is a "consultative body" with a mandate to "oversee the administration and management of the [environmental and social protection] regime through the free exchange of respective views, concerns and information."[198] While environmental regulations also figure in Section 22,[199] there are no provisions for land use planning or water management in the territory.[200]

Section 24 of the *James Bay Agreement* sets out its provisions for fisheries and wildlife management. The regime includes exclusive and preferential harvesting rights[201] of Cree hunters, for certain species or within certain areas.[202] It also expressly recognizes and continues the application of the Cree system of traplines and the right of Cree hunting bosses ("tallymen") to harvest within these territories.[203] The section also establishes the Hunting, Fishing, Trapping Coordinating Committee (HFTCC), a co-management body with primary responsibility to "review, manage, and in certain cases, supervise and regulate" the hunting, fishing and trapping regime established in Section 24.[204] The HFTCC has twelve members – three members each among Cree, Inuit, Quebec and Canadian government representatives. The Chair rotates annually among the

[197] The Advisory Committee is comprised of 13 members: 4 each from the Cree Regional Authority, Quebec and Canada; the Chairman of the Hunting, Fishing, Trapping Coordinating Committee is the thirteenth member *ex officio*. *James Bay Agreement*, *supra* note 7 at s. 22.3.2.
[198] *James Bay Agreement*, *supra* note 7 at 22.3.24.
[199] *James Bay Agreement*, *supra* note 7at s. 22.4.
[200] *Mulrennan and Scott*, *supra* note 175 at 200.
[201] "Harvesting" is "hunting, fishing and trapping by the [Cree] people … for personal and community purposes or for commercial purposes related to the fur trade and commercial fisheries." *James Bay Agreement*, *supra* note 7at ss. 24.1.13 and 24.3.19.
[202] *James Bay Agreement*, *supra* note 7at ss. 24.3, 24.6, 24.7, and 24.12.
[203] These rights are, however, subject to overriding environmental protection measures. *James Bay Agreement*, *supra* note 7at ss. 24.3.25 and 24.12.3(a).
[204] *James Bay Agreement*, *supra* note 7at s. 24.4.1.

parties, and casts the deciding vote in the event of a tie vote.[205] The HFTCC is primarily an advisory body; however, the agreement states that the HFTCC can make binding decisions on certain aspects of the management of moose, caribou and black bear populations,[206] which are subject only to the overriding demands of conservation.[207]

Sections 22 and 24 are highlighted here because they outline the institutional structures of co-management and consultation that are the focus of this chapter. The above has set out how these structures are conceived, but how have they been followed in practice? Further, how does this record of implementation reflect the overall relationship between the parties? The case studies in the following chapter will set out the record of implementation and its reflections on the relationship between the parties in more detail, but some general points can be made here.

The experience of co-management under the agreement has revealed a relationship between the parties that is characterized by a lack of recognition of the Cree perspectives, laws and practices. This has been reflected in a variety of ways over the life of the *James Bay Agreement*. For one, Cree representatives on the HFTCC have struggled to influence harvesting activities in the treaty territory in cases where conflict has arisen with other members, for example, as Monica Mulrennan and Colin Scott note, in conflicts over Quebec government policies that promote capital-intensive development, or favour the interests of recreational hunters and fishers over Cree subsistence use and needs.[208]

---

[205] *James Bay Agreement*, *supra* note 7at ss. 24.4.1, 24.4.2, and 24.4.5 to 24.4.12.
[206] *James Bay Agreement*, *supra* note 7at s. 24.4.30.
[207] *James Bay Agreement*, *supra* note 7at s. 24.2.1.
[208] A particularly controversial issues facing the HFTCC in its history has been the recreational hunting of moose and caribou. An influx of sport hunters and fishers in the treaty territory, brought about by the expansion of access roads for hydro and forestry operations, has contributed to extensive moose population declines in the southern James Bay region. While populations of caribou in the northerly part of the region are not generally cause for concern, the Cree have experienced the sheer density of sport harvesters, along with the unsafe practices of some harvesters and the property damage they cause in some instances, as an

Votes on these issues have had to be resolved by the tie-breaking vote of the chair, instead of by genuinely cooperative and/or consensus-based decision-making. Provincial authorities have been reluctant to implement the *James Bay Agreement* provisions that allow for a measure of Cree control of hunting and fishing in the treaty territory, such as those requiring that non-Aboriginal hunters and fishers be accompanied by Aboriginal guides.[209] The provincial government authorities have also narrowly interpreted the powers and scope of the HFTCC, by treating it as mainly advisory despite its formal decision-making powers under the agreement, and interpreting issue areas with effects on wildlife, such as forestry, as outside its mandate.[210] Rynard argues that the effectiveness of the JBACE as a forum for Cree involvement in environmental management issues has also been compromised by the lack of participation and resources from the provincial and federal governments. As he observes, the JBACE has "barely functioned" due to lack of support and influence among federal and provincial committee representatives.[211]

The regime established for the formal consultation of Cree communities potentially affected by proposed developments within the treaty territory has also limited the opportunities for Cree participation, as well as for genuine engagement in processes for environmental protection and management. The Cree and federal/provincial authorities have often been at loggerheads about the breadth of these provisions, what

---

encroachment on their way of life. Despite these problems, Mulrennan and Scott note that the HFTCC has largely failed to address Cree opposition to recreational hunting of moose and caribou. See: *Mulrennan and Scott*, *supra* note 175 at 200.

[209] *James Bay Agreement*, *supra* note 7at s. 24.8.

[210] *Mulrennan and Scott*, *supra* note 175 at 201.

[211] Diamond also reports that federal participation on the JBACE rose through the early years of the agreement, but generally declined thereafter. In addition, an annual report from the Grand Council of the Crees and the Cree Regional Authority reported a lack of participation by other levels of government, by noting that renewed efforts had recently been undertaken to encourage governmental agencies to submit draft policies and legislation to the JBACE for review. See: *Rynard*, *supra* note 174 at 27; Billy Diamond, "Villages of the Damned" (1990) 1(3) Arctic Circle at 28; and Grand Council of the Crees and Cree Regional Authority, *Annual Report, 2004-2005 (30th Anniversary)*, online: Grand Council of the Crees <http://gcc.ca/cra/administration.php> at 47.

they guarantee to the Cree participants, and when they are engaged. An external indicator of just how fraught the issue has been is the frequency with which it has been litigated over the life of the *James Bay Agreement*. The positions of each of the parties on these issues in the context of several court battles will be explained in detail in the next chapter. Suffice it to say at the present time that the Supreme Court of Canada, which issued its first decision interpreting the *James Bay Agreement* in May 2010, sided with the federal government's preferred narrower interpretation of the consultations provisions contained in Section 22.

The institutional arrangements for co-management and consultation written into the *James Bay Agreement* have the potential to create the conditions for shared decision-making and genuinely cooperative management of the treaty territory. However, the record of implementation suggests otherwise, as the resulting regime of recognition is far from mutual. As noted previously, state authorities undermine these institutions by demonstrating a lack of good faith in participating in their processes of co-management and consultation. Part of the reason behind this poor record of implementation may also have to do with the structural features of the institutions themselves. Co-management institutions, in particular, are designed, in technical terms, to allow for majoritarian decision-making and thus the imposition of one party's view over that of another in the event of a tie vote. Further, recommendations by co-management bodies, as well as the recommendations brought forth via consultation processes, are usually advisory, and their acceptance or rejection is left purely up to the responsible Minister. Formal mechanisms to compel the parties to engage in reciprocal communication may have some success; for example, as will be mentioned in the following analysis of the *New Relationship*

Agreement, that agreement contains a provision to compel the responsible Minister to submit written reasons to the co-management body to explain the Minister's reasons for accepting or rejecting the recommendation. However, measures like this can go only part way in compelling the parties to engage in the reciprocal dialogue; instead, within the co-management and consultation institutions formulated under the *James Bay Agreement*, it is left up to the state party to determine the type of recognition to be implemented under its terms.

2.2.2 – The *New Relationship Agreement* (2002)

The first 25 years of the *James Bay Agreement* were, as noted above, marked in large part by political disagreements and legal disputes over its implementation. In addition to the litigation mentioned above (and surveyed in the next chapter), the Crees undertook political action to influence the plan of development of hydroelectric resources in the treaty territory.[212] To address these issues, along with a variety of socio-economic changes since the *James Bay Agreement* was signed,[213] the parties undertook negotiations on a new agreement in 2001. The *New Relationship Agreement* was signed by the

[212] For a description of this political action, see: Niezen, supra note 177; and Thibault Martin, "The End of an Era in Quebec: The Great Whale Project and the Inuit of Kuujjuarapik and the Umiujaq" in Thibault Martin and Steven M. Hoffman, eds., *Power Struggles: Hydro Development and First Nations in Manitoba and Quebec* (Winnipeg: University of Manitoba Press, 2008) 227.

[213] Socio-economic changes, brought on in part as a result of hydroelectric development under the *James Bay Agreement*, also affected the Crees from this period through the late 1990s. A population of around 6,000 at the time the *James Bay Agreement* was negotiated, the Cree population in the treaty territory was more than 12,000 in 2002. Additional demographic pressures resulted from the relative youth of the Cree population, with 35% under 15 years of age in 1998, with 400 new entrants to the labour force each year. 30% of the population at that time was unemployed, and 38% were involved in hunting and trapping supplemented by the *James Bay Agreement* Income Security Program. See: Ted Moses, "European Tour 2002: Notes for a Speech by Grand Chief Dr. Ted Moses, O.Q. Grand Council of the Crees (Eeyou Istchee) European Tour" (November 2002) online: Grand Council of the Crees <http://www.gcc.ca/archive/article.php?id=73>; and Ted Moses, "'Nunavik-Eeyou': La circonscription électorale du peuple" (Presentation to the Commission de délimitation des circonscriptions électorales fédérales sur le projet de circonscription électorale de Nunavik, 7 November 2002) online: Grand Council of the Crees <http://www.gcc.ca/francais/nouvelles/nunavik_eeyou.htm>.

Government of Quebec and the Grand Council of the Crees (Eeyou Istchee) in February 2002, and ratified by community referendum later the same month. The agreement secured the settlement or withdrawal of all outstanding litigation between Quebec and the Crees over the implementation of the *James Bay Agreement* at that point, in particular over forestry management,[214] potentially worth a total of $8 billion.[215] The Crees also consented to the damming and northward diversion of most of the flow of the Rupert River into the La Grande hydroelectric complex (the Eastmain 1-A/Rupert River Diversion Hydropower Project).[216] In exchange, the Crees were given the right to share in the revenue generated by hydroelectric, forestry and mineral exploitation in the treaty territory through a guaranteed payment of $70 million annually for the next 50 years,[217] indexed to the annual value of forestry, mining and hydroelectric production in the treaty territory.[218] In addition, the parties are expected to discuss the renegotiation of the *New Relationship Agreement* toward the end of the initial 50-year period defined in the agreement.[219]

The *New Relationship Agreement* builds on the *James Bay Agreement* mostly in relation to regional economic development and natural resource development. The *New*

---

[214] Section 9.5 of the *New Relationship Agreement* enumerates a list of 16 separate proceedings, and subsequent sections in the chapter set out the means by which each proceeding will be dealt with, within 6 months of the execution of the agreement.
[215] *Niezen*, *supra* note 177 at 108.
[216] *New Relationship Agreement*, *supra* note 8 at ss. 4.11-4.18. The Eastmain 1-A Rupert River project, which began operations in November 2009, replaced the proposed multiwatershed Nottaway-Broadback-Rupert (NBR) rivers megaproject. The NBR project was contained in the *James Bay Agreement*, but Quebec agreed to abandon it as a condition of the agreement. The Eastmain 1-A Rupert River project floods about one twentieth the surface area of the original NBR project, and leaves the Nottaway and Broadback Rivers intact, at least for the time being. See: *Niezen*, *supra* note 177 at 110; and *Scott*, *supra* note 168 at 141.
[217] While the agreement does not explicitly address the issue of revenue sharing, the $70 million annual payment is understood to be a form of royalty on hydroelectric, forestry and mining activities.
[218] *New Relationship Agreement*, *supra* note 8 at s. 7.4.
[219] The *New Relationship Agreement* is in force until March 31, 2052; the parties must no later than two years before the date of expiry to discuss its renegotiation. *New Relationship Agreement*, *supra* note 8 at ss. 13.3 and 13.4.

Relationship Agreement contains provisions dealing with diverse issues such as: new hydro development projects, and new undertakings on existing projects; mining; economic and community development;[220] support of Cree-run enterprises through new compensation and investment; and measures to encourage joint ventures and partnerships with Cree-run enterprises, including the establishment of a Cree Development Corporation.[221]

The third chapter of the agreement sets out an "adapted forestry regime," which features more detailed forest management standards than those contained in the *James Bay Agreement*.[222] An interesting new feature of forest management under the agreement is the delimitation of the boundaries of forestry management units to correspond with the boundaries of traditional Cree traplines.[223] Other provisions allow Cree trapline leaders (or "tallymen") to designate "sites of special interest" – including traditional, cultural, sacred or archaeological sites – that are off-limits to forestry.[224] Tallymen may also identify areas of "special wildlife interest" that are subject to various harvesting restrictions to maintain or improve the habitat of very important wildlife species (moose, marten, beaver, hare, fish, caribou, partridge)..."[225]In the remaining area of each trapline, measures in place "to ensure the protection of the residual forest cover" include mosaic

[220] *New Relationship Agreement*, *supra* note 8 at c. 4-6.
[221] *New Relationship Agreement*, *supra* note 8 at c. 7-8.
[222] *New Relationship Agreement*, *supra* note 8 at ss. 3.5, 3.54 and 3.66.
[223] These forestry management units are in most cases made up of 3 – 7 complete traplines that are, "as far as possible, contiguous and in a single block." *New Relationship Agreement*, *supra* note 8 at s. 3.8.
[224] Sites of special interest can incorporate up to 1% of the total area of each trapline. *New Relationship Agreement*, *supra* note 8 at s. 3.9.
[225] Areas of special wildlife interest can cover up to 25% of the forest area of each trapline. *New Relationship Agreement*, *supra* note 8 at s. 3.10.1.

cutting, silvicultural techniques, and total restrictions on logging in certain hunting territories.[226]

The adapted forestry regime also establishes structures for co-management of forests in the treaty territory (and will be the subject of a case study in the next chapter).[227] The purpose of the Cree-Quebec Forestry Board (the Forestry Board), one such co-management structure, is to permit "close consultation of the Crees during the different steps of planning and managing forest management activities in order to implement the adapted forestry regime."[228] The Forestry Board monitors and evaluates the implementation of the adapted forestry regime across the territory and makes recommendations to the Minister of Natural Resources and Wildlife (the "Minister") on related policy issues. The Forestry Board is comprised of equal numbers of representatives appointed by the Cree Regional Authority and by Quebec; the Chairperson, who holds a veto since decisions are made by majority vote, is appointed by Quebec in consultation with the Cree Regional Authority.[229] While the role of the Forestry Board is advisory, a reporting mechanism requires the Minister to "provide information about his position or, as the case may be, about the main reasons justifying his decision."[230]

A second co-management structure exists in the form of "joint working groups" (JWGs), one of which is appointed in each of the communities governed by the forestry regime. The mandate of the JWGs includes the implementation of the specific

---

[226] *New Relationship Agreement*, *supra* note 8 at s. 3.11.
[227] Co-management of forestry is new in the treaty territory and addresses a gap in the *James Bay Agreement*, since the provincial authorities had interpreted forestry as outside the purview of the existing HFTCC.
[228] *New Relationship Agreement*, *supra* note 8 at s. 3.15.
[229] If the Cree Regional Authority refuses 3 candidates for the Chair position, Quebec may make a unilateral appointment. *New Relationship Agreement*, *supra* note 8 at ss. 3.16, 3.17, 3.18 and 3.26.
[230] *New Relationship Agreement*, *supra* note 8 at s. 3.31.

rules regarding the consultation of tallymen,[231] the development of "harmonization measures"[232] to supplement the technical provisions contained in the agreement, and the analysis of any conflicts in land usage and the proposal of solutions in such cases.[233] Within each Cree community, JWGs are comprised of equal numbers of representatives appointed by the Cree community and by the Minister.[234]The JWGs are intended to play roles as facilitators and intermediaries between the Cree communities and centralized the government management structures in a number of ways. The JWGs assist the Cree tallymen in identifying sites of special interest through various means such as field visits, and determine the content of working maps in relation to sites of special interest.[235] In the case of conflicts between the activities of the Crees and forest management activities prescribed by the provincial government, the JWGs play a dispute resolution role in holding discussion meetings, providing information, acting as mediator between the parties, and proposing solutions with a view to resolving the conflict.[236] Where conflicts persist past mediation, the Minister must appoint a "conciliator" from a list of individuals

---

[231] Cree-Quebec Forestry Board, *Agreement Concerning a New Relationship Between the Gouvernement du Québec and the Crees of Québec: Status Report on the Implementation of Forestry-Related Provisions 2002-2008* (Cree-Quebec Forestry Board, September 2009), online: <http://www.ccqf-cqfb.ca/eng/0303_advices.php> at 6.

[232] The agreement does not explicitly define the term "harmonization measure," though provisions in the agreement note their use in preventing "conflictual uses" of forest resources. RCAP has provided guidance on the ways in which the "harmonization" of different forest management systems might be accomplished in practice. In its final report, RCAP noted: "Some jurisdictions are already reducing their annual allowable cut requirements and the size of clearcut areas. Continued experimentation with lower harvesting rates, smaller logging areas and longer maintenance of areas left unlogged would allow greater harmonization with generally less intensive Aboriginal forest management practices and traditional Aboriginal activities." The report further noted that: "... [I]t will not be enough simply to incorporate Aboriginal people into existing systems of forest tenure and management. It is important to give proper consideration to Aboriginal values." See: *New Relationship Agreement*, *supra* note 8 at s. 2.2; and Canada, Royal Commission on Aboriginal Peoples (RCAP), *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, Vol. 2, Part 2* (Ottawa: Canada Communications Group, 1996) at 639.

[233] *New Relationship Agreement*, *supra* note 8 at s. 3.41.

[234] The number of members may be modified if the parties agree. *New Relationship Agreement*, *supra* note 8 at s. 3.35.

[235] *New Relationship Agreement*, *supra* note 8, Part IV (C-4) at paragraphs 6-7.

[236] *New Relationship Agreement*, *supra* note 8, Part IV (C-4) at paragraph 16.

provided by the CQFB.[237] In addition, the JWGs create new forums for consultation of tallymen in the development and monitoring of forest management plans.[238]

The issue of protected areas is also addressed in the third chapter of the *New Relationship Agreement* (and, again, will be examined as a case study in the next chapter). Saganash notes that elements of the agreement provide for five new protected areas in Cree territory near Waskaganish (Rupert House) and a new park in the Albanel-Mistissini area.[239] One such proposed protected areas is singled out in the text of the agreement: Muskuuchii, because of "the importance of the Muskuuchii territory as expressed by the Crees."[240] In addition, as noted above, the adapted forestry regime provides for the protection of sites of special interest. Though not formally constituted as protected areas, tallymen can designate areas of their trapline within which forestry development is prohibited, and where specific measures for conservation may be determined by the tallymen and the JWGs.[241]

The *New Relationship Agreement* preceded the negotiation of an agreement between the Crees and the federal level of government, which also has the potential to change the substance and tenor of the relationship between the Crees and the federal government.[242] The *Agreement Concerning a New Relationship Between the Government*

---

[237] The conciliator makes recommendations to the parties and the Minister; if one or both parties refuse the conciliator's recommendations, the Minister must "decide on the measures to apply and shall inform the parties of his decisions and the reasons therefor." *New Relationship Agreement*, *supra* note 8, Part IV (C-4), ss. 17-18.
[238] *New Relationship Agreement*, *supra* note 8 at s. 3.45 and Schedule C, Part IV, s. 2.3.
[239] *Saganash*, *supra* note 29 at 209.
[240] *New Relationship Agreement*, *supra* note 8 at s. 3.61.
[241] *New Relationship Agreement*, *supra* note 8 at s. 3.9. Recall that these sites of interest may include traditional, cultural, sacred or archaeological sites.
[242] Papillon notes that the Grand Council of the Crees leveraged the agreement to "put pressure on the federal government to obtain similar conditions for a 'renewed partnership.'" As part of this strategy, elected Cree leaders joined a European tour with Quebec government officials, during which they promoted the *New Relationship Agreement* and the abandonment of "the old colonial confrontational positions" that it represented, while chastising the federal government for its "apparent inability to move in this direction."

of Canada and the Cree of Eeyou Istchee[243]is, like the earlier agreement, primarily an implementation agreement arising from past disputes surrounding the *James Bay Agreement*. The agreement settled the outstanding Cree legal claims in respect of past implementation, or lack thereof, for the sum of $1.35 billion.[244]The agreement further provides for the establishment of various mechanisms to guide the future implementation of the *James Bay Agreement*,[245] and amends the *Cree-Naskapi Act* to give the Cree Regional Authority expanded law-making and other powers applicable on Category 1A lands.[246]The agreement also establishes a negotiation agenda toward a Cree Nation Governance Agreement – a self-government agreement that would replace the *Cree-Naskapi Act* with separate Cree governance institutions, including a Cree Constitution and an elected Cree Nation Government.[247]

The *New Relationship Agreement* marked a political rapprochement between the Cree and the Quebec governments, and much of the talk surrounding the agreement, as the title of the agreement itself suggests, highlighted the fundamental nature of a "new relationship" between the parties. Leaders of the Cree and Quebec governments have continually advanced their view that the agreement defines a new framework for recognition of the Cree Nation[248] and the actualization of their constitutional rights and

---

See: Martin Papillon, *Federalism From Below? The Emergence of Aboriginal Multilevel Governance in Canada: A Comparison of The James Bay Crees and Kahnawá:ke Mohawks* (D. Phil. Thesis, Department of Political Science, University of Toronto, 2008) at 201; and *Moses*, *European Tour 2002: Notes for a Speech*, *supra* note 213.

[243] (2008), online: Grand Council of the Crees <http://www.gcc.ca/issues/newrelationship.php> [*New Relationship Agreement (2008)*].

[244] *Ibid*. at ss. 6.1and 6.2.

[245] For example, c. 9 of the agreement sets out a new dispute resolution process with respect to implementation issues.

[246] *New Relationship Agreement (2008)*, *supra* note 243 at s. 3.3.

[247] *New Relationship Agreement (2008)*, *supra* note 243 at ss. 3.7-3.18.

[248] For example, Ted Moses, then Grand Chief of the Grand Council of the Crees (Eeyou Istchee) (GCC), remarked in 2002 that the new agreement expressed "an understanding and a level of mutual respect and recognition that I believe could well be a model approach useful for aboriginal rights around the world."

rights contained in international law.[249] The purposes of the agreement are set out in terms of the development of a "common will of the parties to continue the development of the James Bay Territory" and the "flourishing of the Crees and the Cree Nation within a context of growing modernization."[250] But what are the elements of this new relationship, at least as we can discern so far from its terms (a case study on the implementation of the adapted forestry regime will follow in the next chapter), and does it appear to be "new," that is, different from that developed around the *James Bay Agreement*? Certainly, an important difference between the *James Bay Agreement* and the *New Relationship Agreement* is that the latter explicitly makes the Cree nation the object of recognition. While the latter articulated a "nation-to-nation" relationship in a discourse of reciprocal nationhood, the former recognized only enumerated rights, privileges and benefits for the Crees. The *New Relationship Agreement* is similar in this way to the *Nisga'a Final Agreement*, signed at around the same time, which recognized the Nisga'a as a nation and articulated a relationship based on principles of "mutual recognition and sharing."[251] In terms of the formal powers and responsibilities of co-management institutions, however, the *New Relationship Agreement* do not differ much

---

Bernard Landry, Prime Minister of Quebec at the time the agreement was signed, affirmed that, with the *New Relationship Agreement*, "the Crees are now masters in their own house." Landry was referring to the slogan used by Liberal leader Jean Lesage, in reference to the Quebecois, when elected in 1960 just prior to beginning of the "Quiet Revolution" and the rise of Quebecois nationalism. See: *Moses*, *European Tour 2002: Notes for a Speech*, *supra* note 213; and Caroline Desbiens, "Nation to Nation: Defining New Structures of Development in Northern Quebec" 80(4) Economic Geography at 363.

[249] The current Grand Chief of the GCC, Matthew Coon Come, has recently remarked that the *New Relationship Agreement* "reaffirmed the fundamental principles which were, from our perspective, the underpinnings of our major agreements with the governments of Quebec and Canada. These principles, including the fundamental human right of self-determination, are reflected in the UN Declaration on the Rights of Indigenous Peoples and also the two International Covenants." Amy German, "Developing the North Sensibly" The Nation (18 December 2009) online: The Nation <http://www.nationnews.ca/index.php?option=com_zine&view=article&id=469:developing-the-north-sensibly->.

[250] *New Relationship Agreement*, *supra* note 8 at s. 2.5(a)

[251] Recall the mention in the previous chapter of the *Nisga'a Final Agreement*, the preamble to which affirms the parties' intent to establish a relationship "based on a new approach to mutual recognition and sharing,"

from the *James Bay Agreement*; though there are some structural changes in the new co-management institutions, including the designation of forest management units according to trapline boundaries, and the creation of two levels of forestry co-management structures (central co-management board and community-based joint working groups).

Despite the pronouncements and promises of a new relationship, it remains to be seen whether rhetoric surrounding the agreement meets with the reality of lived experience. The previous chapter argued that we should define what is a "new" relationship more particularly by examining the concepts that underlie it. Further, a "new" relationship that is based on "mutual recognition and sharing" must create "norms of mutual recognition" and "shared normative experiences" on terms set within the alternative paradigm. This means, first, a perspectival approach to relations between Aboriginal and non-Aboriginal peoples, second, dialogic processes that create conditions for intersubjective norm creation, and third, a degree of flexibility in terms of both the forms that these dialogic processes take and their provisional normative outcomes. The *New Relationship Agreement* itself is relatively new and reports on its record of implementation are only beginning to emerge. The next chapter will examine aspects of the lived experience of consultation and co-management in the era of the *New Relationship Agreement*, and assess this experience according to the above criteria set by the alternative paradigm.

3 – Relating Theory to Practice

The previous chapter concluded with the observation that whether the promise of a "new relationship" between the Crees and federal/provincial governments is yet borne out is an open question. This is firstly because we currently lack the conceptual criteria to evaluate if the relationship between the parties is genuinely "new," and secondly because the agreement itself is relatively new, and reports on its implementation record are just emerging. The first chapter proposed such criteria for understanding a "new relationship" under an alternative paradigm of recognition and pluralism in the law. The second chapter outlined some of the institutional structures under which recognition and legal pluralism in a new paradigm is possible – co-management, community-based management – and described some of the institutional structures in place for decentralized governance under the *James Bay Agreement* and the *New Relationship Agreement*, including co-management institutions and formal consultation processes. This chapter will continue on to address the second question about the realization "new relationship" in the era of the *New Relationship Agreement*: in particular, how has the relationship between the parties been interpreted during the life of the agreement, both by the courts and the parties themselves? Has the *New Relationship Agreement* ushered in a "new" era in Aboriginal-state relations according to the alternative paradigm? Or does a dominant paradigm persist, and, if so, how does it define a "new relationship" in this context?

This chapter will begin with an analysis of the judicial interpretations of the environmental assessment procedures set out in Section 22 of the *James Bay Agreement*. These provisions set out, along with the common law duty to consult and accommodate,

the extent of community consultations required, and thus the extent to which Cree communities can expect to have input into the environmental assessment process of any proposed development in Eeyou Istchee. The second section will examine the record of implementation of the adapted forestry regime, including the experience of the Crees in forestry co-management, and what this reveals about the nature of the "new relationship" under the *New Relationship Agreement*. The third section will deal with protected areas in the treaty territory, which is an issue area that is largely outside the written parameters of the *New Relationship Agreement* itself. This third section will examine the possibilities of a new relationship largely beyond the provisions of *New Relationship Agreement*, using domestic and international law and policy on protected areas to move towards a new approach to managing protected areas within an alternative paradigm.

3.1 – Judicial Interpretations of Environmental Assessment Procedures Under the *James Bay Agreement*

As noted in the previous chapter, the issue of consultation under Section 22 of the *James Bay Agreement* has been the repeated subject of litigation over the life of the agreement. The basic issue that recurs in these legal disputes is whether and to what extent the environmental assessment procedures set out in Section 22, which set out its community consultation procedures, apply to proposed development projects in the treaty territory. Here we will explore judicial interpretations of the Crees' common law and treaty rights to participate in the environmental reviews of developments affecting their traditional lands, and what this reveals about judicial perspectives on the relationship between Aboriginal peoples and central governing authorities in the context of decision-making over lands governed by the *James Bay Agreement*. Have the courts assimilated

the idea of a "new relationship" in the interpretation of Cree procedural rights to be consulted on issues affecting their traditional lands? If there has been some change in the relationship as interpreted by the court, what is the nature of the change, and does it fit within the idea of a "new relationship" within the dominant or alternative paradigm?

Environmental reviews of projects with potential environmental impacts in the treaty territory must always be conducted, and the agreement sets out the respective responsibilities of the federal and provincial governments to conduct these reviews. An Environmental and Social Impact Review Committee (Review Committee) set up under the agreement must have two members of the Cree Regional Authority, and three members of either the provincial or federal government. A provincial Review Committee[252] for projects "involving provincial jurisdiction," a provincial Review Committee is set up, as is a federal Environmental and Social Impact Review Panel (Review Panel) for projects "involving federal jurisdiction."[253] Depending on what level of government sits on the Review Committee/Panel, either the provincial or federal government appoint the Chair.[254] If the project engages two areas of jurisdiction, the Review Committees/Panel can conduct parallel reviews, or combine them with the consent of the Cree Regional Authority.[255]

The parties mentioned in these provisions – provincial, federal and Cree governments – have generally interpreted their obligations differently, likely due to their differing interests. The federal and provincial governments have sought to avoid any parallel environmental reviews, likely because of the time and expense created by the

[252] The Review Committees have five members: 3 from either the provincial or federal government (depending on the level of jurisdiction engaged by the project); and 2 from the Cree Regional Authority.
[253] *James Bay Agreement*, *supra* note 7 at ss. 22.6.2 and 22.6.4.
[254] *James Bay Agreement*, *supra* note 7 at 22.6.1 and 22.6.4.
[255] *James Bay Agreement*, *supra* note 7 at ss. 22.6.1, 22.6.4, and 22.6.7.

assessment and extensive consultation procedures. As will be surveyed in the following case law, the federal and provincial government have advanced legal interpretations of the environmental review provisions that would allow them to either combine the Review Committee/Panel process altogether by conducting environmental reviews under other environmental statutes, or combine these environmental review processes without the consent of the Cree Regional Authority. The Crees have sought to ensure that the environmental reviews are carried out in ways that allow them to participate on the Review Committees/Panels, and implement their treaty right to consent to or deny the conduct of parallel reviews. For the Crees, the basic issue is likely the respect and implementation of treaty rights, and also the preservation of their participatory rights and influence, to the degree possible under the *James Bay Agreement*, over the form and extent of development on their traditional lands.

The courts have been called on several times to interpret the provisions dealing with the scope of the environmental review process under Section 22. An influential case in this area is *Eastmain Band v. Canada (Federal Administrator)*,[256] in which the Federal Court of Appeal considered the issue of jurisdiction over an environmental impact review of a proposed addition to the La Grande complex. Issues of jurisdiction are often present in environmental litigation, since the environment is not listed as a federal or provincial head of power under s. 91 or s. 92 of the *Constitution Act, 1867*.[257] Rather, environmental issues often straddle matters under exclusive federal jurisdiction, such as fisheries, and exclusive provincial jurisdiction, such as local works and undertakings. In addition, s. 92A of the *Constitution Act, 1867* provides that provincial legislatures may generally

[256] [1993] 1 F.C. 501 (C.A.) (QL) [*Eastmain*].
[257] (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5.

make laws in relation to non-renewable natural resources, forestry resources and electrical energy (including hydro-electricity), but reserves some federal legislative power over the export of these resources outside the province.

In interpreting the scope of environmental review procedures under the *James Bay Agreement*, Justice Decary focused on a provision in the *James Bay Agreement* that stated that the parties "may by mutual agreement combine the two (2) [federal and provincial] impact review[s]," but that "a project shall not be submitted to more than one (1) impact assessment and review procedure" unless it "falls within the jurisdictions of both Quebec and Canada …"[258] First, Justice Decary made the finding that jurisdiction to conduct an environmental impact review should be determined based on the nature of the project itself, and not its potential environmental impacts. The judge then held that, in reference to the above provision in the *James Bay Agreement*, only one area of jurisdiction, and environmental review procedure, was triggered in this case, and thus limited Cree participation in environmental review to this on review process.

Justice Decary also addressed a second issue: the rules of interpretation of modern treaties generally. The long-standing principle that ambiguities be construed in favour of the Aboriginal signatories was outmoded, the judge maintained, since historically-relevant inequalities in bargaining power between the parties were not apparent at the time the *James Bay Agreement* was signed. The judge also maintained that, in an earlier era, the "unique vulnerability of the Aboriginal parties" had been due to the fact that they "were not educated and were compelled to negotiate with parties who had a superior bargaining position, in languages and with legal concepts which were foreign to them and without adequate representation." However, the judge held that, "[i]n this case, there was

[258] *Eastmain*, *supra* note 256 at paras. 56 and 60.

simply no such vulnerability."[259]

Justice Decary's treatment of the jurisdictional issue picked up on an earlier case in the Federal Court. In *Cree Regional Authority v. Robinson*,[260] the Cree Regional Authority had sought to compel the federal government to conduct a Section 22 environmental impact assessment of a proposed hydroelectric development project, while the federal government had sought to delegate this responsibility to the province by agreement. Justice Rouleau, the motions judge, put forth an opposite interpretation of the same provision that Justice Decary would later interpret in *Eastmain*. In ordering the federal government to conduct a parallel review, Justice Rouleau held that s. 22.6.7 of the *James Bay Agreement* required all of the parties – Canada, Quebec and the Crees – must *consent* to a joint review when both federal and provincial jurisdiction were engaged by the project.[261] Justice Rouleau also found that a federal impact review was triggered when "the project has an effect on matters of federal legislative competence," and not only, as Justice Decary later maintained, when the basic nature of the proposed project engaged matters of federal jurisdiction.

These two judgments can be contrasted in terms of the ways in which they fulfill the conditions of the alternative paradigm. Justice Decary's technical and textual reading of the agreement limited the opportunities of the parties to engage in dialogue – either in deciding whether to conduct a combined review or in the course of parallel reviews. Justice Rouleau's interpretation gave more weight to the parties' apparent intent in negotiating the agreement, which was to allow the Cree parties to consent to a combined review. The decision on whether to conduct separate or combined environmental reviews

[259] *Eastmain*, *supra* note 256 at paras. 21 and 22.
[260] [1991] F.C.J. No. 904 (QL) [*Robinson*].
[261] *Ibid*. at paras. 29-30.

is a site of shared decision-making – and an opportunity for intersubjective dialogue – that was negated by Justice Decary's narrow interpretation of the provision. The interpretation by Justice Decary of the jurisdiction to conduct a Section 22 environmental review became precedent.

A later case in the Quebec courts involved the issue of Cree rights to participate in consultations on proposed forestry projects. In *Lord v. Quebec (Attorney General)*[262] concerned two applications for temporary injunctions to halt forestry development[263] on Category II and III lands. The issue in this case was a policy of the Government of Quebec to allow forestry companies to undertake consultations of their proposed forestry management plans with only certain members of the Cree community, thus allowing forestry companies to circumvent the consultations process with the JBACE and environmental impact reviews required under Section 22.[264]

Justice Croteau of the Quebec Superior Court held that the Quebec government had, by failing to enforce the Section 22 environmental review provisions with respect to community consultations, "openly and continuously violated" the *James Bay Agreement* and thus the constitutional rights of the Crees.[265]The judge also affirmed that Cree "traditional beliefs and practices" could be considered in the regime of forest management.[266] However, as Niezen points out, Justice Croteau's decision is more notable for the way in which it was later overturned than for its influence on the legal

[262] [2000] 3 C.N.L.R. 78 (Q.C.S.C.) [*Lord*].
[263] "Development" under s. 22.1.4 of the *James Bay Agreement* means a project that "might affect" the environment or people of the territory. In the case of Category II and Category III lands, this means development that prevents the Crees from exercising their hunting, fishing and trapping right specific to those categories of land.
[264] *Lord*, *supra* note 262 at paras. 110-112.
[265] *Lord*, *supra* note 262 at para. 132 and 137.
[266] *Lord*, *supra* note 262 at para. 138.

interpretation of the *James Bay Agreement*.[267] Justice Lemieux of the Court of Appeal overturned the judgment on the grounds of "reasonable apprehension of bias," and barred Justice Croteau from hearing applications for any further temporary injunctions in the case.[268] Justice Lemieux had difficulty with a few of Justice Croteau's comments in particular, including one at paragraph 114 of Justice Croteau's decision in the injunction hearing: "The Cree applicants thus have a clear right to the suspension they have requested. There is no doubt in the mind of the undersigned."[269] Justice Lemieux held that Justice Croteau had gone too far in expressing his conviction on the rectitude of the Crees' position, and she therefore could not be sure that Justice Croteau could be persuaded to make a fair-minded decision in subsequent hearings involving the parties on these issues.[270]

As noted above, *Eastmain* limited the circumstances in which parallel environmental reviews could be conducted, and thus the opportunities for environmental review oversight and avenues for Cree participation in these processes. The decision of the Federal Court of Appeal in *Eastmain* influenced subsequent federal policy on involvement in environmental impact reviews of hydroelectric developments under the *James Bay Agreement*.[271] The jurisdiction issue was recently brought to the Supreme Court of Canada in *Quebec (Attorney General) v. Moses*.[272] In this case, the federal government sought to conduct an environmental impact assessment under the *Canadian Environmental Assessment Act* (CEAA)[273] of a proposed mining project in the treaty

---

[267] *Niezen*, *supra* note 177 at 105.
[268] *Lord c. Canada (Procureur général)*, [2000] J.Q. no 627 (C.A.) (QL) at paras. 69-77.
[269] *Ibid*. at para. 68.
[270] *Ibid*. at para. 69.
[271] *Rynard*, *supra* note 174 at 28.
[272] [2010] S.C.J. No. 17 (QL) [*Moses*].
[273] S.C. 1992, c. 37 [CEAA].

territory, based on the project's future impacts on fisheries, a federal matter. Mining is a provincial matter, and so the provincial Review Committee under the *James Bay Agreement* was triggered. But the federal government wanted another review in addition to that of the Review Committee, to be conducted under the CEAA and outside the treaty altogether.[274]

The federal government's request to conduct a parallel environmental review under the CEAA raised important questions about the Crees' participatory rights under the treaty. The CEAA is a federal law of general application, and the Crees' ability to participate in its environmental review procedures under the CEAA would be largely determined by the general common law duty to consult and accommodate. If the CEAA review process applied to the project, and it provided a lesser opportunity for the Crees to participate, or achieved a different result from the Review Committee process, this could, in effect, undermine the Crees' participatory rights under the treaty.

Justice Binnie, writing for the majority, held that nothing in the *James Bay Agreement* prohibited subsequent reviews under laws of general application such as the CEAA, insofar as they were "not inconsistent" with the *James Bay Agreement*.[275] Although the CEAA contained no procedures for Cree participation, it was not inconsistent with the *James Bay Agreement* since its provisions must be applied "in a way

[274] The federal government sought to do the separate CEAA review because of the potential *impacts* of the project on fisheries, a federal matter. But recall that *Eastmain* held that the jurisdiction to do an environmental review should be determined according to the nature of the project itself, and not its potential impacts. However, in *Moses*, Justice Binnie notes that *Eastmain* resolved the jurisdictional issue on environmental review procedures for treaty purposes, but not for the purpose of obtaining the required permits and authorizations according to federal laws of general application. See: *Moses*, *supra* note 272 at paras. 10 and 21.

[275] Binnie J. here takes wording from s. 22.2.3 of the *James Bay Agreement*, which states: "All applicable federal and provincial laws of general application respecting environmental and social protection shall apply in the Territory to the extent that they are not inconsistent with the provisions of the Agreement and in particular of this Section."

that fully respects the Crown's duty to consult the Cree on matters affecting their James Bay Treaty rights,"[276] and that "[c]ommon sense as well as legal requirements suggest that the *CEAA* assessment will be structured to accommodate the special context of a project proposal in the James Bay Treaty territory, including the participation of the Cree."[277] Justices Lebel and Deschamps, writing for the 4 dissenting judges, maintained that allowing an additional environmental impact review would "allow the federal government to unilaterally alter the terms of the Agreement …" and result in "duplication, delays and additional costs for taxpayers and interested parties, and a breach of the First Nations' participatory rights."[278] The dissenting judges noted that the CEAA, which did not provide for either substantive or procedural participation by the Cree, was inconsistent with the provisions of the *James Bay Agreement*; and, given the constitutional status of the agreement, the CEAA could not prevail over a constitutional document to impose a parallel review in the treaty territory.[279]

The dissenting judges also addressed the common law principles of treaty interpretation. They first surveyed the rationale for the special interpretive approach to treaties between Aboriginal peoples and the Crown, and found that the broad and liberal interpretation of Aboriginal treaties was developed by the Court in order to address "'significant differences' in the signatories' languages, concepts, cultures and world views."[280] However, the justices cautioned, applying this approach to the interpretation of "modern agreements" was "not uncontroversial."[281] They pointed out that with modern

[276] *Moses*, *supra* note 272 at para. 45.
[277] *Moses*, *supra* note 272 at para. 48.
[278] *Moses*, *supra* note 272 at para. 58.
[279] *Moses*, *supra* note 272 at paras. 94-106 and 141.
[280] *Moses*, *supra* note 272 at para. 108.
[281] *Moses*, *supra* note 272 at para. 109.

treaties,[282] which are the result of lengthy negotiations between parties each represented by lawyers, "[t]he likelihood of ambiguity, though clearly not eliminated, is nevertheless significantly reduced."[283] Instead, the dissenting judges affirmed the approach of Justice Decary in *Eastmain*, by holding that courts must make "reasonable" interpretations of modern agreements, based on "the parties' intentions and the overall context, including the including the legal context, of the negotiations."[284]

The above judicial interpretations demonstrate both the potential and limitations of the formal legal system in supporting participatory rights under the *James Bay Agreement* environmental protection regime. While the reasoning of Justice Rouleau in *Robinson* and of Justice Croteau in *Mario Lord* interpreted the provisions on jurisdiction over environmental reviews with Cree participatory rights at the fore, the overriding judicial approach has been to more narrowly interpret the wording of the treaty, with less focus on its overall spirit and intent, cultural and cosmological differences between the parties, or power imbalances that may manifest in the negotiation and implementation of the treaties.

The principles of treaty interpretation outlined by Justice Decary in *Eastmain* and Justices Lebel and Deschamps in *Moses* in effect give less deference to the interests and perspectives of Aboriginal parties to agreements negotiated in "modern" contexts. The dissenting judges in *Moses* maintain that, as Aboriginal peoples gained experience in the negotiation of comprehensive treaties, the "substantial differences" in "languages,

---

[282] The dissenting judges maintained that the important issue related to the context of the agreement, not era in which it was signed. However, they did rely on the classifications of "modern" and "historic" to define context to a degree, and this, combined with the fact that they applied this new interpretive approach to the first modern comprehensive treaty in Canada, suggests a temporal element to this analysis. See: *Moses*, *supra* note 272 at para. 114.
[283] *Moses*, *supra* note 272 at paras. 110-115.
[284] *Eastmain*, supra note at p. 518; and *Moses*, *supra* note 272 at para. 111.

concepts, cultures and world views"[285] lessened, and the likelihood of any real ambiguity in the treaty has "significantly reduced."[286] For these reasons, treaties negotiated in a modern context will more often lend themselves to a more textual type of legal analysis, instead of a broad and liberal approach informed by the principle that all ambiguities be resolved in favour of Aboriginal parties. While the dissenting judges note the importance of context, including legal context, to the legal analysis of modern treaties, they also held that modern treaties exhibit fewer differences between "languages, concepts, cultures and world views," and therefore ambiguities, than the historic treaties.

The ability of the Crees to participate in the *James Bay Agreement* environmental review procedures has been gradually reduced by judgments that limit the ability of the Crees to affect such reviews through their participation and input. in *Eastmain*, Justice Decary's narrow interpretation of the provision on jurisdiction over environmental impact reviews in effect limited the ability of the Cree to participate in parallel reviews, or to consent to combine them in appropriate circumstances. Justice Binnie in *Moses* held that environmental reviews could be conducted in the treaty territory under legislation outside the *James Bay Agreement*, and that these reviews could employ procedures for Cree consultation that, though not the same as those in the *James Bay Agreement*, were at least "not inconsistent" with the treaty provisions. But Justice Binnie interpreted the general CEAA consultation provisions, subject to the general common law duty to consult and accommodate, as "not inconsistent" with the provisions in the *James Bay Agreement* that require the establishment of a Review Committee with guaranteed Cree representation.[287] The dissenting judges, however, disagreed with this finding: "The federal process under

[285] *Moses*, *supra* note 272 at para. 108.
[286] *Moses*, *supra* note 272 at para. 117.
[287] *Moses*, *supra* note 272 at para. 45.

the CEAA, which does not provide for either substantive or procedural participation by the Cree, is inconsistent with the provisions of the Agreement and cannot apply."[288] As mentioned in the first chapter of this thesis, the Court has articulated the common law duty to consult and accommodate as a spectrum of duties, depending on factors such as the strength of the right claimed to a territory or resource, and the significance of the right and its potential infringement to the Aboriginal group. Defined in this way, on a spectrum based on several variables, the Court cannot guarantee that the CEAA procedures pursuant to the common law duties will be anywhere near consistent with the formal participation in the decision-making process guaranteed under the *James Bay Agreement*.

Two further effects of the ruling in Moses on the participatory rights of the Crees in consultation processes warrant mention. First, the effect of this ruling will be to subject proposed projects within the treaty territory to procedures other than those with constitutional status under the *James Bay Agreement*, and thus, as the dissenting judges maintained, result "in a breach of the First Nations' participatory rights."[289] Further, the type of recognition that the judiciary employed in *Eastmain* and *Moses* attributes unverified, and unverifiable, content to Aboriginal peoples' knowledge in the treaty-making process. This is a one-sided approach to recognition that recalls Chief Justice Lamer's attribution of an "inherent limit" to Aboriginal title in *Delgamuukw*, under which title lands cannot be used in a manner that is, in the Court's view, inconsistent with the nature of the group's attachment to the land. As Chief Justice Lamer attributed content to Aboriginal peoples' understanding of title, the dissenting judges in *Moses* have similarly attributed content to Aboriginal peoples' understanding of modern treaties. This

[288] *Moses*, *supra* note 272 at para. 141.
[289] *Moses*, *supra* note 272 at para. 58.

is justified, the dissenting judges suggest, because Aboriginal peoples now better understand, either themselves or through their lawyers, the legal concepts and perspectives of government negotiators. Even if this is true, can the reverse be said for these government negotiators, their lawyers, or the courts?

Consultation processes that follow the alternative paradigm would require an attunement to Aboriginal perspectives and concepts in the interpretation of treaties. The alternative paradigm defines a "new relationship" in terms of the parties' pursuit of dialogic processes and the creation of intersubjective norms of mutual recognition. Formal institutions such as consultations provide the forums for these normative interactions to take place, and so the alternative paradigm can suggest reforms to current resource management institutions to create conditions for dialogue and outcomes that genuinely reflect the perspectives and interests of the parties.

The textual and narrow interpretations of the *James Bay Agreement* favoured by the judiciary reduce the opportunities for reciprocal dialogue in the environmental review process. The judiciary's interpretive approach can potentially undermine the negotiated compromise, contained in the treaty, of the parties' respective powers to affect the review process and its potential outcomes. The alternative paradigm suggests an interpretive approach to the treaties that protects and upholds the treaty-based consultation processes, since they are the outcome of reciprocal dialogue between the parties in the treaty-making process. It also requires measures that engage the parties in reciprocal dialogue; and this will often likely entail consultation processes that require broad consensus, or even the consent of the parties. But the focus is, rather than the particular institutional structure or outcome of the consultation process, the nature of the relationship itself, and

whether the parties perceive the creation of norms of mutual recognition through these processes. Institutions for consultation, much like co-management and community-based management institutions, are the forums designed for reciprocal dialogue between the state and Aboriginal governments/community-based actors, but their success in this regard depends on the relationship between the parties and their mutual commitments to execute these dialogic processes.

3.2 – The Adapted Forestry Regime Under the *New Relationship Agreement*

The previous case study examined the consultation processes under the *James Bay Agreement* and their interpretation by the judiciary, and what this indicated about the nature of recognition and understanding of pluralism in the law – the conceptual bases of a new relationship – in this context. The following case study looks at similar questions, while focusing on another forum defined under the *New Relationship Agreement* to facilitate reciprocal dialogue in a process of decentralized natural resource governance – forestry co-management. As they were created under the provisions of the *New Relationship Agreement*, the forestry co-management institutions of the adapted forestry regime are among the newest in the treaty territory, and information on the experience of forestry co-management is only beginning to emerge. The adapted forestry regime outlined in the third chapter of the *New Relationship Agreement* certainly sets laudable goals, including "to better take into account the Cree traditional way of life," and allow for "participation, in the form of consultation, by the James Bay Crees in the various forest activities operations planning and management processes."[290] Whether the experience of co-management has yet realized these objectives is an open question. The

[290] *New Relationship Agreement*, *supra* note 8 at s. 3.1.

following will look at the experience of forestry co-management in the treaty territory in terms of its ability to meet the objectives of Cree integration and participation in forest planning and management activities, and the potential of these institutions to facilitate norm-building processes in the way set out by the alternative paradigm.

As noted in the previous chapter, forestry co-management in the treaty territory takes place on two levels: a centralized Cree-Quebec Forestry Board (the Forestry Board), and community-based Joint Working Groups (JWGs). The former has primarily and advisory role on forestry management in the treaty territory, while the latter takes on the role of a facilitator and mediator between Cree communities and provincial government authorities. Both have a direct role in planning of forest management activities. Under the agreement, the Ministry of Natural Resources and Wildlife must consult the Forestry Board and the JWGs in the preparation of the forest management plans,[291] and the JWGs may assist Cree stakeholders to participate in consultations on the management plans. In addition, each "general forest management plan" must contain a Cree section, which identifies "sites of special interest" and forested "areas of special wildlife interest "for the Crees, as well as information on "harmonization measures."[292]

The Forestry Board published a status report that assessed the implementation of each of the forestry-related provisions in the *New Relationship Agreement* over the first five years of the agreement. According to the report, published in 2008, this research was undertaken as a collaborative effort between the parties' representatives on the Forestry Board, and also involved interviews with other stakeholders, including tallymen, JWG members, and forestry companies. The report concluded that stakeholders overall

[291] *New Relationship Agreement*, *supra* note 8, Schedule C, Part IV, s. 2.1.
[292] *New Relationship Agreement*, *supra* note 8, Schedule C, Part IV, s. 2.2.

perceived the implementation of the forestry regime in positive terms, and noted the development of a "common will"[293] among the parties that was "a positive aspect making it possible to gradually build a relationship of trust and, ultimately, a viable partnership."[294] The report also noted instances of collaboration and cooperation in the execution of the requirements under the agreement. For example, the report states that special sites were mapped in 109 of 119 total traplines, and were mapped according to "a cooperative effort involving both parties."[295] While the agreement provides for the appointment of a conciliator in the event that mediations led by the JWGs are unsuccessful, the Forestry Board reports that only one such JWG had submitted a request for conciliation in a matter regarding the construction of a road, but then withdrew the request when the parties reached an agreement on the issue.[296]Crucially, as well, the Forestry Board reports "unanimity was reached on almost all Forestry Board decisions."[297]

Despite the parties' demonstrated goodwill and good faith in implementing some aspects of the agreement, other aspects are marred by a record of inconsistent or incomplete implementation. The Forestry Board notes that "[i]t is mainly through the ongoing work of the … JWG members that a new relation (sic) between the Cree and Quebec can be built."[298] In practice, however, the Forestry Board reports that the JWGs have only been able to partially fulfill their mandated roles under the agreement. In particular, the role of the JWGs has to date been confined to facilitating consultation

[293] This reference to "common will" mimics the language used to describe a key purpose of the agreement at s. 2.5(a).
[294] *Cree-Quebec Forestry Board*, *supra* note 231 at 17.
[295] *Cree-Quebec Forestry Board*, *supra* note 231 at 5.
[296] *Cree-Quebec Forestry Board*, *supra* note 231 at 9.
[297] *Cree-Quebec Forestry Board*, *supra* note 231 at 10.
[298] *Cree-Quebec Forestry Board*, *supra* note 231 at 20.

processes with community members on the approval of forest management plans. The other elements of the JWG's role – including the elaboration of harmonization measures, analysis of land-use conflicts and identification of further technical knowledge – have not been fully implemented.[299] The report also noted the incomplete implementation of the Minister's reporting requirements to the Forestry Board. This provision, which requires the Minister to submit reasons to the Forestry Board to explain why its recommendations were or were not followed, is in place not only to encourage dialogue between the Forestry Board and the Minister, but also to guard against one-sided policy-making. Indeed, it has been acknowledged from within Ministry that ignoring Forestry Board recommendations could be politically costly in terms of compromising the trust built up around the agreement between the parties to the agreement.[300] However, despite the existence of this requirement and its acknowledged importance from within the Ministry, the Forestry Board reports having obtained answers from the Minister to only 8 of 19 total notices of recommendation provided between 2002 and 2008.[301] A further review of the Minister's written responses indicates that the Minister substantively addressed Forestry Board recommendations in 3 of 8 responses.[302]

The Grand Council of the Crees has constituted a Cree Forestry Implementation Team (Implementation Team),[303] tasked with "ensuring that the provisions of the Adapted Forestry Regime contained within Chapter 3 of the *New Relationship Agreement*

---

[299] *Cree-Quebec Forestry Board*, *supra* note 231 at 20.
[300] *Papillon*, *supra* note 242 at 194.
[301] *Cree-Quebec Forestry Board*, *supra* note 231 at 6.
[302] In four responses, the Minister indicated the Ministry would follow up on recommendations or take them under advisement. In another response sent to the CQFB, the Ministry generally and indirectly addressed the issues raised in the CQFB recommendations. This correspondence is available on the Forestry Board's website: <http://www.ccqf-cqfb.ca/eng/0303_advices.php>.
[303] The Implementation Team has 4 members: a member of the Forestry Board, and three representatives of the Grand Council of the Crees.

are followed in the strictest terms."[304] In this respect, the Implementation Team has recently highlighted an issue of concern related to freezes on funding by the Ministry for various co-management and community-based activities. The Implementation Team notes that the Ministry has frozen $1 million to the Cree Trappers Enhancement Program, which supports projects to offset the impact of forestry activities on Cree trappers, and a community enhancement program, through which Quebec diverts stumpage fees paid by forest companies to the Crees for community initiatives such as tree planting and construction of walking trails.[305] Quebec cited financial reporting concerns at the community level, which precipitated discussions between the Ministry and the Grand Council of the Crees treasurer's office to resolve the accounting issues.[306] The Implementation Team also noted that the Ministry had not renewed its commitment to provide financial support for the local JWGs. The funding had been committed by Quebec to the Crees under a side agreement to the *New Relationship Agreement* that expired in 2008. While Quebec's position is that the JWGs are not covered under the funding scheme outlined in the *New Relationship Agreement*,[307] the Grand Council of the Crees maintains that funding the JWGs would place an unequal financial burden on the Crees. The Implementation Team has put forth a proposal to the Ministry that would restore some funding to the JWGs under a new funding formula, but referred the matter to the Council-Board[308] when the Ministry failed to respond to the proposal.[309]

---

[304] Grand Council of the Crees and Cree Regional Authority, *Annual Report, 2008-2009*, online: Grand Council of the Crees <http://gcc.ca/cra/administration.php> at 21.
[305] *Ibid*. at 22 and Grand Council of the Crees and Cree Regional Authority, *Annual Report, 2007-2008*, online: Grand Council of the Crees <http://gcc.ca/cra/administration.php> at 21.
[306] *Ibid*. at 22.
[307] *New Relationship Agreement*, *supra* note 8 at ss. 3.48-3.53.
[308] Eeyou Istchee is governed by a Council-Board of 20 members elected by the Crees, and includes the Grand Chief, Deputy Grand-Chief, and elected Chiefs of the Cree-Naskapi bands and the Chief of Ouje-Bougoumou.

A recent court case has resulted from disagreements between Quebec and the Crees on the interpretation of forestry and environmental review provisions. *Grand Council of the Crees (Eeyou Istchee) v. Quebec (Attorney General)*[310] concerned the proper assessment procedures over the construction of a forestry road through Cree traplines at Ouje-Bougoumou. Quebec took the position that the construction of forestry access roads did not trigger an environmental assessment process under Section 22 of the *James Bay Agreement*, and maintained that consultations under the adapted forestry regime were sufficient to determine the impacts of the proposed project. Quebec then approved the road before receiving formal recommendations from the Forestry Board.[311] The Crees sought a temporary injunction on the construction of the forestry road, arguing that Section 22 did apply to the project by virtue of its status as a "major access road" under the *James Bay Agreement*.[312] The Superior Court refused to grant the injunction; and while the Crees were granted a safeguard order to suspend construction of the road pending an appeal, the Superior Court decision was upheld on appeal.[313] However, hearings on temporary injunctions, usually conducted at the provisional stage of proceedings, typically do not assess the full merits of the case at hand. The Crees maintain that "[t]he Quebec government, shaken by the Cree reaction," were compelled to come back to the table to resolve the issue of consultation and environmental assessments of forestry roads.[314] The Crees report that the parties were able to come to a successful resolution of the issue and end to the court case when the Ministry agreed to

---

[309] *Grand Council of the Crees and Cree Regional Authority*, *supra* note 304.
[310] [2009] 4 C.N.L.R. 64.
[311] *Grand Council of the Crees and Cree Regional Authority*, *supra* note 304 at 21.
[312] *James Bay Agreement*, *supra* note 7 at Section 22, Schedule 1.
[313] *Grand Council of the Crees (Eeyou Istchee) v. Quebec (Attorney General)*, [2009] 4 C.N.L.R. 78 (C.A.) (QL).
[314] *Grand Council of the Crees and Cree Regional Authority*, *supra* note 304 at18.

subject all major forestry access roads to environmental review.[315] This is potentially an important development given the Ministry's plans, reported by the Implementation Team, to construct 7,000km of new forestry roads in the southern part of the treaty territory over the following 2 years.[316]

Aspects of the implementation of the trapline-based forestry unit system have highlighted challenges in integrating traditional and scientific/technical forms of land-use planning. John-Paul Murdoch, one of the key negotiators of the *New Relationship Agreement*, has noted that trapline boundaries, which are officially determined by the Cree Regional Authority, have generated disagreements among tallymen and the families they represent. Since shares of territory also determine shares of benefits under the agreement, boundary disputes have become resource and economic disputes by proxy, and the formal ownership status of several traplines within Forestry Management Units remains unresolved.[317] The Forestry Board reports dissatisfaction among tallymen about the extent of harvesting on the 25% of the trapline subject to the modified forest management plan for wildlife preservation. The Forestry Board also reported dissatisfaction among many tallymen, who feel in general that they are "informed" of measures rather than "consulted" on them, and have "insufficient influence" in the planning processes. The Forestry Board recommended renewed efforts to strengthen relations between tallymen and forestry planners.[318]

The previous examination of the implementation record of the adapted forestry regime in its first five years in existence somewhat tempers the high expectations set out

[315] *Grand Council of the Crees and Cree Regional Authority*, *supra* note 304 at 18.
[316] *Grand Council of the Crees and Cree Regional Authority*, *supra* note 304 at 21.
[317] John-Paul Murdoch, personal communication, 26 March 2010; and Letter from Jean-Pierre Gauthier, Cree-Quebec Forestry Board, to Claude Bechard, Minister of Natural Resources and Wildlife (25 May 2009) online: Cree-Quebec Forestry Board <http://www.ccqf-cqfb.ca/eng/0303_advices.php>.
[318] *Cree-Quebec Forestry Board*, *supra* note 231 at 21.

at the time of its creation. But is the adapted forestry regime making inroads toward the realization of a type of recognition and legal pluralism set out by the alternative paradigm? The alternative paradigm combines a processual/intersubjective model of recognition (in the creation of "norms of mutual recognition") and an institutional/discursive view of legal pluralism (in the creation of "provisional norms" and "shared normative experiences"). Can the formal institutional features and the relationship formed between the participating parties during the first five years of the agreement carry the adapted forestry regime toward a new relationship modeled on the alternative paradigm?

It is clear that the Forestry Board and the JWGs exhibit gaps between their written mandates and duties, and the ways in which the parties execute these in practice. In particular, there is a gap in participation that is due to the Ministry's failures to engage in the type of dialogue envisioned under the adapted forestry regime. The participation gap is familiar to observers of the co-management regime under the *James Bay Agreement*. The Hunting, Fishing, Trapping Coordinating Committee, as noted in the previous chapter, has dealt with numerous problems related to the lack of interest, participation, and influence on the part of the government representatives on the co-management committee. The adapted forestry regime also demonstrates a failure on the part of the Quebec government to participate in the reporting requirements roughly half the time, with substantive responses to Forestry Board recommendations in only a small minority of cases.

Still, the Forestry Board and the JWGs appear to exhibit elements of a processual/intersubjective model of recognition, by incorporating, as both of these

institutions do, input from both parties in the pursuit of consensus-based decision-making, and by the government's recognition of its importance demonstrated by its willingness to engage in substantive dialogue in some cases. This is different from a type of co-management arrangement that relies on majority votes to make decisions, and is either ignored by the government entity with final decision-making authority or is a body that the government entity is convinced that it can summarily ignore if it wants to. Recall as well Webber's assertion that the recognition of non-state legal orders should include "that order's practices of normative deliberation and decision making."[319] This adds significance to, and elevates the importance of, incorporating into the adapted forestry regime Cree institutions such as consensus-based decision-making, and trapline-based forest harvesting, including the authority of the tallymen. The overall approach to recognition and legal pluralism emphasizes the conditions for dialogue in the creation of provisional, and imperfect, compromises. This is different from the dominant model of recognition and pluralism in the law, in which a central governing authority can unilaterally choose which elements of the other party to recognize from a set of "Aboriginal" laws, customs and practices.

Another gap between the vision and execution of the adapted forestry regime is in terms of the difficulties experienced in implementing measures designed to integrate two sources of knowledge and law into a blended approach to forestry management. Tensions experienced in the communities with respect to the incorporation of traplines into the determination of forestry management units provide an example of this type of issue. As noted previously, the formal designation of Cree traplines as forest units has precipitated new challenges for community-level actors in applying this traditional forest management

[319] *Webber*, *supra* note 124 at 170.

institution. In particular, due to the attachment of formal benefits to the traplines for tallymen and their families, boundary disputes have surfaced as resource disputes by proxy. This recalls an analogous situation encountered during field visits to coastal communities in the Fiji Islands, described in the second chapter of this study. Coastal communities in Fiji will, following customary marine tenure,[320] specially designate areas of the coastal zones as no-take areas, or "tabus."[321] The community of Waisomo chose to integrate the formal law into their tabu, by formally gazetting the tabu as a marine protected area under the national fisheries law.[322] The gazette maps out the boundaries of the tabu and sets a renewable term of several years. Various stakeholders have described the results of the formal declaration as mixed.[323] On the one hand, some community members feel as though their tabu does have greater protection under the national fisheries law, and the boundaries are certain and clear for all who enter the vicinity of the tabu. On the other hand, the gazette has led some community members to rely on the formal legal mechanism to protect and conserve the area, and it has also proven less flexible to proposed revisions by the community during its mandated term.[324]

Although contextually very different, the above examples of the Cree trapline and the Fijian tabu have several points on common. Both cases demonstrate a less than comfortable fit between community-based resource management institutions and the state

[320] For a description of customary tenure in Fiji, see generally: Unaisi Nabobo-Baba, *Knowing and Learning: An Indigenous Fijian Approach* (Suva, Fiji: University of the South Pacific, 2006); and Joeli Veitayaki, "Taking Advantage of Indigenous Knowledge: The Fiji Case" (2002) 54(3) International Social Science Journal 395.
[321] The word "taboo" in the English language has Melanesian/Polynesian roots.
[322] The area is known under the national law as the Ulunikoro Marine Conservation Area.
[323] Governmental, non-governmental and community-based partners were interviewed at the time of the initial study.
[324] While the community of Waisomo has pursued its goals under the auspices of the state law, the vast majority of coastal communities in Fiji have not gazetted their tabus, and many manage the coastal zones under community-based forms of management, which operate largely outside the realm of the state law. These are the locally-managed marine areas described previously, in the second chapter of this thesis.

law. In both cases, designation under the formal law precipitated changes in actors' behaviour, not always positively, and restricted the flexibility of the legal environment in which they operate. A further point of commonality, however, requires particular emphasis: both are examples of the formal recognition of a non-state legal institution. In other words, the object of recognition in both cases is a substantive aspect of the non-state law.

This latter point is at the heart of the tension between state law and non-state law in the above examples. The complexity of any type of legal order, with its particular meaning derived from a particular culture and history, makes the recognition of its substance and content extremely difficult. As the "inherent limit" has demonstrated, when state law attempts to recognize a substantive aspect of the non-state law, it will attribute meaning to the non-state law and thus run the risk that this meaning will create inappropriate restrictions on its application by the community concerned. In neither of the above examples was meaning directly attributed to non-state legal orders, as the inherent limit has done. Instead, the Cree trapline and the Fijian tabu have been enlisted as *forms* of state law, to be understood and applied in the same manner as the state law.

It might be said that traplines are not forestry units, and tabus are not marine protected areas, and their integration will require some adjustments and compromises. But the larger point is that, in any form of integration between state and non-state legal orders, it is important to know who is empowered to define how these elements of the law are similar or dissimilar, and in what ways. Community-based actors can and do function in association with formal legal systems, but they must be able to define the terms of their participation and make decisions on the nature of acceptable compromise.

Currently the adapted forestry regime demonstrates elements of both dominant and alternative paradigms of recognition and legal pluralism. The overall evaluations put forth by the Cree-Quebec Forestry Board and the Cree Forestry implementation Team, however, indicate movement towards an alternative paradigm of recognition and pluralism in the law. Despite the ongoing and serious challenges to the establishment of a genuinely representative forestry regime outlined in the previous analysis, the Forestry Board and Implementation Team have offered positive appraisals of the overall relationship with the Quebec government and its possibilities moving forward. Taking into account the overall record of relations, including the political and legal challenges encountered over the life of the adapted forestry regime, the members of the Implementation Team note that they "regard these events as positive steps toward the full implementation of Chapter 3 of the *New Relationship Agreement*."[325] The Forestry Board members echo this sentiment by characterizing the NRA as "an ongoing collaborative learning experience for all stakeholders engaged in its implementation." The Forestry Board further notes that, "[f]rom a forestry standpoint, … the 'new relationship' between the Gouvernement du Québec and the Cree of Québec is characterized by cooperation, partnership and mutual respect."[326] Statements of this type are politically astute, given the parties' mutual interests in maintaining good relations and the appearance thereof, but there is likely more behind this positive overall appraisal on the part of the Forestry Board and Implementation Team. Rather, these parties likely acknowledge the imperfect nature of their relationship with other parties, but commit to share in an "ongoing

[325] *Grand Council of the Crees and Cree Regional Authority*, *supra* note 304.
[326] *Cree-Quebec Forestry Board*, *supra* note 231 at 25.

collaborative learning experience" in order to improve relations and institutions over time.

3.3 – Protected Areas in Eeyou Istchee

Protected areas are parts of the natural world that are designated as special and in need of protection from industrial or other types of development. In areas where state governments, community-based groups, and other stakeholders such as conservation organizations have attachments to the land or resource in question, debates can arise about the appropriateness of the areas designated for protection, and the type of protection that is appropriate. For example, a state government might wish to preserve a natural feature of the landscape or resource from any human intervention, while a community-based group may require access to these same territories or resources for cultural, social, economic and other collective purposes. Protected areas in contexts where the rights and interests of more than one party are engaged therefore raise some important questions about the nature of appropriate measures for protection. One important question relates to the management of protected areas, including its conservation objectives, and the degree of human involvement allowed. Another important question relates to the ways in which protected areas are governed, including who has decision-making authority in the area, and the institutions in place for shared or delegated forms of governance.

This section will examine how the legal regime for protected areas has been established in Eeyou Istchee, with reference to the above questions regarding governance and management, including opportunities for the institution of decentralized governance such as co-management and community-based management. As mentioned previously,

the *New Relationship Agreement* allows for the creation of new protected areas in the treaty territory, but does not deal with the subject in detail. The legal regime for protected areas in the treaty territory combines a broad base of policy and legal sources – including international conventions, international policy instruments, and national and provincial laws – in addition to the *New Relationship Agreement* and Cree legal orders. The first part of this section will survey the main sources of law at work in the protected areas legal framework, and the second part of this section will explore how all of these may combine to create a protected areas legal regime that reflects an alternative paradigm.

Quebec currently designates about 8% of its total territory as "protected,"[327] and has developed a plan for protected areas that eventually aims to protect 12% of its territory by 2015.[328] The current network of protected areas in Quebec comprises about 1,800 natural sites, including forest ecosystems, wildlife habitats, marine ecosystems, provincial and national parks, historic sites, and migratory bird sanctuaries.[329] In developing a province-wide network of protected areas, Quebec, and in particular the Ministry of Sustainable Development, Environment and Parks (the Ministry), has very closely followed the definition of protected areas set out by the World Conservation Union (IUCN),[330] as well as the *Convention on Biological Diversity* (the *Convention*) and

---

[327] Quebec, Ministère du Développement durable, de l'Environnement et des Parcs, News Release, "Quebec Passes a Historic Milestone in the Protection of its Biodiversity" (29 March 2009), online: Ministère du Développement durable, de l'Environnement et des Parcs <http://www.mddep.gouv.qc.ca/biodiversite/aires_protegees/actions-en.htm>. The current surface of protected areas is about 135,000 square kilometres, roughly corresponding to the surface area of Greece.
[328] Quebec, Ministère du Développement durable, de l'Environnement et des Parcs, *Protected Areas in Quebec*, online: Ministere du Developpement durable, Environnement et Parcs <http://www.mddep.gouv.qc.ca/biodiversite/aires_protegees/aires_quebec-en.htm>.
[329] *Ibid*.
[330] Detailed in a 2008 publication, the current IUCN definition of a protected area is: "A clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values." Nigel Dudley, *Guidelines for Applying Protected Area Management Categories* (Gland, Switzerland: IUCN, 2008) at 8.

its associated plan of action on protected areas.[331] In terms of how protected areas are managed and regulated, the IUCN definition requires that protected areas be "recognised, dedicated and managed, through legal or other effective means," while the *Convention* requires only that they be "designated or regulated and managed to achieve specific conservation objectives." Quebec's own definition of protected areas, in the *Natural Heritage Conservation Act* (NHCA),[332] enacted in 2002, is:

> … a geographically defined expanse of land or water established under a legal and administrative framework designed specifically to ensure the protection and maintenance of biological diversity and of related natural and cultural resources.[333]

Quebec's definition is similar to the other two in terms of how protected areas are to be managed and regulated, though it is perhaps more stringent in terms of the role of the formal law, in that it requires that protected areas be established under "a legal and administrative framework." According to IUCN, the requirement that protected areas be declared "through legal or other effective means" conveys that protected areas must either "be gazetted (that is, recognised under statutory civil law), recognised through an international convention or agreement," or managed under "other effective but non-gazetted means, such as through recognised traditional rules under which community conserved areas operate or the policies of established non-governmental organizations."[334]This approach is more flexible on the role of the formal law than

---

[331] The *Convention* defines a "protected area" as: "A geographically defined area which is designated or regulated and managed to achieve specific conservation objectives." *Convention on Biological Diversity*, *supra* note 151 at Art. 2.
[332] R.S.Q. 2002, c. C-61.01 [NHCA].
[333] *Ibid.* at s. 2.
[334] A protected area may be declared and managed outside the realm of state law, but the traditional rules or non-governmental policies that apply within the protected area must be "recognized," presumably by some type of formal legal or governmental authority. According to IUCN, this means that protected areas may be self-declared by a community, but must also be recognized by another source such as a government, an international agreement, or the international database of protected areas kept by the IUCN World

Quebec's approach appears in the wording of the statute.

Although Quebec has differed somewhat from the IUCN definition in terms of the requirement of formal regulation, it has adhered closely to the definitional requirement that protected areas be a "geographically defined space." The Ministry published its Register of Protected Areas in 2007;[335] at that time, re-evaluated the classification of its protected areas according to the statutory and IUCN definitions. This revision resulted in the net reduction of the province's recorded number of protected areas by 1.9%, or about 32,000 square kilometres;[336] and included two expansive territories in the calving areas of the tundra caribou north of the 52nd parallel, which had constituted part of the largest protected area in Quebec.[337] The Ministry reported that "the legal or administrative frameworks, the implementation of certain activities and new standards of the IUCN no longer allowed certain significant domains in Quebec to be recognized as protected areas."[338]

IUCN has developed a typology of protected areas according to their management objectives; and, like the overall definition of protected areas, the Ministry has also adhered to this typology in the classification of protected areas within the province-wide

---

Commission on Protected Areas. In this regard, IUCN cites the example of the Anindilyakwa Indigenous Protected Area, which was self-declared in 2006 by aboriginal communities in the Groote Eylandt peninsula in northeastern Australia, and recognized by the government as part of a national protected areas initiative. See: *Dudley*, *supra* note 330 at 8.

[335] The register contains information about the geography, management type etc. of the area.

[336] Quebec, Ministère du Développement durable, de l'Environnement et des Parcs*, Overview of Quebec's Protected Areas Network, Period 2002 – 2009* (May 2010), online: Ministère du Développement durable, de l'Environnement et des Parcs <http://www.mddep.gouv.qc.ca/biodiversite/aires_protegees/portrait02-09/index-en.htm> at 28.

[337] *Ibid*. at 26.

[338] *Ibid*. at 28. In particular, the Ministry maintained that since the boundaries of the calving grounds changed every few years, depending on the location of the den sites in previous years, the area could not be "geographically defined" to ensure ongoing protection of the habitat in the long term. Instead, the caribou calving north of the 52nd parallel had to receive other statutory protection outside the NHCA.

network. IUCN defines 6 distinct management categories for protected areas.[339] The Ministry reports that, in 2009, the most prevalent type of protected area in Quebec was the natural monument or feature (category III), which is an area set aside for its distinct natural characteristics along with its associated biodiversity and habitats.[340] The description of category III areas under the IUCN typology corresponds with the definition of "biodiversity reserve" under Quebec's NHCA:

> … "biodiversity reserve" means an area established in order to maintain biodiversity and in particular an area established to preserve a natural monument — a physical formation or group of formations — and an area established as a representative sample of the biological diversity of the various natural regions of Québec.[341]

In contrast to "strict" types of protected areas, which aim above all to minimize the presence and potential impacts of humans on the natural ecology, category III areas create more flexible management arrangements that allow some degree of human activity or intervention. Since management is centrally aimed at protecting and maintaining particular natural features, this type of protected area is the most influenced by human appraisals of value in the landscape or seascape, and lends itself less often to quantitative assessments of biological value.[342]

In addition to classification by management objective, IUCN also categorizes

---

[339] Briefly, these are: strict nature reserves or wilderness areas (category 1a / 1b); national parks (category II); natural monuments or features (category III); habitat/species management areas (category IV); protected landscapes/seascapes (category V); and protected areas with sustainable use of natural resources (category VI). For a description of these management types, including objectives and comparative details, see: *Dudley*, *supra* note 330 at 13-24.

[340] Quebec classifies the majority of the protected areas in its network as category III because of its interest in creating a diverse network that is representative of the biodiversity of Quebec. In 2009, this type of protected area made up about 68,000 square kilometres, or 50%, of the province-wide protected areas network. See: *Quebec*, *supra* note 336.

[341] *NHCA*, *supra* note 331 at s. 2.

[342] *Dudley*, *supra* note 330 at 18.

protected areas by governance type. These governance types – of which there are 4 –[343] refer to decision-making and management authority and responsibility over the protected area.[344] Shared governance – or co-management – refers to the institutional arrangements "to share management authority and responsibility among plurality of (formally and informally) governmental and non-governmental actors."[345] Another governance type – governance by indigenous and local communities – recalls the previous discussion of community-based management. IUCN refers to this governance type as "indigenous and community conserved areas (ICCAs)," and defines these as "protected areas where the management authority and responsibility rest with indigenous peoples and/or local communities through various forms of customary or legal, formal or informal, institutions and rules."[346]

In contrast to its close replication of the IUCN definitions of protected areas and designation by management type, Quebec has not explicitly classified its network of protected areas by governance type. While the Ministry has emphasized the participation of "regional and local communities" in the development of conservation plans "and eventually, in the management of these territories,"[347] the official role of regional and/or local municipal authorities under the current protected areas legislation is concentrated on

[343] Briefly, these are: Governance by government (at the federal/state/sub-national/municipal level) (type A); shared governance between governmental and non-governmental actors (type B); private governance (by individual/cooperative/non-governmental/corporate actors) (type C); and governance by indigenous peoples and local communities (type D). *Dudley*, *supra* note 330 at 26.
[344] *Dudley*, *supra* note 330 at 26.
[345] *Dudley*, *supra* note 330 26.
[346] *Dudley*, *supra* note 330 26.
[347] Quebec, Ministère du Développement durable, de l'Environnement et des Parcs, News Release, "Quebec Announces the Protection of 3,220 Square Kilometres of Territory in Northwestern Quebec "(4 March 2003), online: Ministère du Développement durable, de l'Environnement et des Parcs <http://www.mddep.gouv.qc.ca/biodiversite/aires_protegees/actions-en.htm>.

the management of "man-made landscapes."[348] The role of local communities is mostly contained within the realm of public consultations.[349] At least one government report has stated that the NHCA does not itself provide for co-management of protected areas with Aboriginal communities, and that such arrangements must be negotiated by agreement.[350] Governance arrangements are left open and therefore subject to case-by-case negotiation. One such arrangement for devolved protected areas management authority is the Pingualuit National Park in Nunavik, constituted under the *Parks Act*.[351] Section 6 of this act allows the Minister of Sustainable Development, Environment and Parks to delegate responsibility for "any work of maintenance, development or construction in a park" to certain groups, and specifically mentions the Kativik Regional Government and the Cree Regional Authority. Opened in 2007, the park was the subject of an agreement between the Ministry and the Kativik Regional Government (KRG) to devolve the management of all operations to the KRG.[352]

The Ministry's protected areas system is regulated with close attention to standards developed in international law and policy, certainly more than most provinces and

---

[348] *NHCA*, *supra* note 331 at ss. 12, 27, 51. Section 2 of the NHCA defines "man-made landscape" as: "an area established to protect the biodiversity of an inhabited area of water or land whose landscape and natural features have been shaped over time by human activities in harmony with nature and present outstanding intrinsic qualities the conservation of which depends to a large extent on the continuation of the practices that originally shaped them."

[349] *NHCA*, *supra* note 331 at s. 37.

[350] Quebec, Bureau d'audiences publics sur l'environnement, *Projets de réserves de biodiversité du lac des Quinze, du lac Opasatica, de la forêt Piché-Lemoine et du réservoir Decelles en Abitibi-Témiscamingue* (August 2007), online: Bureau d'audiences publics sur l'environnement <http://www.bape.gouv.qc.ca/sections/mandats/4reserves_abitibi/documents/liste_cotes.htm> at 69-70.

[351] R.S.Q. 1977, c. P-9 [*Parks Act*].

[352] Measures to achieve this devolution of management authority over the protected area include a "harmonization committee," comprised mostly of Inuit members, that reports on the implementation of the agreement, and serves "as a forum to preclude conflict between harvesting right activities such as those defined in Section 24 of the JBNQA and park operation activities." In addition, Inuit knowledge and local concerns are intended to be reflected in the management plan for the park, which allows traditional hunting and fishing by the Inuit. See: *Entente concernant le financement global de l'administration régionale Kativik (Entente Sivunirmut)* (2004), online: Secrétariat aux affaires autochtones <http://www.autochtones.gouv.qc.ca/relations_autochtones/ententes/inuits/20040331_en.htm> Annex B.

perhaps more than any other province, but this attention has been selective. The definition of protected areas in the *Convention on Biological Diversity* and IUCN guidelines are closely reflected in the NHCA. The IUCN management types are also reflected in the Ministry's classification of its protected areas network, but not so with the IUCN typologies on protected areas governance. Instead of formulating a clear strategy for protected areas governance, including guidelines for community-based forms of governance, the Ministry's approach has been to negotiate devolved governance arrangements on an *ad hoc* basis.

The lack of a clear policy direction may create challenges for groups hoping to negotiate more community-based forms of protected areas governance. However, several aspects of the current protected areas regime in Quebec also create unique opportunities for co-management and community-based management. The provincial legislative framework is, for example, permissive of such arrangements to an extent. The two pieces of provincial legislation most directly governing parks and protected areas – the *Natural Heritage Conservation Act* and the *Parks Act* – each include formal mechanisms to devolve responsibility for the management of designated sites to other entities. The *Parks Act* is more clear on this front: Section 6 of this act explicitly addresses devolution to Aboriginal governments. Section 12 of the NHCA provides that the Minister may "entrust any natural person or legal person established in the public interest or for a private interest with all or any of the Minister's powers relating to the management" of a protected area. While "a natural or legal person" could technically include Aboriginal-run entities such as the Cree Development Corporation, or even the provincial landholding corporations set up in each of the eight Cree communities that are parties to the original

James Bay Agreement, it is more likely that "legal persons" refers to private individual or corporate landowners.

As noted in the previous chapter, Muskuuchii (also known as Bear Mountain) is an area singled out in the *New Relationship Agreement* for protected area status because of "the importance of the Muskuuchii territory as expressed by the Crees;"[353] and, indeed, the community of Waskaganish had campaigned to have the nature and sacredness of Muskuuchii to the Crees recognized in order to protect the territory from destructive logging.[354] "Muskuuchii Hills" is currently classified as a proposed biodiversity reserve under the NHCA,[355] and occupies Category III land under the terms of the *James Bay Agreement* land regime.[356] A conservation plan for the proposed reserve, published by the Ministry in 2008, outlines the actions that are restricted within the area, but allows certain exceptions, including those that apply to "members of a Native community who, for food, ritual or social purposes, carry on an intervention or an activity within the proposed reserve."[357]Although the Crees have in large part chosen this site for protection, and will be permitted to use the site for certain purposes, governance authority for the area is centralized within the Ministry.

---

[353] *New Relationship Agreement*, *supra* note 8 at s. 3.61.

[354] A document released by the community during this campaign highlighted that "Muskuuchii was and continues to be held in great respect and considered sacred" due to its reliability as "an abundant source of game, in particular moose, even during times of scarcity elsewhere," and especially during a period of widespread deprivation in the 1930s. The community further noted that "[b]ecause of the eternal blessings given by Muskuuchii, it was treated with special respect, in order for these blessings to continue." See: Waskaganish First Nation, "Muskuuchii: More than a Mountain" (undated), online: Grand Council of the Crees <http://www.gcc.ca/cra/environment.php>.

[355] The area received temporary protection in May 2003 (which was extended in 2007 through to May 2011), with a view to eventually granting permanent status under the legislation.

[356] The area occupies 801.1 square kilometres in the southeastern part of the treaty territory.

[357] Quebec, Ministère du Développement durable, de l'Environnement et des Parcs, *Proposed Muskuuchii Hills Biodiversity Reserve: Conservation Plan* (March 2008), online: Ministère du Développement durable, de l'Environnement et des Parcs <http://www.mddep.gouv.qc.ca/biodiversite/reserves-bio/index-en.htm> s. 3.14.

"Paakumshumwaau-Maatuskaau" is a proposed biodiversity reserve located within the treaty territory,[358] in which a community-based form of governance has been put forward for consideration. Unlike Muksuuchii Hills, whose significance to the community largely dates back only to the last century, the area of Paakumshumwaau-Maatuskaau has been traditional territory for over 3,500 years[359] and contains significant archaeological deposits.[360] The community has undertaken partnered research with the McGill School of the Environment and others on the cultural, historical and ecological significance of the area,[361] with the eventual goal of establishing "a network of protected areas anchored in Cree knowledge and institutions for land and sea management, to achieve combined goals of regional sustainability, biodiversity protection, and cultural continuity."[362] The community and its partners have proposed to the Ministry the creation of a protected area management board that would include "hunting group leaders of the main family hunting territories within the protected area," as well as representatives of several community-based groups, government and academic partners.[363] Berkes has characterized the Paakumshumwaau-Maatuskaau Biodiversity Reserve as an "indigenous

---

[358] The area covers both Category II and Category III lands in the territory of the Cree Nation of Wemindji (Nouveau-Comptoir). The proposed protected area has both a marine component (146.5 square kilometres) and a terrestrial component (4,932.5 square kilometres), and includes the watersheds of the Old Factory and Poplar Rivers and their estuaries.

[359] Quebec, Ministère du Développement durable, de l'Environnement et des Parcs, *Proposed Paakumshumwaau-Maatuskaau Biodiversity Reserve: Conservation Plan* (May 2010), online: Ministère du Développement durable, de l'Environnement et des Parcs <http://www.mddep.gouv.qc.ca/biodiversite/reserves-bio/index-en.htm> at s. 2.3.

[360] Wemindji Protected Area Project, "The Wemindji Protected Area Project: Environment, Development and Sustainability in Eastern James Bay" (2006) online: The Wemindji Protected Area Project <http://www.wemindjiprotectedarea.org/> at 2.

[361] Known as the Wemindji Protected Area Project, the initial partnership has expanded to include other stakeholders, including academic researchers, the Grand Council of the Crees (Eeyou Istchee), Parks Canada, and Quebec's Ministry of Sustainable Development, Environment and Parks.

[362] The Wemindji Protected Area Project, "The Wemindji Protected Area Project: Environment, Development and Sustainability in Eastern James Bay" online: The Wemindji Protected Area Project <http://www.wemindjiprotectedarea.org/>.

[363] *Wemindji Protected Area Project*, *supra* note 360 at 3.

and community conserved area (ICCA)" within the meaning of the IUCN typology.[364] This also recalls the discussion in the previous chapter of community-based management – in essence, the community is at the centre of decision-making, with governmental authorities and other partners in a facilitating role. It is currently unclear the extent to which this proposal or elements of it will be reflected in the plan once the site is formally declared, but the community of Wemindji has already successfully mobilized to expand the proposed protected area to include a site recently subject to a mining claim. In this instance, the interested mining company abandoned the claim in the wake of the community's lobbying efforts to include the site.[365]However, as noted above, there is a current gap in the NHCA that does not explicitly recognize devolution of responsibility to other than "legal persons;" If the NHCA is to allow for some type of devolution of management responsibility to an Aboriginal-run entity, as it does under the *Parks Act*, then it should explicitly reflect this intention.

The Albanel-Témiscamie-Otish (ATO) proposed biodiversity reserve[366]has been put forth as a possible co-managed park under the *Parks Act*. The ATO is the subject of a Partnership Agreement between the Cree Nation of Mistissini and an agency of the Ministry. The agreement provides for the creation of its own administrative agency, to be composed of equal numbers of representatives of both parties, with responsibility for

---

[364] *Berkes*, *supra* note 145 at 21.
[365] Nature Quebec, *Loi sur les mines : servir le bien commun avant les intérêts privés. Mémoire présenté à la Commission de l'agriculture, des pêcheries, de l'énergie et des ressources naturelles, dans le cadre de la consultation générale sur le projet de loi no 79, loi modifiant la Loi sur les mines* (May 2010), online: Nature Quebec <http://www.naturequebec.org/ressources/fichiers/Aires_protegees/ME10-05-05_Mines.pdf>.
[366] The proposed protected area covers Category II and III lands over 11,874 square kilometres, and includes zones of boreal forest, taiga and tundra; the area also includes the Otish Mountains and Mistissini Lake, which, at 2,336 square kilometres, is the largest natural lake in Quebec.

managing the park,[367]whose mission will include managing the multiple expectations for the park as a tool for preserving natural and cultural heritage. Plans for ATO also contain some other rather innovative features for parklands in Quebec. For example, ATO is billed as "the first inhabited park in Quebec," because families from the Mistissini Cree community will live within its boundaries.[368] The 2006 Quebec government report on the public consultations for the park highlights the overall consensus reached among stakeholders on the potential of the park to generate "socio-economic restructuring and recovery throughout the entire region."[369] Despite the pressures created by these high and diverse expectations for the future park, the report ends on a confident note, with the view that: "the new dynamic offered by the project appears to create a context that is favourable to the emergence of a sustainable collaborative socio-economic relationship" between the Cree Nation of Mistissini and other regional stakeholders.[370]

Through its protected areas legislation, Quebec has demonstrated the willingness to implement international legal and policy standards on protected areas. Quebec legislation adheres closely to the international definitions of protected areas set out in the *Convention* and IUCN guidelines, and the Ministry directly applies the IUCN management categories to its network of protected areas. However, a more fulsome discussion of the potential for a broader policy of decentralized governance for protected areas is needed in Quebec, and these same international standards can be used to begin dialogue on developing such a policy. The IUCN protected areas typologies reflect

---

[367] *Quebec*, *supra* note 347 at 8.
[368] Quebec, Ministère du Développement durable, de l'Environnement et des Parcs, *Albanel-Témiscamie-Otish National Park project: E'weewach, place where the waters come from: Provisory Master Plan* (2005), online: Ministère du Développement durable, de l'Environnement et des Parcs <http://www.mddep.gouv.qc.ca/parcs/ato/con-ato_en.htm> at 7.
[369] *Quebec*, *supra* note 347 at 37.
[370] *Quebec*, *supra* note 347 at 38.

options for devolved community-based governance and management; in particular, governance types address both co-management and community-based management for protected areas; some management types also posit greater degrees of human intervention and sustainable use of resources in the area, which may conform better to Aboriginal peoples' needs and expectations for the area.[371]

Currently, the provincial government is the default governing authority over protected areas (including parks), but arrangements are open to agreements on delegation of management responsibility. In negotiating such agreements, the parties need to keep in mind the interpretive principles for modern agreements between Aboriginal peoples and the state, articulated by the Supreme Court in *Moses*. These require the courts to interpret such agreements based on "the parties' intentions and the overall context, including the legal context"[372] in which the agreement was negotiated, with the attendant expectation that such contexts feature attenuated differences in the parties' "languages, concepts, cultures and world views."[373] The parties can at least partially counteract the common law approach by including an interpretive clause to spell out their preferred approach to the interpretation of the agreement.[374] On lands and territories where Aboriginal and treaty rights are affected, the priority of Aboriginal rights should be explicitly set out, where appropriate.[375]

Protected areas legislation can also better enable community-level participation in protected areas management. At the very least, applicable provincial statutes should

[371] See for example IUCN Category VI: Protected areas with sustainable use of natural resources.
[372] *Moses*, *supra* note 272 at para. 111.
[373] *Moses*, *supra* note 272 at para. 108.
[374] This approach may be "broad and liberal," or even apply a perspectival approach, which acknowledges the existence of mutual biases and the need to take measures toward balancing perspectives.
[375] For example, recall that hunting, trapping and fishing rights under the *James Bay Agreement* are subject to conservation needs. A park or protected area with an important conservation purpose may therefore affect the nature of these rights.

reflect the possibility of delegated management responsibilities to other governmental authorities, such as the Cree Regional Authority, or a Cree Nation represented by its band council. Again, given the Supreme Court's recent move toward close textual readings of modern treaties, protected areas legislation should set out expectations for the interpretation and application of Aboriginal rights. The establishment of a protected area on Category III lands raises conservation efforts above the levels set out under the *James Bay Agreement*, but it is possible for such gains to be tempered in other areas by confusion or lack of clarity over rights of access for hunting, fishing or trapping by the Cree people.

The Quebec protected areas network is undergoing rapid expansion at the moment, and this may explain some of the policy and legislative gaps noted above. Given this, formal policy and law may have to catch up to the reality of protected areas governance within the network and, if co-management or community-based management of protected areas is to become a broad-based reality in Quebec, this makes developing models for community-based at this stage especially important. The above surveyed examples of governance arrangements for parks and protected areas demonstrate a range of possible governance types: governance by government, co-management, and community-based management. Solid precedents, policies or legislative backing for any devolved form of protected areas governance have yet to be developed; in this vein, the NHCA should be amended to include a provision closer in wording to section 6 of the *Parks Act*.

The choice of governance model defines the institutional context in which the relationship between government and community-based stakeholders will develop, and

thus the development of the relationship itself. Protected areas are one aspect of natural resource management in Quebec, including the treaty territory, in which clear precedents for co-management and community-based management have not yet been fully established. However, despite the challenges presented by the legal and policy approach to the protected areas system in Quebec outlined above, opportunities do exist for the establishment of a system of protected areas that is representative not only of the province's biological diversity, but of the cultures, rights and laws of Aboriginal stakeholders.

As argued previously, governance institutions that are genuinely representative of multi-faceted diversity, and capable of creating the conditions for genuine mutual recognition, are understood within an alternative paradigm. The alternative paradigm in turn implies the establishment of formal institutions that create the conditions for mutual recognition and meaningful dialogue. This points to co-management and community-based management institutions, which necessitate the interaction of various groups with shared domain over the area, rather than the governance by government that is the current default. The lesson provided by the experience of co-management and consultation under the *James Bay Agreement* is, however, that such institutions must be informed by the correct approach in order to be successful. Otherwise, gaps in participation and understanding of each others' differences will lead to the divisive experiences on co-management institutions, such as the Hunting, Fishing, Trapping Coordinating Committee, and in the courts, as to do with the interpretation of the environmental review procedures under the *James Bay Agreement*.

Conclusion

This study began with an observation of the frequent usage of the phrase "mutual recognition" as a framing principle for the "new relationship" between Aboriginal and non-Aboriginal peoples in Canada. The first chapter attempted to better understand both the concept of recognition (and associated concepts of legal pluralism) and, by extension, the nature of the new relationship itself. There were two main aspects to this enquiry: first, current understandings of the conceptual elements of a new relationship; and second, how an alternative view may address weaknesses in the current dominant view of these concepts, and expand the possibilities of a new relationship.

I argued that the current dominant understanding of recognition and pluralism in the law – exhibited by the courts, government actors and in many areas of political discourse – fit within a "dominant paradigm." This paradigm designates recognition as the expansion of the existing state apparatus to accommodate Aboriginal peoples' differences, within certain limits, bounded by concepts of universal rights and principles, and a view of what the larger society deems an appropriate level of accommodation. It also understands Aboriginal difference itself as something cognizable and distillable within one's own pre-existing categories of perception. Thus Chief Justice Lamer's assertion that Aboriginal title may be accommodated by the wider society, subject to an "inherent limit" that reflected the Chief Justice's own ideas of the nature of the Aboriginal group's attachment to the land. This is one example of the fundamental conceptual problem that the dominant paradigm presents: How can the majority society purport to accurately recognize a minority group using only the majority's categories of knowledge and perception? The dominant paradigm must be questioned in terms of its

ability to articulate a new relationship that is able to appropriately address the needs and concerns of the minority group.

A liberal view of recognition manifests in the approach of the Supreme Court to the common law affecting Aboriginal peoples, including the inherent limit on Aboriginal title, and the interpretive principles applied to modern treaties.[376]It is also visible in the types of natural resource management institutions that see fit to accommodate minority groups according to perceptions of, and within limits defined by, the majority group. This includes state-centric governance models for protected areas; and in some types of co-management arrangements in which government actors unilaterally decide which aspects of Aboriginal practices, traditions and customs to recognize, and which to ignore.[377]

The alternative paradigm, by contrast, understands recognition as reflected in "norms of mutual recognition" that result from processes of interaction, in which normative disagreements are resolved by mutually acceptable compromises. In this view, the solutions to normative disagreements are part of ongoing discursive processes, where norms of mutual recognition are provisional and acceptable only insofar as the parties consider them to be so. The success of such an approach fundamentally depends on the parties' priorities in developing constructive relationships grounded in a perspectival approach to their relationship, which acknowledges the limits of one's own perceptions and seeks ways to apply perspectives other than those of the majority group in areas that engage the rights and interests of a minority group.

---

[376] Recall the assertion of Justices Lebel and Deschamps that the interpretation of modern treaties be informed by the context in which these treaties were negotiated, including, according to the justices, attenuated differences in the parties' "languages, concepts, cultures and world views." *Moses*, *supra* note 272 at para. 108.

[377] Recall, for example, the reliance of the Hunting, Fishing, Trapping Coordinating Committee on the tie-breaking vote to resolve contentious issues, and the narrow interpretation applied by the provincial government to the committee's mandate and powers. *Mulrennan and Scott*, *supra* note 175 at 201.

What does the alternative paradigm mean for the development of a "new relationship" in Eeyou Istchee? Perhaps the most fundamental feature of a new relationship within the alternative paradigm is the creation of normative relationships of reciprocal recognition and cooperation. The *New Relationship Agreement* has set down a good foundation in this respect. The agreement was signed as a "nation-to-nation" agreement between the Crees and Quebec, which implies mutuality and reciprocity in the action of recognition. In this way, how each of the parties substantively defines the object of recognition – and, indeed, the Crees and Quebec likely have different understandings of "nation" that are informed by their respective histories and political cultures – matters less than the fact that they are willing to act according to a mutual view of recognition.

Natural resource management institutions that assume some type of interaction between government managers and resource users – such as co-management or community-based management – provide the institutional forums for the parties to carry forth in their mutual commitments to recognize the other. The experience of co-management under the *James Bay Agreement* and *New Relationship Agreement* shows, however, that the formal structures of these institutions matter only to a certain extent. The formal structures of co-management under the *James Bay Agreement* and *New Relationship Agreement* – including the HFTCC, JBACE and the Forestry Board – do not differ significantly: all are comprised of equal numbers of representatives from the stakeholder constituencies; all are structured to allow majoritarian decision-making, if necessary; and all take steps to even up the parties' access to the deciding vote in the event of a tie.[378] The formal institutions established for shared governance under the

[378] As noted previously, the HFTCC Chair, who casts the tie-breaking vote, rotates annually among the parties (who are Cree, Inuit, Quebec and Canadian government representatives), and the Chair of the

James Bay Agreement have not resulted in reciprocal dialogue and mutual recognition; on the contrary, for example, the relationship between the JBACE and the Ministry is characterized by lack of participation on the part of the provincial and federal governments to the extent that the institution, according to Rynard, has "barely functioned."[379]However, whereas the HFTCC relies on the tie-breaking vote to resolve contentious issues, the Forestry Board makes decisions by consensus. This is a significant indicator of an improvement in the relationship between the parties and the creation of the conditions for mutual recognition from the *James Bay Agreement* to the *New Relationship Agreement*. However, the experience of co-management internal to the Forestry Board itself is only a partial view of the relationship between Crees and the Quebec government in this context. Relations with the Ministry provide the other partial view and, as noted previously, the Minister has responded to board recommendations engaged in the type of substantive dialogue envisioned by the agreement in only a small minority of cases. While this indicates an incomplete fulfillment of the conditions for a new relationship under the alternative paradigm, it is nevertheless an improvement over the relations between the Crees and Quebec within institutions created under the *James Bay Agreement*.

Another forum in which the parties can carry forth their commitments to mutual recognition is in the consultations as part of the environmental review requirements contained under Section 22 of the *James Bay Agreement*. The legal interpretations of these provisions by the courts have, however, limited the cases in which formal dialogue on proposed developments in the treaty territory are necessary. In practical terms, a

---

HFTCC is the 13th member of the JBACE; the Chair of the Board is appointed by Quebec in consultation with the Cree Regional Authority, with a unilateral appointment possible after 3 failed appointments.
[379] *Rynard*, *supra* note 174 at 27.

narrow interpretation of the jurisdiction to conduct environmental reviews limits the incidence of dialogue between the parties, and thus the opportunities of the Cree to affect the course of development on their lands and territories. But this narrow interpretation of the consultation requirements has broader effects on the nature of the relationship between the parties. Recall the Supreme Court's ruling in *Moses*, in which the majority held that other statutory environmental reviews could be conducted in the treaty territory, as long as they are "not inconsistent" with the provisions under the *James Bay Agreement*; and, further, that the requirements imposed by the general duty to consult and accommodate were not inconsistent with the provisions in the *James Bay Agreement* requiring the establishment of a Review Committee with Cree representatives. The Court applied a textual interpretation to the *James Bay Agreement* to establish the "not inconsistent" threshold; then, by seeing no inconsistency between the consultation provisions under the treaty, set a low threshold for the application of this standard. In doing so, the Supreme Court has held that statutory and common law requirements to consult and accommodate can, in some cases, override a constitutionally protected document that reflects an agreement between the parties, based on a close textual reading of the treaty itself.[380] This ruling has in effect overlooked the parties' long-standing obligation to fulfill the treaties according to their spirit and intent, and undermined the relationship achieved between the parties through negotiation and dialogue. Consider, as well, the types of consultations that the alternative paradigm might involve. At the very least, it would entail the elaboration of processes for meaningful dialogue, and would

[380] *James Bay Agreement*, *supra* note 7 at s. 23.2.3: "All applicable federal and provincial laws of general application respecting environmental and social protection shall apply in the Region to the extent that they are not inconsistent with the provisions of the Agreement and in particular of this Section. If necessary to give effect to this Section of the Agreement, Quebec and Canada shall take the required measures to adopt suitable legislation and regulations for such purpose."

likely further entail the requirement of broad consensus (or even consent) to ensure genuine normative compromises were reached on a proposed development. A gap exists here between the common law and the requirements of the alternative paradigm.

The ruling in *Moses* also raises questions about the role of state law in defining the relationship between Aboriginal and non-Aboriginal peoples in the context of natural resource management under the modern treaties. The ruling gives more power to the written law to define the parameters of the relationship and mutual obligations between the parties. However, this goes against the experience and expectations of the parties to the *James Bay Agreement* and *New Relationship Agreement*. As noted above, the experience of co-management under these treaties shows that the ways in which the formal institutions of co-management are set out do not necessarily determine how they are actually implemented. Far more important are contextual factors and the strength of the parties' mutual commitments to recognize the other and act in cooperation. The Cree parties to the *New Relationship Agreement* in fact expect and accept some degree of ambiguity in the treaty text itself, because this provides space for the parties to continually discuss and pursue their interests.[381] State actors as well expect and rely on a degree of ambiguity between the treaty text and the realities of co-management. For instance, co-management boards are technically designed to handle oppositional relationships by majoritarian decision-making, while governments acting in good faith try to ensure that they never have to resort to these measures. The Court's assumption that the treaty text will always closely reflect the parties' intentions and negotiated compromises is therefore plainly erroneous.

[381] *Murdoch*, *supra* note 317.

Disagreements as to the appropriate role of state law persist among those concerned with legal and policy options for facilitating community-based governance and management of natural resources. In a state-centred view, state law is central to the enhancement of communities' role in managing natural resources,[382] by creating "enabling environments" that promote flexibility and leave "legal space" within which local people can exercise real choice and domain over their lands and territories.[383] A community-centred view, promotes instead the formal legal sanctioning of community-based governance and management, in order "to legally empower community-based managers and to recognize community-based rules of access."[384] In a sense, both views are correct, since both state-centred and community-centred perspectives on the role of state laws can work well depending on the circumstances. The creation of autonomous legal spaces for local-level governance and management organizations may be appropriate in some circumstances, as can formal channels for the establishment of vertical and horizontal linkages between all types of resource management institutions. The differences in these approaches are not so pronounced, as long as commitments among participants to mutual processes of recognition are constant between them, and as long as state laws are implemented in ways that appropriately support and facilitate the application of non-state laws.

The legal frameworks for natural resource management in Eeyou Istchee – comprised of multiple sources of law including the *James Bay Agreement*, *New*

---

[382] This includes using the state law, among other things, to: recognize local community institutions in the formal law; set out the respective powers and responsibilities of the parties with shared jurisdiction over the land, territory or resource; sanction local law making processes and ensuring enforcement; and adjust existing regulations to reflect local ecological knowledge.
[383] Jon Lindsay, *Designing Legal Space: Law as an Enabling Tool in Community-Based Management* (Washington, DC: CBNRM Workshop, 1998).
[384] *Wiber & Kearney*, *supra* note 147 at 142.

Relationship Agreement, Cree legal orders, federal and provincial statutes, *ad hoc* agreements between Cree and other government authorities, and the common law – illustrate a variety of approaches to community-based natural resource management. A state-centred approach in particular – in which the state law is consciously used as a primary means to enable the operation of non-state types of law – is evident in a number of areas. The co-management model is itself a type of "enabling environment" created by state law and legal institutions to provide a formal mechanism for delegation of management responsibility to local actors. The provincial parks legislation provides for the delegation of management responsibility to Aboriginal governments. The *New Relationship Agreement*[385]has carved out a formal function for Cree traplines as forestry units. However, as highlighted previously in the discussion of the Cree traplines, enlisting traditional resource management institutions into state legal frameworks can create unexpected tensions, and limit the flexibility in the application of traditional institutions, at the community level.

Community-based management allows local actors to define their own laws and institutions, and to determine how they are interpreted and applied. Co-management can also promote this type of empowerment, under the right circumstances. As argued previously, these circumstances largely depend on the strength and integrity of the relationship between parties engaged in co-management, and their willingness to demonstrate their mutual commitments to listen to and recognize the other. A preferable object of recognition to a substantive law or institution is therefore, as Webber suggests, "the processes by which normative claims are discussed, disagreement adjudicated …

[385] The treaties themselves are not state laws *per se*, but they are formal agreements that are, in general, brought into force by enabling state laws, and receive constitutional protection. They are also, like state laws, written documents that those subject to it use to guide their actions.

and the resultant norms interpreted and elaborated."[386] This might entail recognition of decision-making by consensus; and the commitment of the representatives on the Forestry Board to engage in consensus-based decision-making is a key example of this procedural type of recognition at work. Among the settled features of this co-management arrangement are the parties' dialogic processes and mutual commitments to recognize the other, and their recommendations may therefore be said to express their provisional normative compromises. Alternatively, as Webber suggests, recognition may accrue to "spheres of autonomy,"[387] that is, variously autonomous exercises of community-based processes of decision-making and management, as in the cases of the Watchmen in the Haida Gwaii, the coastal communities in the locally-managed marine areas network in the Fiji Islands, or the community participants on the management board of the proposed Paakumshumwaau-Maatuskaau biodiversity reserve.

Instead of a substantive object of recognition, which claims to understand what the law or legal institution "is" and how it operates, the parties should therefore define a procedural type of recognition, which leaves the substantive details largely up to the parties to sort out themselves as provisional norms. For example, instead of recognizing the trapline, thereby attaching a form and meaning to it that might not fit, a more suitable object of recognition would be processes of consultation requiring the consent of the tallymen, or processes of collaboration requiring consensus, on the forestry uses of the trapline. Further, both parties must be able to participate meaningfully in these discursive processes, in order to produce the provisional norms that reflect their mutually acceptable compromises. This approach, Webber concedes, "may produce a mere modus vivendi

[386] *Webber*, *supra* note 124 at 170.
[387] *Webber*, *supra* note 124 at 170.

rather than a comprehensive body of principle," but it will aim for "some settled order among the contending positions, allowing us to escape the brute interaction of those who are always 'forçans ou forcés."[388]

This study puts forward for consideration an alternative paradigm for natural resource management in Eeyou Istchee, and the preceding chapters set out what this might entail. The first chapter set out the conceptual basis for a new relationship in the form of the "alternative paradigm" to recognition and legal pluralism. The second chapter looked at how this new relationship might manifest in the natural resource management context – in, for example, co-management, community-based management, and consultation processes – in general and in Eeyou Istchee in particular; and the third chapter examined case studies that demonstrate the current relationship between Aboriginal and state actors in terms of environmental consultation, forestry co-management, and protected areas governance and management.

The preceding case studies show movement toward the alternative paradigm in the legal regime for natural resource management in Eeyou Istchee. While the courts persist in interpreting modern treaties and their consultation provisions through the lens of the dominant paradigm, other elements of the legal regime show an effort to engage in mutual processes of dialogue and norm creation. The adapted forestry regime exemplifies the alternative paradigm in its dialogic processes (consensus-based decision-making) and resulting norms of mutual recognition (recommendations to the Minister). The adapted forestry regime mandates that the Minister engage in dialogue with the Forestry Board on its recommendations, which the Minister has started to do, though not yet frequently enough. It also contains some other promising institutional features – such as the

[388] *Webber*, *supra* note 124 at 170.

community-based JWGs and their (as yet unrealized) role in the elaboration of "harmonization measures" with the tallymen – which add to the opportunities for normative interaction in forestry management. Various reforms to the protected areas legal regime were proposed in the previous chapter of this study, including the inclusion of interpretive principles in agreements and legislation, and formal mechanisms in the provincial legislation to allow for the delegation of management authority to Aboriginal governments.

A wide variety of formal and informal institutions that exhibit various forms of centralized, shared or autonomous of governance can, depending on the circumstances, appropriately implement a legal regime for natural resource management modelled on the alternative paradigm. While the alternative paradigm of recognition and pluralism in the law may manifest in various institutional forms, what remains constant in the process of its actualization are the basic elements of a genuinely "new relationship," including a perspectival approach to cross-contextual relations, and commitments to achieve processes and norms of mutual recognition. One of the strongest expressions of a new relationship under the *New Relationship Agreement*, at least on a rhetorical level, was the promise of mutual recognition in the form of a "nation-to-nation" agreement. The parties' expressions of their continued commitment to fulfill the promise of a new relationship, despite ongoing experiences with litigation and partial implementation, is perhaps the strongest indicator of the existence of a regime of mutual recognition in Eeyou Istchee.

Bibliography

Agreements

Agreement Concerning a New Relationship Between the Government of Canada and the Cree of Eeyou Istchee (2008), online: Grand Council of the Crees <http://www.gcc.ca/issues/newrelationship.php>.

Agreement Respecting a New Relationship Between the Cree Nation and the Government of Quebec (2002), online: Grand Council of the Crees: <http://www.gcc.ca/ >.

Entente concernant le financement global de l'administration régionale Kativik (Entente Sivunirmut) (2004), online: Secrétariat aux affaires autochtones <http://www.autochtones.gouv.qc.ca/relations_autochtones/ententes/inuits/20040331_en.htm>.

Gwaii Haanas Agreement, online: Parks Canada <http://www.pc.gc.ca/pn-np/bc/gwaiihaanas/plan/plan2a_E.asp>.

James Bay and Northern Quebec Agreement (1975), online: Grand Council of the Crees: <http://www.gcc.ca/ >.

Nisga'a Final Agreement, signed April 27, 1999, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nsga/nis/nis-eng.asp>.

Cases

Calder v. British Columbia (Attorney General), [1973] S.C.R. 313.

Cree Regional Authority v. Robinson [1991] F.C.J. No. 904 (QL).

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (QL).

Eastmain Band v. Canada (Federal Administrator), [1993] 1 F.C. 501 (C.A.) (QL).

Grand Council of the Crees (Eeyou Istchee) v. Quebec (Attorney General), [2009] 4 C.N.L.R. 64 (S.C.) (QL).

Grand Council of the Crees (Eeyou Istchee) v. Quebec (Attorney General), [2009] 4 C.N.L.R. 78 (C.A.) (QL).

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511

(QL).

Kanatewat v. James Bay Development Corporation, [1974] Q.J. No. 14 (C.A.) (QL).

Lord c. Canada (Procureur général), [2000] J.Q. no 627 (C.A.) (QL).

Lord v. Quebec (Attorney General), [2000] 3 C.N.L.R. 78 (Q.C.S.C.) (QL).

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388 (QL).

Quebec (Attorney General) v. Moses, [2010] S.C.J. No. 17 (QL).

R. v. Sparrow, [1990] 1 S.C.R. 1075 (QL).

R. v. Van der Peet, [1996] 2 S.C.R. 507 (QL).

International Instruments

Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79; 31 ILM 818 (entered into force 29 December 1993).

Legislation

Canada National Parks Act, S.C. 2000, c. 32.

Canadian Environmental Assessment Act, S.C. 1992, c. 37.

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5.

Cree-Naskapi (of Quebec) Act, S.C. 1984, c. 18.

Natural Heritage Conservation Act, R.S.Q. 2002, c. C-61.01.

Parks Act, R.S.Q. 1977, c. P-9.

Secondary Sources

Alfred, Taiaiake. *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Ont.: Oxford University Press, 1999).

Alfred, Taiaiake. *Wasase: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview Press, 2005).

Battiste, Marie & Henderson, James (Sa'ke'j) Youngblood. *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing, 2000).

Berkes, Fikret. "Community Conserved Areas: Policy Issues in Historic and Contemporary Context" (2009) 2 Conservation Letters 19.

Berkes, Fikret. "Evolution of Co-Management: Role of Knowledge Generation, Bridging Organizations and Social Learning" (2009) 90 Journal of Environmental Management 1692–1702.

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

Blanchard, Martin. "Looking Ahead: A Pragmatic Outlook on Aboriginal Self-Rule" in John D. Whyte, ed., *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing, 2008) 61.

Borrini-Feyerabend, Grazia. "Governance of Protected Areas: Innovation in the Air" (2003) 12 Policy Matters 98.

Borrini-Feyerabend, Grazia, Kothari, Ashish & Oviedo, Gonzalo, eds., *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation* (Gland, Switzerland and Cambridge, UK: World Conservation Union (IUCN) 2004).

Borrows, John. *Justice Within: Indigenous Legal Traditions in Canada* (Ottawa: Law Commission of Canada, 2006).

Borrows, John. *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

Bradshaw, Ben. "Questioning the Credibility and Capacity of Community-Based Resource Management" (2003) 47(2) The Canadian Geographer 137.

British Columbia, "The Transformative Change Accord," online: Government of British Columbia <http://www.newrelationship.gov.bc.ca/>.

Canada, Royal Commission on Aboriginal Peoples, "Chapter 16: The Principles of a Renewed Relationship," in *Report of the Royal Commission on Aboriginal* Peoples, *Vol.1: Looking Forward, Looking Back* (Ottawa:

Canada Communications Group, 1996), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ap/rrc-eng.asp>.

Canada, Royal Commission on Aboriginal Peoples (RCAP), *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, Vol. 2, Part 2* (Ottawa: Canada Communications Group, 1996).

Cardinal, Harold & Hildebrandt, Walter. *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000).

Christie, Gordon. "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" 6 Indigenous L.J. 13.

Cotterell, Roger. "Does Legal Pluralism Need a Concept of Law?" (2009) 19(10) Law and Politics Book Review 774.

Coulthard, Glen. "Subjects of Empire: Indigenous Peoples and 'The Politics of Recognition' in Canada" (2007) 6 Contemporary Political Theory 437.

Cree-Quebec Forestry Board, *Agreement Concerning a New Relationship Between the Gouvernement du Québec and the Crees of Québec: Status Report on the Implementation of Forestry-Related Provisions 2002-2008* (Cree-Quebec Forestry Board, September 2009), online: <http://www.ccqf-cqfb.ca/eng/0303_advices.php>.

De Sousa Santos, Bonaventura. "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14(3) Journal of Law and Society 279.

Dene Nation, "The Dene Declaration," in Mel Watkins, ed., *Dene Nation: The Colony Withi*n (Toronto: University of Toronto Press, 1977).

Desbiens, Caroline. "Nation to Nation: Defining New Structures of Development in Northern Quebec" 80(4) Economic Geography 351.

Diamond, Billy. "Villages of the Damned" (1990) 1(3) Arctic Circle 24.

Dudley, Nigel. *Guidelines for Applying Protected Area Management Categories* (Gland, Switzerland: IUCN, 2008).

Fanon, Frantz. *The Wretched of the Earth* (New York: Grove Press, 1963).

Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham & London: Duke University Press, 2002).

Feit, Harvey. “Legitimation and Autonomy in James Bay Cree Responses to Hydro-Electric Development” in Noel Dyck, ed., *Indigenous Peoples and the Nation-State: Fourth World Politics in Canada, Australia and Norway* (St. John’s, NL: Institute of Social and Economic Research Memorial University, 1985).

Feit, Harvey & Spaeder, Joseph. “Co-Management and Indigenous Communities: Barriers and Bridges to Decentralized Resource Management-Introduction” (2005) 47 Anthropologica 147.

German, Amy. “Developing the North Sensibly” The Nation (18 December 2009) online: The Nation <http://www.nationnews.ca/index.php?option=com_zine &view=article&id=469:developing-the-north-sensibly->.

Gladu, J.P. *Aboriginal Experiences in Canada – Parks and Protected Areas* (San Francisco and Stockholm: Boreal Footprint Initiative and Taiga Rescue Network, 2003).

Grand Council of the Crees and Cree Regional Authority, *Annual Report, 2004-2005 (30th Anniversary)*, online: Grand Council of the Crees <http://gcc.ca/cra/administration.php>.

Grand Council of the Crees and Cree Regional Authority, *Annual Report, 2007-2008*, online: Grand Council of the Crees <http://gcc.ca/cra/administration.php>.

Grand Council of the Crees and Cree Regional Authority, *Annual Report, 2008-2009*, online: Grand Council of the Crees <http://gcc.ca/cra/administration.php>.

Griffiths, John. 'What is Legal Pluralism?' (1986) 24 Journal of Legal Pluralism 1.

Gutmann, Amy. “Introduction” in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1992) 3.

Hawkes, Suzanne. "The Gwaii Haanas Agreement: From Conflict to Consensus" (1996) 23 Environments 87.

Hegel, G.W.F. *Phénoménologie de l’esprit* (Paris: Aubier, Ed. Montaigne, 1941).

Henderson, James Youngblood. *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006).

Howitt, Richard. *Rethinking Resource Management: Justice, Sustainability and Indigenous Peoples* (New York: Routledge, 2001).

International Union for Conservation of Nature (IUCN), *Resolutions and Recommendations: World Conservation Congress, Montreal, Canada, 13-23 October 1996* (Gland, Switzerland: IUCN, 1997).

International Union for Conservation of Nature (IUCN), "Theme / Strategic Direction on Governance, Communities, Equity, and Livelihood Rights in Relation to Protected Areas (TILCEPA)" online: IUCN <http://www.iucn.org/about/union/commissions/ceesp/wg/tilcepa/>.

Jobin, Shalene. *Guiding Philosophy and Governance Model of Bent Arrow Traditional Healing Society* (M.A. Thesis, University of Victoria, 2005).

Kleinhans, Martha-Marie & Macdonald, Roderick. "What is a *Critical* Legal Pluralism?" (1997) 12 Can. J. L. & Soc. 25.

Kojeve, Alexandre. *An Introduction to the Reading of Hegel* (Ithaca, N.Y.: Cornell University Press, 1980).

Kothari, Ashish. "Community Conserved Areas" in Michael Lockwood, Graeme L. Worboys and Ashish Kothari, eds., Protected Areas Management: A Global Guide (London: IUCN/The World Conservation Union, 2006).

Kymlicka, Will. *Multicultural Citizenship* (New York: Oxford University Press, 1995).

Kymlicka, Will. *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (New York: Oxford University Press, 2001).

Letter from Jean-Pierre Gauthier, Cree-Quebec Forestry Board, to Claude Bechard, Minister of Natural Resources and Wildlife (25 May 2009) online: Cree-Quebec Forestry Board <http://www.ccqf-cqfb.ca/eng/0303_advices.php>.

Lindsay, Jon. *Designing Legal Space: Law as an Enabling Tool in Community-Based Management* (Washington, DC: CBNRM Workshop, 1998).

Martin, Thibault. "The End of an Era in Quebec: The Great Whale Project and the Inuit of Kuujjuarapik and the Umiujaq" in Thibault Martin and Steven M. Hoffman, eds., *Power Struggles: Hydro Development and First Nations in Manitoba and Quebec* (Winnipeg: University of Manitoba Press, 2008) 227.

McNeil, Kent. “The Post-Delgamuukw Nature and Content of Aboriginal Title” in Kent McNeil, ed., *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, University of Saskatchewan, 2001) 102.

Melissaris, Emmanuel. “The More the Merrier? A New Take on Legal Pluralism” 13(1) Social & Legal Studies 57.

Melissaris, Emmanuel. *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Surrey, UK: Ashgate Publishing Ltd., 2009).

Moore, Sally Falk. “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study” (1973) 7(4) Law & Society Review 719.

Moses, Ted. “European Tour 2002: Notes for a Speech by Grand Chief Dr. Ted Moses, O.Q. Grand Council of the Crees (Eeyou Istchee) European Tour” (November 2002) online: Grand Council of the Crees <http://www.gcc.ca/archive/article.php?id=73>.

Moses, Ted. "’Nunavik-Eeyou’: La circonscription électorale du peuple” (Presentation to the Commission de délimitation des circonscriptions électorales fédérales sur le projet de circonscription électorale de Nunavik, 7 November 2002) online: Grand Council of the Crees <http://www.gcc.ca/francais/nouvelles/nunavik_eeyou.htm>.

Mulrennan, Monica & Scott, Colin. “Co-Management – An Attainable Partnership? Two Cases form James Bay, Northern Quebec and Torres Strait, Northern Queensland” (2005) 47(2) Anthropologica 197.

Nabobo-Baba, Unaisi. *Knowing and Learning: An Indigenous Fijian Approach* (Suva, Fiji: University of the South Pacific, 2006)

Nadasdy, Paul. "The Anti-Politics of TEK: The Institutionalization of Co-management Discourse and Practice" (2005) 47(2) Anthropologica 215.

Nadasdy, Paul. "The Politics of TEK: Power and the ‘Integration" of Knowledge’ 36(1-2) Arctic Anthropology (1999) 1.

National Round Table on the Environment and the Economy, *Sustainable Strategies for Oceans: A Co-Management Guide* (Ottawa: National Round Table on the Environment and the Economy, 1998).

Nature Quebec, *Loi sur les mines : servir le bien commun avant les intérêts privés. Mémoire présenté à la Commission de l’agriculture, des pêcheries, de l’énergie et des resources naturelles, dans le cadre de la consultation*

générale sur le projet de loi no 79, loi modifiant la Loi sur les mines (May 2010), online: Nature Quebec <http://www.naturequebec.org/ressources/fichiers/Aires_protegees/ME10-05-05_Mines.pdf>.

Niezen, Ronald. *Defending the Land: Sovereignty and Forest Life in James Bay Cree Society* (Upper Saddle River, NJ: Pearson Prentice Hall, 2009).

Ontario, Ontario's New Approach to Aboriginal Affairs (Toronto: Ontario Native Affairs Secretariat, 2005), online: Ontario Ministry of Aboriginal Affairs <http://www.nativeaffairs.jus.gov.on.ca>.

Papillon, Martin. *Federalism From Below? The Emergence of Aboriginal Multilevel Governance in Canada: A Comparison of The James Bay Crees and Kahnawá:ke Mohawks* (D. Phil. Thesis, Department of Political Science, University of Toronto, 2008).

Quebec, Bureau d'audiences publics sur l'environnement, *Projets de réserves de biodiversité du lac des Quinze, du lac Opasatica, de la forêt Piché-Lemoine et du réservoir Decelles en Abitibi-Témiscamingue* (August 2007), online: Bureau d'audiences publics sur l'environnement <http://www.bape.gouv.qc.ca/sections/mandats/4reserves_abitibi/documents/liste_cotes.htm>.

Quebec, Centre de services partages du Quebec, *Non-Consolidated Agreement and Complementary Agreements*, online: Publications Quebec <http://www3.publicationsduquebec.gouv.qc.ca/produits/conventions/lois/loi2/pages/page3.fr.html>.

Quebec, Ministère du Développement durable, de l'Environnement et des Parcs, *Albanel-Témiscamie-Otish National Park project: E'weewach, place where the waters come from: Provisory Master Plan* (2005), online: Ministère du Développement durable, de l'Environnement et des Parcs <http://www.mddep.gouv.qc.ca/parcs/ato/con-ato_en.htm>.

Quebec, Ministère du Développement durable, de l'Environnement et des Parcs, *Proposed Muskuuchii Hills Biodiversity Reserve: Conservation Plan* (March 2008), online: Ministère du Développement durable, de l'Environnement et des Parcs <http://www.mddep.gouv.qc.ca/biodiversite/reserves-bio/index-en.htm>.

Quebec, Ministère du Développement durable, de l'Environnement et des Parcs, *Protected Areas in Quebec*, online: Ministere du Developpement durable, Environnement et Parcs <http://www.mddep.gouv.qc.ca/biodiversite/aires_protegees/aires_quebec-en.htm>.

Quebec, Ministère du Développement durable, de l'Environnement et des Parcs, *Overview of Quebec's Protected Areas Network, Period 2002 – 2009* (May 2010), online: Ministère du Développement durable, de l'Environnement et des Parcs <http://www.mddep.gouv.qc.ca/biodiversite/aires_protegees/portrait02-09/index-en.htm>.

Quebec, Ministère du Développement durable, de l'Environnement et des Parcs, *Proposed Paakumshumwaau-Maatuskaau Biodiversity Reserve: Conservation Plan* (May 2010), online: Ministère du Développement durable, de l'Environnement et des Parcs <http://www.mddep.gouv.qc.ca/biodiversite/reserves-bio/index-en.htm>.

Quebec, Ministère du Développement durable, de l'Environnement et des Parcs, News Release, "Quebec Announces the Protection of 3,220 Square Kilometres of Territory in Northwestern Quebec "(4 March 2003), online: Ministère du Développement durable, de l'Environnement et des Parcs <http://www.mddep.gouv.qc.ca/biodiversite/aires_protegees/actions-en.htm>.

Quebec, Ministère du Développement durable, de l'Environnement et des Parcs, News Release, "Quebec Passes a Historic Milestone in the Protection of its Biodiversity" (29 March 2009), online: Ministère du Développement durable, de l'Environnement et des Parcs <http://www.mddep.gouv.qc.ca/biodiversite/aires_protegees/actions-en.htm>.

Ramos, Howard. "National Recognition Without a State: Cree Nationalism *Within* Canada" (2000) 6(2) Nationalism and Ethnic Politics 95.

Richardson, Boyce. *Strangers Devour the Land* (White River Junction, VT: Chelsea Green Publishing Co., 1991).

Rodon, Thierry. "Co-management and Self-determination in Nunavut" (1998) 22(2) Polar Geography 119.

Rusnak, Gerett. *Co-Management of Natural Resources in Canada: A Review of Concepts and Case Studies* (Ottawa: International Development Research Centre, 1997).

Rynard, Paul. "Allly or Colonizer? The Federal State, the Cree Nation and the James Bay Agreement" (2001) 36(2) Journal of Canadian Studies 8.

Saganash, Romeo. "The Paix des Braves: An Attempt to Renew Relations with the Cree" in Thibault Martin & Steven M. Hoffman, eds., *Power*

Struggles: Hydro Development and First Nations in Manitoba and Quebec (Winnipeg: University of Manitoba Press, 2008).

Said, Edward. *Culture and Imperialism* (New York: Vintage Books, 1993).

Samuel, Henry. "French MPs Vote in Favour of Banning Burka" The Daily Telegraph (13 July 2010), online: The Telegraph Group: <http://www.telegraph.co.uk/>.

Saul, John Ralston. *A Fair Country: Telling Truths About Canada* (Toronto: Penguin, 2008).

Scott, David. "Culture in Political Theory" (2003) 31(1) Political Theory 92.

Tully, James. "Recognition and Dialogue: The Emergence of a New Field" (2004) 7(3) Critical Review of International Social and Political Philosophy 84.

Scott, Colin. "Co-Management and the Politics of Aboriginal Consent to Resource Development: The *Agreement Concerning a New Relationship between Le Gouvernement du Québec and the Crees of Québec* (2002)" in Michael Murphy, ed., *Canada: The State of the Federation: Reconfiguring Aboriginal-State Relations* (Montreal & Kingston: McGill-Queen's University Press, 2003) 133.

Scott, Colin & Webber, Jeremy. "Conflicts between Cree Hunting and Sport Hunting: Co-Management Decision-Making at James Bay" in Colin Scott, ed., *Aboriginal Autonomy and Development in the Canadian Provincial North* (Vancouver: University of British Columbia Press, 2001) 149.

Tamanaha, Brian. "A Non-Essentialist Version of Legal Pluralism" (2000) 27 Journal of Law and Society 296.

Tawake, Alifereti & Tuivanuavou, Silika. "Community Involvement in the Implementation of Ocean Policies: The Fiji Locally Managed Marine Network" in Anne Caillaud et al., *Tabus or not Taboos? How to use traditional environmental knowledge to support sustainable development of marine resources in Melanesia* (December 2004) 17 SPC Traditional Marine Resource Management and Knowledge Information Bulletin.

Taylor, Charles. *Sources of the Self: The Making of the Modern Identity* (Cambridge, UK: Cambridge University Press, 1989).

Taylor, Charles. "The Politics of Recognition" in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1992) 25.

Tully, James. “Introduction” in James Tully & Alain Gagnon, eds., *Multinational Democracies* (Cambridge, UK: Cambridge University Press, 2001) 1.

Tully, James. *Strange Multiplicity: Constitutionalism in an Age of Diversity* (New York: Cambridge University Press, 1995).

Turpel, Mary Ellen. “Indigenous Peoples’ Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition” (1992) 25 Cornell Int’l L.J. 579.

United Nations Development Program (UNDP), *Learning from the Practitioners: Benefit Sharing Perspectives from Enterprising Communities* (October 2009) online: Equator Initiative <http://www.equatorinitiative.org/index.php>.

Veitayaki, Joeli. “Taking Advantage of Indigenous Knowledge: The Fiji Case” (2002) 54(3) International Social Science Journal 395.

Von Benda-Beckmann, Franz. “Who’s Afraid of Legal Pluralism?” (2002) 47 J. Legal Pluralism & Unofficial L. 37.

Waskaganish First Nation, “Muskuuchii: More than a Mountain” (undated), online: Grand Council of the Crees <http://www.gcc.ca/cra/environment.php>.

Webber, Jeremy. “Legal Pluralism and Human Agency” (2006) 44(1) Osgoode Hall L. J. 167.

Wemindji Protected Area Project, “The Wemindji Protected Area Project: Environment, Development and Sustainability in Eastern James Bay” (2006) online: The Wemindji Protected Area Project <http://www.wemindjiprotectedarea.org/>.

Wiber, Melanie & Kearney, John. “Learning Communities and Legal Spaces: Community-Based Fisheries Management in a Globalizing World” in Franz von Benda-Beckmann et al., eds., *The Power of Law in a Transnational World: Anthropological Enquiries* (New York: Berghahn Books, 2009) 137.