PART TWO

A Note About Sources

Among the sources referred to in this report, readers will find mention of testimony given at the Commission’s public hearings; briefs and submissions to the Commission; submissions from groups and organizations funded through the Intervener Participation Program; research studies conducted under the auspices of the Commission’s research program; reports on the national round tables on Aboriginal issues organized by the Commission; and commentaries, special reports and research studies published by the Commission during its mandate. After the Commission completes its work, this information will be available in various forms from a number of sources.

This report, the published commentaries and special reports, published research studies, round table reports, and other publications released during the Commission’s mandate will be available in Canada through local booksellers or by mail from

Canada Communication Group — Publishing
Ottawa, Ontario
K1A 0S9

A CD-ROM will be published following this report. It will contain the report, transcripts of the Commission’s hearings and round tables, overviews of the four rounds of hearings, research studies, the round table reports, and the Commission’s special reports and commentaries, together with a resource guide for educators. The CD-ROM will be available in libraries across the country through the government’s depository services program and for purchase from

Canada Communication Group — Publishing
Ottawa, Ontario
K1A 0S9

Briefs and submissions to the Commission, as well as research studies not published in book or CD-ROM form, will be housed in the National Archives of Canada after the Commission completes its work.

A Note About Terminology

The Commission uses the term *Aboriginal people* to refer to the indigenous inhabitants of Canada when we want to refer in a general manner to Inuit and to First Nations and Métis people, without regard to their separate origins and identities.
The term *Aboriginal peoples* refers to organic political and cultural entities that stem historically from the original peoples of North America, not to collections of individuals united by so-called ‘racial’ characteristics. The term includes the Indian, Inuit and Métis peoples of Canada (see section 35(2) of the *Constitution Act, 1982*). *Aboriginal people* (in the singular) means the individuals belonging to the political and cultural entities known as Aboriginal peoples.

The term *Aboriginal nations* overlaps with the term Aboriginal peoples but also has a more specific usage. The Commission’s use of the term nation is discussed in some detail in Volume 2, Chapter 3, where it is defined as a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or collection of territories.

The Commission distinguishes between local communities and nations. We use terms such as a *First Nation community* and a *Métis community* to refer to a relatively small group of Aboriginal people residing in a single locality and forming part of a larger Aboriginal nation or people. Despite the name, a First Nation community would not normally constitute an Aboriginal nation in the sense just defined. Rather, most (but not all) Aboriginal nations are composed of a number of communities.

Our use of the term *Métis* is consistent with our conception of Aboriginal peoples as described above. We refer to Métis as distinct Aboriginal peoples whose early ancestors were of mixed heritage (First Nations, or Inuit in the case of the Labrador Métis, and European) and who associate themselves with a culture that is distinctly Métis. The more specific term *Métis Nation* is used to refer to Métis people who identify themselves as a nation with historical roots in the Canadian west. Our use of the terms Métis and Métis Nation is discussed in some detail in Volume 4, Chapter 5.

Following accepted practice and as a general rule, the term *Inuit* replaces the term *Eskimo*. As well, the term *First Nation* replaces the term *Indian*. However, where the subject under discussion is a specific historical or contemporary nation, we use the name of that nation (e.g., Mi’kmaq, Dene, Mohawk). Often more than one spelling is considered acceptable for these nations. We try to use the name preferred by particular nations or communities, many of which now use their traditional names. Where necessary, we add the more familiar or generic name in parentheses — for example, Siksika (Blackfoot).

Terms such as Eskimo and Indian continue to be used in at least three contexts:

1. where such terms are used in quotations from other sources;

2. where Indian or Eskimo is the term used in legislation or policy and hence in discussions concerning such legislation or policy (e.g., the *Indian Act*; the Eskimo Loan Fund); and
3. where the term continues to be used to describe different categories of persons in statistical tables and related discussions, usually involving data from Statistics Canada or the Department of Indian Affairs and Northern Development (e.g., status Indians, registered Indians).

4

Lands and Resources

We find ourselves without any real home in this our own country ... owing to the inadequacy of most of our reservations, some having hardly any good land, others no irrigation water etc., our limitations re pasture lands for stock owing to fencing of so-called government lands by whites ... the depletion of salmon by overfishing of the whites ... . In many places we are debarred from camping, travelling, gathering roots and obtaining wood and water as heretofore. Our people are fined and imprisoned for breaking the game and fish laws and using the same game and fish which we were told would always be ours for food. Gradually we are becoming regarded as trespassers over a large portion of this our country ... . We have no grudge against the white race as a whole nor against the settlers, but we want to have an equal chance with them of making a living ... . It is their government which is to blame by heaping up injustice on us. But it is also their duty to see their government does right by us, and gives us a square deal. We condemn the whole policy of the B.C. government towards the Indian tribes of this country as utterly unjust, shameful and blundering in every way.¹
We hold this piece of land as our own home. When our great grandfathers came to that piece of land they said they would never move from it and that it was going to be their permanent home. We are still in occupation of it and we ask that the Indian Affairs Branch produce whatever documents they have dealing with this land so that everything may be settled, once and for all.²

THE COMMISSION WAS ASKED TO INVESTIGATE and make concrete recommendations on “the land base for Aboriginal peoples, including the process for resolving comprehensive and specific claims, whether rooted in Canadian constitutional instruments, treaties or in Aboriginal title”. In Chapter 3, we discussed the recognition of Aboriginal peoples as self-governing political entities within Canada. Governance is inseparable from lands and resources. If self-government is to be a reality, then Aboriginal people need substantially more lands and resources than they have now. While these alone cannot guarantee self-reliance, Aboriginal peoples will be unable to build their societies and economies without an adequate land base.

Except in the far north (including northern Quebec), where comprehensive claims settlements since 1975 have improved the situation, the present land base of Aboriginal communities is inadequate. Lands acknowledged as Aboriginal south of the sixtieth parallel (mainly reserves) make up less than one-half of one per cent of the Canadian land mass.³ Much of this land is of marginal value. In the United States (excluding Alaska) — where Aboriginal people are a much smaller percentage of the total population — the comparable figure is three per cent. In fact, as Robert White-Harvey points out, “all of the reserves in every province of Canada combined would not cover one-half of the reservation held by Arizona’s Navajo Nation”. ⁴ The accompanying maps (Figures 4.1, 4.2 and 4.3) graphically illustrate these differences.
We have therefore concluded that the current land base of Aboriginal peoples should be expanded significantly. In addition, there should be a significant improvement in Aboriginal access to or control over lands and resources outside the boundaries of this expanded land base. Put another way, Aboriginal people must have self-governing powers over their lands, as well as a share in the jurisdiction over some other lands and resources to which they have a right of access. This is both a matter of justice — of redressing past wrongs — and a fundamental principle of the new relationship with Aboriginal people that we are proposing throughout this report. How we reach that goal, while overcoming the many problems that stand in the way, is the subject of this chapter.

1. The Case for a New Deal

As the two quotations at the beginning of the chapter make clear, Aboriginal peoples have had great difficulty preserving a home in what has always been their country. Throughout our hearings, Aboriginal people told us about the past loss of their reserve or community lands and their inability to secure additional lands for a growing population. They also spoke eloquently about the difficulties they have experienced in participating in the resource economy; about the impact of what they see as uncontrolled development or environmental degradation of their traditional territories; and about the lack of recognition of their treaty and Aboriginal harvesting rights. Throughout this chapter, we use the terms ‘traditional territory’ and ‘traditional land-use area’ synonymously.

Land is absolutely fundamental to Aboriginal identity. We examine how land is reflected in the language, culture and spiritual values of all Aboriginal peoples. Aboriginal concepts of territory, property and tenure, of resource management and ecological knowledge may differ profoundly from those of other Canadians, but they are no less entitled to respect. Unfortunately, those concepts have not been honoured in the past, and Aboriginal peoples have had great difficulty maintaining their lands and livelihoods in the face of massive encroachment.
This encroachment is not ancient history. In addition to the devastating impact of settlement and development on traditional land-use areas, the actual reserve or community land base of Aboriginal people has shrunk by almost two-thirds since Confederation, and on-reserve resources have largely vanished. The history of these losses includes the abject failure of the Indian affairs department’s stewardship of reserves and other Aboriginal assets. As a result, Aboriginal people have been impoverished, deprived of the tools necessary for self-sufficiency and self-reliance.

Aboriginal peoples have not been simply the passive victims of this process. They have used any means at their disposal to halt the relentless shrinkage of their land base. From an Aboriginal perspective, treaties were one means to that end. But Aboriginal people insist that the Crown has failed to uphold those agreements and has generally broken faith with them. And since the nineteenth century, they have continuously protested — to government officials, to parliamentary inquiries, and in the courts — what they see as the resulting inequity in the distribution of lands and resources in this country.

There is a strong moral case, then, for improving Aboriginal access to lands and resources. But there are also many pragmatic reasons. One is the sheer cost of the present system of programs and services for First Nations, Inuit and, to a lesser extent, Métis people. Improved access to lands, resources and resource revenues will finance at least some of the costs of self-government.

An equally important reason is that conflict over lands and resources remains the principal source of friction in relations between Aboriginal and other Canadians. If that friction is not resolved, the situation can only get worse, as events between the summers of 1990 and 1995 have already shown.

The confrontation at Kanesatake (Oka) was much more than a trivial dispute over the location of a golf course. Like most Aboriginal communities, the Mohawk people of Kanesatake were seeking to secure their land base. In this particular instance, the interests of the neighbouring municipality of Oka became caught up in a three-way dispute between the Kanesatake community, Canada and Quebec over title to land. That dispute, which dates to the early eighteenth century (see Volume 1, Chapter 7), remains unresolved.

This was not an isolated incident. Also during the summer of 1990, a group from the Blackfoot Confederacy called the Lonefighters tried to halt construction of an irrigation dam on the Oldman River in southern Alberta, citing potential environmental damage to their communities and loss of traditional livelihood. This provoked an immediate reaction from the provincial government and area farmers, who expected to benefit from the regulation of water flow on the river. In northern Ontario, members of three Ojibwa bands blocked railway lines in support of their claims to a greater share in the allocation of local lands and resources. At Ontario’s Ipperwash Provincial Park, members of the Kettle and Stoney Point First Nations communities, claiming the park contained burial sites, clashed with provincial police in the fall of 1995, resulting in the death of one of the protesters.
Since 1973, when members of the Ojibwa Warrior Society occupied Anishinabe Park in the northwestern Ontario town of Kenora, there has been a marked increase in this kind of Aboriginal protest and accompanying counter-reaction. The Cree people of Lubicon Lake in northern Alberta have attempted to halt oil and gas exploration in their traditional territories in support of their claim to land, angering industry and the provincial government. The Innu people in Labrador have occupied the airport runway at Happy Valley-Goose Bay to protest low-level training flights over their hunting grounds, antagonizing the military and other residents of the region. Mi’kmaq people in Quebec and New Brunswick have been involved in armed confrontations with provincial game wardens and police officers, as well as federal fisheries officials, over fishing rights in the Restigouche and Miramichi rivers.

In the Temagami region of Ontario and in various parts of British Columbia, Aboriginal people (often in association with environmentalists) have blockaded access roads to protest timber harvesting practices on traditional lands and, in the process, they have attracted counter-protests from residents of rural and remote logging communities. New allocations of fishing rights to Aboriginal people in British Columbia and Ontario also have attracted public protest.

Aboriginal actions over the past two decades have not been limited to high-profile blockades and other forms of direct action. Some groups — such as the Nisg̱a’a and the Gitksan and Wet’suwet’en in British Columbia — have tried to have their Aboriginal title recognized in Canadian courts. Others have been able to persuade courts to acknowledge their treaty or Aboriginal rights as a shield against prosecution for violation of provincial and federal fish and wildlife legislation. Still other Aboriginal groups have taken part in long (and costly) hearings about the potentially adverse effects of development, such as the Berger inquiry of the mid-1970s.

Many representations were made on these matters at the Commission’s hearings. While these suggested a general commitment to sharing and reconciliation, we recognize that solutions based on those principles will not be easy. Any redistribution of lands and resources must be just and equitable to all concerned. Aboriginal people should not be surprised if, when rights and property are at stake, other Canadians react with surprise, concern or indignation at the assertion of their rights.

In Ontario, for example, the Algonquin people of Golden Lake have laid claim to much of Algonquin Provincial Park, attracting vocal opposition from parks and wilderness advocates as well as from local citizens. In the nearby Muskoka district, property owners on Gibson Lake — most of them urban dwellers from Toronto and other parts of the province — are concerned that their Mohawk neighbours from the Wahta Reserve might gain control of Crown land surrounding their cottages, as well as access routes to them. The Commission has heard from many groups, including municipalities, western ranchers, and recreational hunters and anglers, who express similar concerns about the potential impact of any expansion in the reserve land base or an increase in Aboriginal control over off-reserve lands and resources.
It is nevertheless essential for Canadians to understand that these are not new problems. The basic difficulty — given the change in power relationships between Aboriginal people and other Canadians over the past century or more — has been that, until very recently, governments have either ignored or failed to address the basic issues. Now the time of reckoning has arrived.

The Commission believes strongly that negotiations provide the best hope for a solution to these issues. Further confrontation will not bring social peace; continued resort to the courts is not only expensive, it risks outcomes (because of the all-or-nothing nature of the process) that may be unacceptable to all sides. But before there can be real negotiations, the power imbalance between Aboriginal governments and federal and provincial governments must be addressed.

One important step will be to alter the process for resolving what are referred to by governments as land claims. Although there have been some improvements in the two decades since federal claims policies were first introduced, opinion is virtually unanimous that the present system does not work. The system is generally inequitable, inefficient, time consuming and far too expensive. And it places the department of Indian affairs in a clear conflict of interest as funding agent, defence counsel, judge and jury.

But if Aboriginal people are to obtain a greater share of lands and resources in this country, existing claims processes are not the sole obstacle. A fundamental difficulty, and one that has had a major influence on government claims policy, is how governments and the courts have interpreted the law of Aboriginal title. In our report on federal extinguishment policy, we concluded that blanket or partial extinguishment should not be a requirement of future claims settlements. The Commission believes strongly that doctrines such as extinguishment and frozen rights — not to mention the very exacting tests that Aboriginal people are being asked to meet to prove their title — are an embarrassment. It should be distasteful for Canadians to rely on inappropriate nineteenth-century (or earlier) attitudes to Aboriginal peoples. But so long as Canadian governments continue to argue some or all of these doctrines, there can be no just resolution of Aboriginal claims.

Effecting a new and equitable distribution of lands and resources will require more than new claims processes or legal arrangements, for there are many other blockages to be overcome. The state of the law has influenced how constitutional powers have been distributed, leaving little room for Aboriginal title and jurisdiction. The mandate and operating styles — in short, the institutional interests — of both provincial and federal resource management agencies and the department of Indian affairs often make it difficult to implement treaty provisions and claims settlements. Resource policies, which are based on state management and open access, have seldom respected treaty and Aboriginal rights, and they continue to result in Aboriginal exclusion from traditional territories. These policies generally reflect the views of the dominant society on matters of property or resource rights, views that have often conflicted with those of Aboriginal people. As an example, the Commission heard from many non-Aboriginal Canadians
who see fish, wildlife, and parks as common property resources to which Aboriginal people should have no special rights.

What these various blockages really represent is a clash between two fundamental visions of the relationship between Aboriginal and other Canadians. What Aboriginal people see as their traditional territories are treated by governments and society as ordinary Crown or public lands. The philosophy that prevailed for more than a century and that shaped the present situation (especially south of the sixtieth parallel) supported confining Aboriginal people to reserves and assuming control of the rest of the land. Under the *Constitution Act, 1867*, the provinces were the chief beneficiaries of this approach to the division of lands.

This approach has not worked and cannot work. The Aboriginal principles of sharing and coexistence offer us the chance for a fresh start. Canadians have an opportunity to address the land question in the spirit of these principles.

In this chapter we outline our proposals to implement the Aboriginal concept of sharing on a reasonable and equitable basis and thereby improve their access to lands and resources. The spur to action is provided by legal developments over the past several years, which are already improving the standing of Aboriginal people in negotiations. Recent Supreme Court decisions such as *Simon* and *Sparrow*, for example, have acknowledged that Aboriginal title is a unique or *sui generis* interest in land. Accordingly, Aboriginal people have now an opportunity to explain to other Canadians their understanding of the nature of their title and the sources of its uniqueness.

The other major legal development, emanating from the Supreme Court judgements in *Guerin* and *Bear Island*, is the concept of the Crown’s fiduciary or trustee obligations to Aboriginal peoples. What Aboriginal people see as a breach of faith — already the subject of most specific land claims — can also be viewed as a breach of the Crown’s fiduciary duties. The concept of fiduciary duty has other important implications as well, since section 35 of the constitution gives protection to “existing treaty and Aboriginal rights”. It is the Commission’s view that Aboriginal people now have the standing to challenge past and present Crown conduct with respect to their rights.

The Crown’s fiduciary duty also means that Parliament has a positive obligation to enact a fair and effective process to facilitate negotiated solutions concerning the recognition and protection of Aboriginal rights to lands and resources. The new approach to treaty implementation and renewal and treaty making, proposed in Chapter 2, would replace the current land claims processes. The new approach would be based on respect for the treaty relationship and would remove the department of Indian affairs from its present controlling and conflicting role. As part of that solution, we recommend the creation of a new Aboriginal Lands and Treaties Tribunal, which would have binding powers over an enlarged category of specific claims and would play a facilitating role with respect to the treaty processes set out Chapter 2.
Treaty making — in areas where no treaties exist at present — and implementing and
renewing existing historical treaties is the proper way to negotiate an expanded land and
resource base for Aboriginal peoples. The Commission believes that the same general
goals should apply to both categories of treaty. It would be inequitable if Aboriginal
people who signed earlier treaties were prejudiced as far as the applicable principles are
concerned in comparison with those taking part in modern agreements.

For that reason, we outline a model land regime, involving the recognition of three
different categories of land (Aboriginal land, shared land and Crown land) in which the
respective rights of Aboriginal people and other Canadians would be clearly identified
and balanced differently than under the present system. On lands in the first category
(which would include those lands now called Indian reserves), full rights of beneficial
ownership and primary, if not exclusive, jurisdiction in relation to lands and resources
would belong to the Aboriginal party in accordance with the traditions of land tenure and
governance of the people in question. Aboriginal understandings of their title with respect
to such lands could be recognized more or less in their entirety, leaving the people free to
structure their relationship with the lands in accordance with their own world view.

On lands in the second category, which would comprise a portion of the Aboriginal
party’s traditional lands, a number of Aboriginal and Crown rights with respect to land
would be recognized by the agreement, and rights of governance and jurisdiction would
be shared among the parties. Co-jurisdiction or co-management bodies, which could be
based on the principle of parity of representation among parties to the treaty, could be
empowered to manage the lands and direct and control development and land use.

On lands in the third category, a complete set of Crown rights with respect to land and
governance would be recognized by agreement. Even on lands in this category, however,
some Aboriginal rights could be recognized, to acknowledge that Aboriginal peoples
enjoy historical and spiritual relationships with such lands. For example, Aboriginal
people, as a matter of protocol, could serve as diplomatic hosts at significant events of a
civic, national or international nature that take place on their territory.

This new approach must, of course, take into consideration the existing rights of the
public and of third parties with property interests. The Commission has listened carefully
to the concerns expressed by many Canadians about the practical cost of implementing
treaty rights and land claims, and we have heard the voices of non-Aboriginal residents in
rural and remote parts of Canada who feel excluded by their governments from
negotiations with Aboriginal people that might affect them. We therefore outline the
principles we believe should govern the selection of lands and resources in treaty
negotiations and offer some suggestions for how to accommodate existing rights in new
agreements. Fundamentally, however, we believe that a co-operative approach to land
and resource management in shared areas can lead to solutions that increase equity,
efficiency and sustainability for all Canadians, not just for Aboriginal people.

Several examples of co-operative land and resource management already exist in Canada.
We discuss these examples later in this chapter in the context of interim measures to be
implemented while the proposed treaty processes are going on. These would go a long way toward expanding the Aboriginal land base and improving access to natural resources. Commissioners realize that it will take time to make the fundamental changes to law and process that we are recommending. In some jurisdictions, governments and Aboriginal peoples have already worked out some innovative new approaches to lands and resources. These deserve to be highlighted.

Expanding the Aboriginal land and resource base is not just about honouring past obligations or paying a moral debt to Aboriginal people. It is about laying a firm consensual foundation for a new relationship between Aboriginal and non-Aboriginal Canadians, one of fair sharing of Canada’s enormous land mass, of mutual reconciliation and of peaceful co-existence. Without it there can be no workable system of Aboriginal self-government. There can only be a continuing clash of cultures and interests. The Commission believes it is time to put this behind us — it has gone on far too long already — to sit down at the negotiating table, and to work out our differences in a spirit of co-operation and good faith.

We trust, however, that these negotiations will be guided by one of the fundamental insights from our hearings: that is, to Aboriginal peoples, land is not just a commodity; it is an inextricable part of Aboriginal identity, deeply rooted in moral and spiritual values.

2. A Story

In Dene Th’a (Slavey) communities of northwestern Alberta, religious leaders still sing Nógha’s Song (see box), accompanying themselves on the traditional skin drum. The words belonged to Nógha (wolverine), a Dene prophet from the Bistcho Lake region who died in the mid-1930s. The song expresses the sadness the singer feels for his departed parents and is also a prayer for the land itself, which the singer recognizes as a gift from the Creator.

Nógha’s Song

Hee di d´geh elin. Hey, this is the land.

Hee hee hi-a hi-a. He hey hia hia. Ndahet‡ d´geh elin. It is God’s land. Hee hee hi-a hi-a. Hey hey hia hia. Ane la hia hi-a hi-a. Mother! la hia hia hia.

Set‡ la d´geh elin. It is my father’s land.

Ane la d´geh elin. It is my mother’s land.

Hee hee hi-a hi-a. Hey hey hia hia. Set‡ d´geh elin-a. It is my father’s land.

Ha ha hi-a hi-a. Ha ha hia hia Hee hee hee. Hey hey hey.
For the prophets, who are called ndatin (dreamers), traditional stories of animal people and culture heroes furnish the landscape for their dreams and visions. Shin (songs) provide the trail through that landscape. Unlike the modern western tradition that divides music into sacred and secular forms, all Dene Th’a songs are prayers, which are most often directed at the spirits of natural forces, of animals or of people who have died.

Aspiring religious leaders learn to sing the songs of Nógha and the other prophets who have come before them. This allows them both to acquire their own songs and to develop their special ability to direct dreams. Like other Aboriginal societies in Canada and throughout the world, Dene Th’a hold that powerful individuals can pass at will between the material and spiritual worlds, travelling long distances as they sleep. The most skilled prophets, they say, can locate moose in the bush by dreaming, and the prophecies they bring back from the spirit world are invariably proven true.

The prophet Nógha is especially well remembered for the accuracy of his dreams and predictions. Though at the time of his death Dene Th’a were still living for most of the year in small encampments out on the land, Nógha had already witnessed the influence of Canadian frontier society on areas immediately to the north and south. He urged his people to protect their culture by keeping their games, their stories and their songs. According to his spiritual heirs and descendants, he also foresaw the day when they would end up confined to small parcels of land. Don’t live on those reserves, he warned them, “because people will be roaming about like packs of dogs”. Nógha, they say, also warned of the impact of alcohol on communities and predicted that the payment of money or other forms of government assistance would be a mixed blessing for his people. One of Nógha’s last prophecies was that the traditional territories of Dene Th’a would one day be covered with satsóné (metal) — which they interpret as a reference to the pipes, seismic lines, and other modern installations of the oil and gas companies.⁹

When Dene Th’a elders speak of the land, therefore, it is with a sense of loss. Within two decades of Nógha’s death their lives had changed a great deal. Instead of dwelling in their small bush encampments, most Dene Th’a now live year-round in the communities of Bushie River, Assumption and Meander River. These are three of the eight small parcels of reserve land (see Figure 4.4) that the department of Indian affairs began surveying in 1946 for the Slavey people of the upper Hay River, as the federal government then called Dene Th’a.¹⁰ Although they had been formally recognized as far back as 1900, when Nógha and others took part in an adhesion to Treaty 8 signed at Fort Vermilion, no reserves had ever been set apart for their benefit. Post-war governments wanted to
persuade northern Aboriginal people like Dene Th’a to form more concentrated settlements so that they could be more easily assimilated into mainstream society. This process, which was encouraged by the Catholic missionaries who built a mission and residential school at Assumption in 1951, spurred the growth of the three modern communities.¹¹

To Dene Th’a, this community land base is far from adequate. Over the last 50 years, their numbers have expanded to more than a thousand people. For that reason, they are in the process of challenging the federal government that their total entitlement to reserve land under the treaty has not been fulfilled. The department of Indian affairs refers to this sort of grievance as a specific land claim and has developed policy criteria for dealing with such issues. Even if Dene Th’a are successful,

however, their room for community expansion may still be limited. Assumption itself is in the middle of a large oil field, and the province of Alberta, which has constitutional jurisdiction over public lands and resources, has granted various kinds of development rights to other parties on the lands that surround the three reserve communities. Current federal policy requires that such rights be respected in land claims settlements.

As matters now stand, Dene Th’a have no say in the awarding of development rights on their traditional territories, nor do they receive guarantees of employment benefits. They do not share in resource revenues or receive compensation for disruption of their lifestyle, and they are not represented in the municipal government structures that cover their traditional lands. Canada and Alberta take the position that any rights Dene Th’a may have had to lands outside their reserves were extinguished absolutely — according to the text of the document — by Treaty 8.

Both governments do acknowledge that Dene Th’a have treaty hunting, fishing and trapping rights on unoccupied Crown lands and waters — but for subsistence purposes only, as defined by government. Dene Th’a have no priority allocation or special rights to fish and game within their traditional territories, which are open to licensed recreational hunters and anglers from Alberta and elsewhere. Nor are Dene involved in the management of game, fish and fur-bearing animals — although their hunters complain that moose have declined in number with the opening of access roads and loss of habitat. And while their traditional territories span (like Treaty 8 itself) portions of northeastern British Columbia and the southern Northwest Territories, wildlife officials in those jurisdictions have often been reluctant to acknowledge the harvesting rights of people they see as ‘Alberta Indians’.

For many years now, other people have been coming to live along the upper Hay River, though Dene Th’a still outnumber them. Those who have stayed throughout the up and down cycles of the local resource industries have developed their own attachment to the land. They hunt and fish, canoe the rivers, build cabins in the woods and ride horses along local trails. But few of them know about Yamahndeya, the culture hero who killed the animal monsters in ancient times and made the upper Hay River area safe for human life; nor have they heard Dene Th’a stories about the animal helpers, wolf and wolverine.
They do not know that some of their neighbours from the reserve at Assumption were born at Bistcho Lake or at Amber River or at Rainbow Lake, nor do they know the meaning of the Dene names for those places.

When Nógha’s nephew, Alexis Seniantha, who succeeded him as the head prophet at Assumption, regularly crossed the British Columbia boundary to trap, he would head for July Lake, as it is now called. He knew this lake as ‘Ts’u K’edhe (Girls’ Place), so called because a very long time ago, two teenaged girls lived there alone all winter. He learned this from his father, Ahkimnatchie, who also told him that an earlier prophet named Gochee (brother) was buried near that same lake.

In 1979, Alexis Seniantha gave an account of Nógha’s prophecies to an assembly at Assumption of Aboriginal elders from across North America:

‘Nothing will happen to this land,’ Nógha said, ‘because the earth is tremendous. Anything can happen on the surface of the earth. There may be bad things happening, but if you yourself are a good person, you shouldn’t worry about these things,’ he often told us. ‘Sometimes far off there may be a huge wind,’ he said, ‘but it avoids us as long as even one person prays.’ He prayed for us, for the future, I think.\textsuperscript{12}

3. Lands and Resources: Background

3.1 Lessons from the Hearings

The themes of Nógha’s songs and prophecies — nurturing communities, making a living, caring for the land — recurred throughout the Commission’s public hearings. We have no hesitation in saying that these themes unite all Canadians. In a country that still derives much of its culture and wealth from the land and its natural resources, this should not be
surprising. Over the course of our travels and meetings, the individuals and organizations that spoke to us about such issues, whether Aboriginal or non-Aboriginal, showed a common concern for social and economic well-being, for finding ways to provide for their children and future generations.

But while there are definite similarities, we also learned that there are profound differences between Aboriginal people and other Canadians over fundamental issues associated with lands and resources. As Chief Tony Mercredi of Fort Chipewyan in Alberta reminded us, much of the problem stems from the power imbalance in the current relationship:

Envision, if you will, a circle. The Creator occupies the centre of the circle and society ... revolves around the Creator.

This system is not based on hierarchy. Rather, it is based on harmony. Harmony between the elements, between and within ourselves and within our relationship with the Creator. In this circle there are only equals.

Now, envision a triangle. This triangle represents the fundamental elements of the Euro-Canadian society. Authority emanates from the top and filters down to the bottom. Those at the bottom are accountable to those at the top, that is control. Control in this society is not self-imposed, but rather exercised by those at the top upon those beneath them.

In this system the place of the First Nations peoples is at the bottom. This is alien to the fundamental elements of our society, where we are accountable only to the Creator, our own consciences and to the maintenance of harmony.

By having the institutions and regulations of the Euro-Canadian society imposed upon us, our sense of balance is lost.

Chief Tony Mercredi
Athabasca Chipewyan First Nation Community
Fort Chipewyan, Alberta, 18 June 1992

The songs of the prophet Nógha convey this idea of harmony in the relationship between the earth and all those who inhabit the lands and waters. This fundamental tenet of Aboriginal spirituality was repeated to us many times during the hearings by individuals like Elder Alex Skead in Winnipeg:

We are so close to the land. This is my body when you see this mother earth, because I live by it. Without that water, we dry up, we die. Without food from the animals, we die, because we got to live on that. That’s why I call that spirit, and that’s why we communicate with spirits. We thank them every day that we are alive ...

Elder Alex Skead
Winnipeg, Manitoba
22 April 1992
Some Canadians told us that they find resonance in such insights, because they provide a kind of spiritual content that is often missing from public discourse on land and resource issues. Mavis Gillie of Project North, an inter-church coalition in support of Aboriginal peoples, made this point in her appearance before the Commission:

The chief lesson I think I have learned all these years is that there is a moral and spiritual dimension to the right of Aboriginal peoples to be distinct peoples, their right to an adequate land base and the right to self-government.

I believe that the reason Canada has failed so miserably in the past in its relationship with First Peoples is that it failed to take into account the impact of this moral and spiritual dimension, and we had better not make the same mistake this time around.

Mavis M. Gillie
Project North
Victoria, British Columbia
22 May 1992

At the core of Aboriginal peoples’ world view is a belief that lands and resources are living things that both deserve and require respect and protection. Grand Chief Harold Turner of the Swampy Cree Tribal Council stressed that his people were “placed on Mother Earth to take care of the land and to live in harmony with nature”:

The Creator gave us life, inherent rights and laws which governed our relationship with nations and all peoples in the spirit of coexistence. This continues to this day.

We as original caretakers, not owners of this great country now called Canada, never gave up our rights to govern ourselves and thus are sovereign nations. We, as sovereign nations and caretakers of Mother Earth, have a special relationship with the land.

Our responsibilities to Mother Earth are the foundation of our spirituality, culture and traditions ... .Our ancestors did not sign a real estate deal, as you cannot give away something you do not own.

Grand Chief Harold Turner
Swampy Cree Tribal Council
The Pas, Manitoba, 20 May 1992

Aboriginal peoples believe, therefore, that lands and resources are their common property, not commodities to be bought and sold. Chief George Desjarlais of the West Moberly community in British Columbia told us that the principle of sharing formed the basis of arrangements made between his people and the Crown:

We are treaty people. Our nations entered into a treaty relationship with your Crown, with your sovereign. We agreed to share our lands and territories with the Crown. We did not sell or give up our rights to our land and territories. We agreed to share our custodial responsibility for the land with the Crown. We did not abdicate it to the Crown. We agreed to maintain peace and friendship among ourselves and with the Crown.
Aboriginal people also understand the treaties as instruments through which land-based livelihood and future self-sufficiency for themselves and the newcomers were secured. The late John McDonald, then Vice-Chief of the Prince Albert Tribal Council, stated emphatically that Aboriginal peoples never gave up their right to take part in the governance and management of lands and resources:

If the wealth of our homelands was equitably shared with us and if there is no forced interference in our way of life, we could fully regain and exercise our traditional capacity to govern, develop and care for ourselves from our natural resources. This is what was intended by the Creator, this is what our elders believe to be the true significance of our treaties. First Nations agreed to share the wealth of their homelands with the Crown, the Crown agreed to protect the First Nations and their homelands from forced interference into their way of life, i.e., culture, economy, social relations, and provide development and material assistance.

Vice-Chief John McDonald
Prince Albert Tribal Council
La Ronge, Saskatchewan, 28 May 1992

Many of the Aboriginal people who appeared before us expressed bitterness at the way they had been treated by society. Elder Moses Smith of the Nuu-chah-nulth Nation on Vancouver Island particularly objected to the assumption that Aboriginal people had not been making proper use of their lands and resources before the settlers arrived:

We got absolutely the short end of the stick. And to quote what was said, what was said of us, we, as Nuu-chah-nulth people, “These people, they don’t need the land. They make their livelihood from the sea.” ... So, here we have just mere little rock piles on the west coast of Vancouver Island, the territory of the Nuu-chah-nulth Nation. Rock piles! Rock piles!

Moses Smith
Nuu-chah-nulth Nation
Port Alberni, British Columbia, 20 May 1992

Many non-Aboriginal Canadians, however, interpret the treaty relationship differently. To Andy Von Busse of the Alberta Fish and Game Association, a modern society calls for modern rules and relationships:

We respectfully suggest that traditions are something that changes in all societies. As an example, Treaty 6 and Treaty 7 Indians in Alberta traditionally subsisted through the hunting of buffalo and, of course, that tradition is not something that could be carried out today because of other changing circumstances.

We feel that the principle of wildlife conservation must override that of treaty rights. Subsistence hunting and fishing should only be allowed in those areas where access to
other food sources is limited. Today’s realities are that most Canadians, whether status or otherwise, live within a reasonable driving distance of grocery stores. The reality is today, again the use of high-powered rifles, night lighting, four-by-four vehicles allow access and success that could not have been foreseen at the time that the treaties were signed.

Andy Von Busse
Alberta Fish and Game Association
Edmonton, Alberta, 11 June 1992

A basic consequence of such differences of opinion about the treaty relationship is that what Aboriginal people see as traditional land use areas, society considers to be lands and resources under public government. Public servants base their actions on the assumption that the Crown ultimately holds title to and hence jurisdiction over lands and resources, even those included within claims settlement agreements:

By encouraging the involvement of residents in renewable resource management, the Department has not compromised its mandate of managing resources ... .Even within land claim agreements, the Minister of Renewable Resources retains the final say in accepting management decisions.

Joe Hanly
Deputy Minister of Renewable Resources
Yellowknife, Northwest Territories, 9 December 1992

Implicit in this perspective is the idea that lands and resources can be separated into distinct units of specific rights of ownership and use by governments, private individuals and corporations. Glen Pinnell of Abitibi-Price Ltd. stressed the importance of the existing arrangements for resource industries and for their employees and their communities:

With the resource, it is important to all the communities. It is important to the livelihood of the mill. If the resource is not there, then there is no possibility for investing in the mill. In order to have the mill, there has to be the right or the commitment to have that resource.

Glen Pinnell
Abitibi-Price Ltd.
Fort Alexander, Manitoba, 30 October 1992

Many Canadians, then, regard access to Crown lands and to the resources on them as common property rights. In its brief to the Commission in September 1993, the Ontario Federation of Anglers and Hunters argued very forcefully that treaty and Aboriginal rights do not give Aboriginal people any exclusive privileges with regard to Crown lands and resources and that ultimately public government must retain the responsibility to manage and conserve those resources on behalf of all citizens:

Crown lands, and the indigenous natural resources they harbor, are held in trust by the Crown for the continued economic benefits, and social and cultural well being of all the
people of Ontario (i.e., society as a whole). Thus, together they are public common property resources. Concerning freeliving fish and wildlife, the protection against proprietary, possessionary claims extends even onto patented lands. No one person or group owns them! In effect, no individual, group of individuals, enterprise, or political entity can claim proprietary rights over them. Possessory rights to Crown lands are usually conveyed through tenure agreements and licences at fair market value, issued by the Crown for payment of fees/royalties. [emphasis in original]

Ontario Federation of Anglers and Hunters
Toronto, Ontario
3 May 1993

Some recreational hunters and anglers argue that Aboriginal and treaty rights in effect discriminate against poorer residents of rural and northern areas, who may have subsistence needs of their own. Lorne Schollar of the Northwest Territories Wildlife Federation urged that this “imbalance” be addressed, so as to foster better relationships between northern residents of all backgrounds:

We recognize and support the need for true subsistence hunting by Native people. There should, however, be a clear distinction made between actual subsistence hunting and perceived rights. Exclusive Aboriginal rights to hunt at any time of year and without restrictions can hardly be justified as subsistence when an individual is permanently employed.

On the other hand, a non-Aboriginal person, making the same or less money, is subject to strict harvest regulations. Licensing and reporting procedures that apply to all resource users alike are deemed essential components for effective wildlife conservation and management.

Lorne Schollar
Northwest Territories Wildlife Federation
Yellowknife, Northwest Territories
9 December 1992

The Commission was reminded throughout the hearings that non-Aboriginal Canadians have developed their own identity, history, sense of community, and ties to lands and resources. Don McKinnon, a prospector from Timmins, Ontario, spoke about the lives and livelihood of residents of rural and northern Canada:

Most people work in the north, and especially northern Ontario, because they like it. They work in resource industries and they enjoy the outdoors, for recreation such as skiing, snowmobiling, fishing and hunting. They also like the clean air and fresh water.

They are just as concerned as the Aboriginal about environmental issues and preserving the land and its wildlife. Forestry and mining depend on secure long-term access to Canada’s land base ... I love the fresh water and stately trees and clean air and fruitful land. I want my children and my grandchildren to develop the same strong feelings for the land. More than that, I pledge that there will be a place for them in Northern Ontario.
Many Canadians are seeking a sense of certainty, as Cor Vandermeulen of the British Columbia Federation of Agriculture put it, for rights of settlement and development in the face of Aboriginal claims to lands and resources:

Uncertainty comes when we hear statements from the Aboriginal leaders such as, “There will be a complete change in the power structure,” or “These lands that you are on belong to us.” Uncertainty comes when it seems that the indecisiveness of governments leads to higher and higher expectation from the Aboriginal community. Uncertainty comes when we hear that some Native nations want to return to a system of government that will give hereditary chiefs a major role in making decisions ...

I think, as far as the land question is concerned, we do need a high degree of certainty and finality, but we must proceed cautiously so that the final outcome will be fair and equitable for all parties ... We understand that the Aboriginal people have their aspirations as well and are entitled to seek redress for past injustices. In addressing these past injustices, we have to be careful that a whole new set of injustices is not created.

This perspective is understood by Aboriginal people, who are attempting to address issues of land and resource development within their own communities. Gilbert Cheechoo, a Cree from Moose Factory on James Bay, pointed out the error of assuming that Aboriginal people are automatically opposed to development:

So a lot of people get mixed up ... when we talk about resource development: the Indians want to keep their culture, the Indians want to trap on that land when they are sitting on a million dollars worth of gold. That is not the only thing we are talking about.

There are debates going on in our reserves right now, our communities, about resource development. But a lot of non-Native people don’t know that because they don’t take the initiative to find out if our people are talking about these things. They assume that everybody is against them saying, “They want to take our land. They want to take our rights to explore and to take resource development out ...”.

Resource development is a big issue that they talk about in our communities. What are we going to do? Some people say, “Well, we should go and negotiate and try to get a deal.” Some people say “no.”

There are, however, many reasons why Aboriginal people express concerns about resource development. We were reminded by Chief Allan Happyjack of Waswanipi,
Quebec, that his people have borne most of the costs, while reaping few of the benefits, of past development activities:

Our trees are gone. When the trees are gone, the animals are gone and all the land is destroyed. They all came from the outside, from non-native economic development. That is where we have our problems, with our hunting and fishing, our traditional way of life has been affected and these developments cause other problems from alcohol and drug abuse, but you have also heard about the dams and the flooding on the territory. You heard about forestry and those people that are leaders of Quebec and Canada, they are the ones that are letting the developers come into our territory to do what nobody has asked us, asked for our consent or to talk about it. Nobody asked us for our consent, if we approve or are in favour of these projects.

Chief Allan Happyjack
Cree First Nation of Waswanipi
Waswanipi, Quebec, 9 June 1992

We were told of similar kinds of pressure in other parts of Canada. Adrian Tanner of Memorial University in St. John’s, Newfoundland, pointed to the rapidity and scale of resource development in his own province:

There is now an increasing pace of large-scale development of the interior of the province. Much of this new activity is incompatible with Aboriginal patterns of land use and with how Aboriginal people envision their own futures. Labrador, in particular, is at a development threshold with actual and planned projects which include the expansion of military training activities, a highway which will, for the first time, open up large areas to contact through Baie Comeau with the rest of Canada, the proposed development of the Lower Churchill and other rivers for hydro-electricity, new mines and new forestry ventures.

The Mi’kmaq on the island of Newfoundland have already experienced the same kinds of intrusions, with the Upper Salmon hydro-electric project, extensive pulpwood cutting and mines, such as the one at Hope Brook.

Little has been done to protect Aboriginal interests in their unsurrendered traditional lands ...

Adrian Tanner
Native Peoples’ Support Group of
Newfoundland and Labrador
St. John’s, Newfoundland, 22 May 1992

As Max Morin of the Metis Society of Saskatchewan explained, these continuing, unresolved situations have fostered an increased and compounded sense of frustration, bitterness and resentment on the part of Aboriginal people across Canada and have led at times to conflict between Aboriginal communities:

One of the things I am really concerned about when we talk about self-government and Aboriginal rights is this land has always been ours ... I believe that and I continue to
believe that, but all of a sudden the government in 1930, the federal government, transferred it to the provincial government without consulting the people in northern Saskatchewan, especially the Aboriginal people.

Weyerhauser Canada, which is a pulp company operating out of Prince Albert, Saskatchewan; and Millar Western, which is a company operating out of Meadow Lake, Saskatchewan, have more rights to this land than we do. They have forest management lease agreements. They are clear cutting our livelihood, our traditional traplines and hunting areas. They are clear cutting right to the lakes, to the rivers. Our rivers are drying up. Our fish are dying out and yet as Aboriginal people when we make a stand and ask for our rights, the general public in Canada, the general public in Saskatchewan say we are a bunch of radicals.

Max Morin
Metis Society of Saskatchewan
La Ronge, Saskatchewan, 28 May 1992

However, in seeking redress for past wrongs as well as an expanded land and resource base, Aboriginal people told us that they are not advocating taking away the rights of others:

But in suggesting that we need a land base, we have to be very careful and we have to be honest in saying it’s not our ambition to build boats or to buy boats from the Gander Bay Indian Band Council and take all of the white people that live within our community or our surrounding community and put them in and send them off to drift. That’s not our ambition. We want to manage for us and for them also.

Calvin White
Flat Bay Indian Band
Gander, Newfoundland, 5 November 1992

When claims come to the table for our people we don’t want society as a whole to be scared of what might come down because we are not looking at making changes that are going to be severely adverse to non-Aboriginal people. We are not looking at chasing them out of this land. We’re prepared to sit and talk to them and negotiate and point out and work with them as to how we can both co-operate together.

Hereditary Chief Gerald Wesley
Kitsumkalum Band
Terrace, British Columbia, 25 May 1993

As Chief David Walkem from the Cooks’ Ferry community (Nlaks’Pamux Nation) in British Columbia made clear, many Aboriginal groups are willing to implement the notion of shared jurisdiction over territories, as embodied in their understanding of the treaties:

The first principle that has to be incorporated is an increased access to land and natural resources over and above the existing reservations we have been placed upon.
The second one is a shared management and control of all natural resources within our traditional territories, or the development of, for want of a better term, ‘interim partnership agreements’, with the specifics to be subject to negotiation.

Chief David Walkem  
Council of the Nlaks’Pamux Nation  
Merritt, British Columbia, 5 November 1992

Commissioners found that many Canadians would support measures that would constitute a significant break with the failed solutions of the past. Gordon Wilson, then opposition leader in British Columbia, and Denis Perron, a member of the Quebec National Assembly, emphasized the potential of new land and resource arrangements:

It is widely recognized that the legal and political structures which currently govern every aspect of the lives of Aboriginal people have been a complete failure. And the attempt at eradication of First Nations culture has left a legacy of poverty and injustice to Aboriginal people across Canada.

Accordingly, we believe that it is time to acknowledge the principle that Aboriginal people have with respect to their inherent right to govern themselves, a right which flows from their long-term occupation and use of the land, and a right which also flows from their long history of self-government, prior to European colonization.

Gordon F.D. Wilson, MLA  
Leader of the Official Opposition  
Esquimalt, British Columbia, 21 May 1992

Through agreements, it is possible to define the territory within which each Aboriginal nation will have the right to pursue its traditional activities. At the same time, these agreements could set up joint development and management mechanisms for these territories to allow for both traditional Aboriginal activities and sustainable natural resource development. Within the context of these agreements, an Aboriginal government could receive part of the income or royalties that the government of Quebec earns from exploiting resources within that territory. [translation]

Denis Perron, MNA  
Opposition Spokesperson on Aboriginal Affairs  
Mani-Utenam, Quebec, 20 November 1992

However, a fundamental issue is how non-Aboriginal Canadians are to be involved in resolving these issues. Commissioners recognize the frustration expressed by many participants in the hearings, including municipal representatives like Barrie Conkin, the mayor of North Battleford, Saskatchewan:

Thus far, federal and provincial governments have done all the negotiating of the framework agreements for treaty land entitlements and land claims. Municipal governments have not had input. The federal and provincial governments have made promises the ordinary citizen at the grassroots level does not understand and does not feel part of. This is true, as well, of local government. In other words, the federal and
provincial government can put a cheque in the mail but it is at the local level that natives and non-natives will have to implement and live with the actual changes. And profound changes there will be. To avoid the clash of anger and frustration on the native side with fear and uncertainty on the non-native side, it is imperative that people at this level, both native and non-native, be included in the process.

Barrie Conkin  
North Battleford, Saskatchewan  
29 October 1992

Similar concerns were expressed by Richard Martin of the Canadian Labour Congress:

We believe that labour should be treated as a stakeholder in third-party consultations anywhere in Canada, whether they involve treaty and land settlements, interim measures or co-management agreements with Aboriginal communities.

Governments have taken the position that third-party property rights that are diminished or taken away by Aboriginal land or treaty settlements should be protected or compensated. We believe that this principle should also apply to workers who are substantially affected by land and treaty settlements or other decisions involving Aboriginal groups.

Richard Martin  
Canadian Labour Congress  
Ottawa, Ontario, 15 November 1993

At an individual level, many residents of rural and northern Canada pride themselves on their pioneer ethos of self-sufficiency and self-reliance. As Don McKinnon put it, they are distrustful of government, which they see as dominated by urban concerns, and they too feel excluded from the negotiation of land claims agreements or other new arrangements with Aboriginal people:

We would like to suggest that the proper way to address the legitimate concerns of the Aboriginal peoples is one step at a time. Much as we recognize their frustration at the slowness of change and their desire to control their own affairs on their land, we feel two wrongs can never make a right ...

Natives cannot build a secure future on the wreckage of the lives of their non-Aboriginal neighbours. There has been too little consultation with the non-Aboriginal residents of northern Canada by the negotiating teams of Aboriginal and faceless bureaucrats ...

No elected or appointed body has the moral right to give away my heritage. No politician or bureaucrat with the wave of a pen will make me disappear. I am prepared to share with others, but I will not be pushed off my land or out of the north.

Don McKinnon  
Timmins, Ontario 5 November 1992
On the other hand, Aboriginal people told us that their relationship with other Canadians,
including the negotiation of land claims agreements, must be conducted on a
government-to-government basis. Chief Peter Quaw of Stoney Creek, British Columbia,
rejected any notion that Aboriginal people are simply one among many groups of
stakeholders who have interests in Crown lands and resources:

We are not just another ‘interest’ group within the province. We are a people with an
inherent right to govern ourselves and control our own resources and economies. We are
willing and interested in sharing with the non-Aboriginal peoples and governments, but it
must be a joint sharing through joint ventures based on equality, not subordination.

Chief Peter Quaw
Lheit-Lit’en Nation
Stoney Creek, British Columbia, 18 June 1992

Although the views expressed by Aboriginal and non-Aboriginal people are often
divergent, Commissioners believe that the concepts of coexistence and shared jurisdiction
over lands and resources may provide a unique window for reconciliation. It was
encouraging for us to hear the optimism of Canadians like Clifford Branchflower, mayor
of Kamloops, British Columbia:

I emphasize that whatever process takes place it is important that we do try to meet with
and understand one another ... .It is important that real effort be made to raise the level of
person-to-person and family-to-family understanding among our peoples.

I am convinced, being an optimist, that we can live together as neighbours in peace and
harmony and that we can enrich one another’s lives by our interactions ... .I don’t believe
we can afford not to make the effort to do so.

Clifford G. Branchflower
Kamloops, British Columbia
15 June 1993

According to environmental activist Henri Jacob, differences in views about Aboriginal
and treaty rights to lands and resources cannot be resolved without addressing the
relationship between diverse cultures. He also argued that reconciling these differing
perspectives on land would create opportunities and benefits for all Canadians:

Because of different mentalities and different origins ... there were always compromises
to be made, in order to reach agreement ... .There is also the question of consensus. We
were used to voting when there was disagreement. Most Canadian environmental groups
have now adopted the consensus approach to settling problems and various demands.

When we worked with Aboriginal people, the consensus mentality taught us the meaning
of the word ‘respect’. I am talking here not only about respect for individuals, but respect
for all parts of every ecosystem, considering ourselves as part of an ecosystem. This gave
us a different view of the world in general. [translation]
The fundamental concern of Aboriginal people, as expressed throughout the hearings, was that the resolution of land and resource concerns — including the recognition, accommodation and implementation of Aboriginal rights to and jurisdiction over lands and resources — is absolutely critical to their goals of self-sufficiency and self-reliance. Cliff Calliou of the Kelly Lake community in northeastern British Columbia made this linkage explicit in his testimony:

A land and resource base must also be provided. A land base is seen as essential for the long-term survival and betterment of our nation. The absence of a land and resource base is the source of poverty which exists amongst our people today. Total control of our own land and resources will generate economic development to create employment ... The Kelly Lake community is located within Treaty 8 territory. It is time that negotiations proceed. This community is ready to pave the way for other communities similar to ours to follow.

Cliff Calliou
Kelly Lake Community
Fort St. John, British Columbia
19 November 1992

To set the stage for discussing the kinds of changes that would make such goals a reality, we need to examine in more detail the background of the land and resource issues raised at the hearings. These issues did not arise in a vacuum but are the product of the complex interplay of culture, politics and the law in the almost five centuries since first contact between Europeans and the Indigenous peoples of North America.

3.2 Significance of Lands and Resources to Aboriginal Peoples

We lived a nomadic lifestyle, following the vegetation and hunting cycles throughout our territory for over 10,000 years. We lived in harmony with the earth, obtaining all our food, medicines and materials for shelter and clothing from nature. We are the protectors of our territory, a responsibility handed to us from the Creator. Our existence continues to centre on this responsibility.

Denise Birdstone
St. Mary’s Indian Band
Cranbrook, British Columbia, 3 November 1992

Aboriginal people have told us of their special relationship to the land and its resources. This relationship, they say, is both spiritual and material, not only one of livelihood, but of community and indeed of the continuity of their cultures and societies.

Many Aboriginal languages have a term that can be translated as ‘land’. Thus, the Cree, the Innu and the Montagnais say aski; Dene, digeh; the Ojibwa and Odawa, aki. To Aboriginal peoples, land has a broad meaning, covering the environment, or what
ecologists know as the biosphere, the earth’s life-support system. Land means not just the surface of the land, but the subsurface, as well as the rivers, lakes (and in winter, ice), shorelines, the marine environment and the air. To Aboriginal people, land is not simply the basis of livelihood but of life and must be treated as such.

The way people have related to and lived on the land (and in many cases continue to) also forms the basis of society, nationhood, governance and community. Land touches every aspect of life: conceptual and spiritual views; securing food, shelter and clothing; cycles of economic activities including the division of labour; forms of social organization such as recreational and ceremonial events; and systems of governance and management.

To survive and prosper as communities, as well as fulfil the role of steward assigned to them by the Creator, Aboriginal societies needed laws and rules that could be known and enforced by their citizens and institutions of governance. This involved appropriate standards of behaviour (law) governing individuals and the collective, as well as territorial rights of possession, use and jurisdiction that — although foreign to and different from the European and subsequent Canadian systems of law and governance — were valid in their own right and continue to be worthy of respect.

Our survival depended on our wise use of game and the protection of the environment. Hunting for pleasure was looked upon as wasteful and all hunters were encouraged to share food and skins. Sharing and caring for all members of the society, especially the old, the disabled, the widows, and the young were the important values of the Mi’kmaq people. Without these values, my people would not have survived for thousands of years as a hunting, fishing and gathering culture.

Kep’tin John Joe Sark
Micmac Grand Council
Charlottetown, Prince Edward Island
5 May 1992

Even today, Aboriginal people strive to maintain this connection between land, livelihood and community. For some, it is the substance of everyday life; for others, it has been weakened as lands have been lost or access to resources disrupted. For some, the meaning of that relationship is much as it was for generations past; for others, it is being rediscovered and reshaped. Yet the maintenance and renewal of the connection between land, livelihood and community remain priorities for Aboriginal peoples everywhere in Canada — whether in the far north, the coastal villages, the isolated boreal forest communities, the prairie reserves and settlements, or in and around the major cities.

Figure 4.5 shows present-day reserves and other Aboriginal communities, as well as the distribution of Aboriginal people and other Canadians. In many parts of the Northwest Territories, central Quebec, Labrador and other parts of eastern Canada, some First Nations communities are not located on reserves. Since the early nineteenth century, Canada’s overall population has grown from less than 200,000 to almost 30 million. While Aboriginal people make up no more than 2.5 per cent of that total, this general statistic masks the way their numbers are distributed. As a result of rapid urbanization in the post-war period, more than 90 per cent of all Canadians are now concentrated in the
most southerly 10 per cent of the country — basically Atlantic Canada, the St. Lawrence River-Great Lakes waterway, the railway belt of the prairie provinces, and the southernmost parts of British Columbia. Among the 139 communities in the far north (Yukon, Northwest Territories, northern Quebec and Labrador), 96 communities, or 69 per cent, have an Aboriginal majority population. Of communities in the mid-north, 216 of 624 communities (34 per cent) have an Aboriginal majority. However, in the mid-north zones of Manitoba, Saskatchewan and British Columbia, more than half the communities have a majority Aboriginal population.

Like Canadian society in general, a steadily increasing number of Aboriginal people live in cities and towns. This migration (discussed in Volume 4, Chapter 7 and in Chapter 5 of this volume) is relatively recent and often tends not to be by choice. While many Canadians have been moving from rural to urban areas in order to find employment, better living conditions, or education opportunities not available in their home communities, Aboriginal people have in addition felt particular pressure from government assimilation policies and other actions designed to move them away from their reserves and settlements.

Nonetheless, Aboriginal communities continue to survive and even grow, and Aboriginal people regard these places as the heartland of their culture. For most, living off the reserve or settlement and in the towns and cities is like being in a diaspora. Mohawk steelworkers who spend much of the year in New York or other urban areas still consider Kahnawake or Akwesasne home. This desire to return is deeply rooted. Alphonse Shawana, an Odawa from the Wikwemikong Unceded Reserve on Manitoulin Island, spent his professional life working in the oil and gas industry in Alberta, Venezuela and Scotland; in the late 1980s, he returned to his home community in Ontario and has since served as chief and councillor.

Among the Crees of Waswanipi, Quebec, as Chief Allan Happyjack explained to us, the urge to centre economic life in their communities and indeed to maintain the link between land, livelihood and community is strong:
Today we are working and we want to go back and take care of the land and clean up the damage that was done. We also want to go back to our traditional territory because that is where our tradition came from ... Our elders have told us the strengths from our past and we are listening to them and they told us about what happened in the past. We still want to look toward the future with a strong past.

Chief Allan Happyjack  
Cree First Nation of Waswanipi  
Waswanipi, Quebec, 9 June 1992

Figure 4.5 shows reserves as well as Aboriginal settlements. Fewer than half the reserves are inhabited; many are small, scattered pieces of land. Most of the Aboriginal people of the north reside in about 480 scattered villages ranging in population from less than a hundred to a few thousand persons. In the far north, outside of the few mining communities, at least 80 per cent of village residents are Aboriginal. In the mid-north and in the southern portion of the provinces (apart from urban areas), many of the villages are located on Indian reserves or settlements or are Métis communities and are predominantly Aboriginal. While land and resource activities are a mainstay of the Aboriginal economy in the north, even in more southerly regions, the economy of many Aboriginal communities continues to be based on activities such as commercial fishing or, to a lesser degree, farming. Many Aboriginal people living in urban centres have retained a connection to the land through ties to home communities or participation in ceremonial and cultural events (which include feasting, harvesting, fishing and hunting).

For thousands of years Aboriginal people have practised many forms of self-government. These forms are diverse and incorporate many unique methods of jurisdictional control. Traditional Aboriginal government, culture, spirituality and history are tied to the land and the sea. Our history is passed onto the present and future generations through an old tradition in such forms as songs, dances, legends, ceremonies and kinship relations. Our grandparents believe our old traditions top and strengthen the laws and practices necessary to uphold harmony between people and the world we live in.

Robert Mitchell  
University of Victoria Aboriginal Government Program  
Victoria, British Columbia, 22 May 1992

Aboriginal territories, use and occupancy

In natural resource law, the state assumes that it owns the resources and that only it can effectively regulate the exploitation by individuals and corporations of the natural resources. The purpose of the state in the area of natural resources law is to balance competing uses between the individuals who live in the state. As in criminal law, those who offend are charged, tried and punished.

Where are we in the scheme of things? We are not the Canadian state. Neither are we simply Canadian individuals. Our communities are not made up of a state and individuals ... We operate almost as a family where we all have obligations and rights. We do not
have crimes so much as we have inappropriate behaviour. We do not punish; rather we seek to heal. Sharing is the basis of our land and resource use. [translation]

Garnet H. Angeconeb
Independent First Nations Alliance
Big Trout Lake, Ontario, 3 December 1992

Before the arrival of Europeans, virtually all of Canada was inhabited and used by Aboriginal peoples. Whether they were comparatively settled fishers and horticulturalists or wide-ranging hunters, each people occupied specific territories and had systems of tenure, access and resource conservation that amounted to ownership and governance — although those systems were not readily understood by Europeans, in part because of language and cultural differences.

Aboriginal societies in Canada were generally either foraging societies — such as those based around seasonal hunting, fishing and gathering — or settled, resource-based communities — such as those based on agriculture. In either case, kinship was the organizing institutional basis of production and consumption. The household was the basic unit of production, several of which constituted a camp or village. The band, tribe or nation (the latter a culturally and linguistically homogeneous entity consisting of several of these groups) numbered from fewer than a hundred to several thousand persons. 14

Each of the extended families of Dene people have their own traditional land base and, within that land base, they have jurisdiction over all matters pertaining to human life in relationship with the animals and the land and the Creator.

Rene Lamothe
Deh Cho Regional Council
Fort Simpson, Northwest Territories, 26 May 1992

Each nation’s system of territoriality, governance and occupancy was intimately linked to its particular relationship to lands and resources. Northern and western nations, including Dene and Cree, had very large territories, shaping their system of governance to make it easier for them to move in harmony with seasonal activities such as hunting, fishing and harvesting. 15 By contrast, Pacific coast nations such as the Haida and the Tsimshian, whose sustenance and activities were tied to the sea and its resources, resided in settled villages with an elaborate system of governance. As for the east, there are many historical references to established agrarian communities at the time of contact:

When sixteenth-century Europeans encountered Iroquoians, first in the Gaspé and St. Lawrence Valley, and later in their homelands in the Great Lakes region and to the south, they also found gardens, although on a very modest scale in comparison with the Mexica [of Central America], and none was strictly for pleasure. Rather it was the Iroquoian cornfields that immediately attracted European attention: in 1535 Cartier was impressed with Hochelaga’s “large fields covered with the corn of the country,” which he thought resembled Brazilian millet. Nearly a century later, Recollet Friar Gabriel Sagard, visiting
Huronia in 1623-24, reported that it was easier to lose his way in the cornfields than in the forest.\textsuperscript{16}

 Regardless of the actual pattern of land and resource-based activity, some social and political principles were common to all Aboriginal nations. These included stewardship of the earth and a set of responsibilities and obligations governing individuals, the family or clan, and the collective. These rules guided behaviour with respect to resource access and use and governed, managed and regulated territorial boundaries and resources.

 Certain obligations and responsibilities for the larger collective — such as presiding at councils or conducting warfare — were undertaken by designated leadership. In Anishnabe-speaking nations (Ojibwa, Mississauga, Algonquin, Potawatomi and Odawa), these individuals were known as \textit{okima} — a term that Europeans first translated as ‘captain’, and then as ‘chief’.\textsuperscript{17} Depending on the nation, leaders were chosen through the male or female line of descent of certain key families, or as a result of demonstrated ability in certain areas. Decisions about allocation, access to and use of lands and resources occurred mostly at this broader level.

 The relationship to land was also reflected in jurisdictional issues relating to lands and resources. Tribal or band territories — often thousands of square kilometres — were communal property to which every member had unquestioned rights of access. As John Joe Sark, Kep’tin of the Micmac Grand Council, explained during the hearings, the Grand Council “traditionally divided hunting grounds so that all bands within the Mi’kmaq Nation would have adequate resources for their needs”.\textsuperscript{18}

 A similar system existed among the Ojibwa people of northern lakes Huron and Superior, according to the report of two commissioners appointed by the province of Canada in 1849 to investigate Aboriginal grievances on the upper lakes:

 Long established custom, which among these uncivilized tribes is as binding in its obligations as Law in a more civilized nation, has divided this territory among several bands each independent of the others; and having its own Chief or Chiefs and possessing an exclusive right to and control over its own hunting grounds; — the limits of these grounds especially their frontages on the Lake are generally well known and acknowledged by neighbouring bands; in two or three instances only, is there any difficulty in determining the precise boundary between adjoining tracts, there being in these cases a small portion of disputed territory to which two parties advance a claim.\textsuperscript{19}

 The map of Lake Huron that commissioners Alexander Vidal and T.G. Anderson enclosed with their report is shown in Figure 4.6. Although the division lines marking each territory appear as straight lines, most follow major river systems flowing into the lake. Each of these band territories included such resources as lakeshore fisheries, sugar bushes and gardens, as well as interior fisheries and hunting grounds.\textsuperscript{20}
Within these band or tribal territories, however, family units or clans retained their autonomy. Day-to-day decision making about production and consumption occurred mostly at the household level, and the families or clans generally returned every year to the same specific areas. In later years, many Ojibwa communities attempted to adapt this traditional pattern of organization and territoriality when they were settled on reserves. This was true, for example, along the English River between what is now Manitoba and northwestern Ontario:

On the old reserve, every family lived together. We weren’t all bunched up and mixed together like we are today ...

On the old reserve, the families were far apart from each other. We lived beside the Fobisters, about a half mile apart; in between us were the Lands. John Loon and his family lived on that island, up the English River. The Assins were more on the Wabigoon side of the river. The Hyacinthes all lived together on one shore ... the next point belonged to the Ashopenaces ... then the Fishers, then the Necanapenaces ... . The Taypaywaykejicks had a different spot too. It was traditional for all the clans to live separately from each other. That’s the way they have always lived. It was much better that way.\(^{21}\)

The geographic extent of territorial rights was based on systematic jurisdiction, use and occupancy, although among the Pacific coast tribes, more formal property rights based on lineage and descent existed. However, the connection between the land and the group lay not simply in use, occupancy, and governance, but in knowledge, naming and stories. These were the cultural and symbolic expression of travel, harvesting, habitation and one’s sense of place in the scheme of the universe:

Our people used to believe there is a spirit that dwells in those cliffs over there. Whenever the Indians thought something like that, they put a marker. And you can still
see these markers on the old reserve. Sometimes, you see paintings on rocks. These mean something; they were put there for a purpose. You can still see a rock painting when you go up to Indian Lake....

The rock paintings mean that there is a good spirit there that will help us on the waters of the English River. You see a cut in the rocks over there; that’s where people leave tobacco for the good spirit that inhabits that place.

On the old reserve, they used to gather at the rock formation — “Little Boy Lying Down,” they called it. From there they sent an echo across the space. They could tell by the strength of the echo if the land was good. Good echoes meant that the land would give people strength, that they could live well and survive there, that the land would support them.

Another way to tell whether the land was good to live on was by the light that comes off the land. The old people used to be able to see this light. The place where the new reserve is, it is not a good place. It is not a place for life.22

One criticism that Aboriginal people make of the current comprehensive claims process is that federal policy reduces the geographic basis for claims to evidence of economic use, without adequate recognition of the more fundamental connection with sites and areas of cultural, spiritual and community significance.

**Boundary maintenance**

The maintenance of territorial integrity (or, more specifically, access to resources) was effected through defence of social boundaries and of the territorial perimeter itself. The key to survival was access to and control of resources rather than land per se. Territorial boundaries could be variable or somewhat flexible according to social and political rules, such as alliances with other nations. Nonetheless, the limits were known to the members of the territorial group and to their neighbours and were defended accordingly. Unauthorized presence in the territory of another group would lead to disputes and was in most cases regarded as punishable trespass; people governed their behaviour accordingly.

In this respect, individual nations or tribes formed alliances or arrangements as required to address their respective rights of access or land use. In extreme instances, they resorted to war or to spiritual sanctions. In 1913, anthropologist Frank Speck learned about such duties of chieftainship among the Algonquin and Ojibwa peoples of western Quebec and northeastern Ontario:

In time of war, it is remembered, the chief was the head. He decided the fighting policy of the band, where to camp, where to move, when to retreat, when to advance, and the like. Or, if unable to go himself, he would apportion so many men to another responsible leader, whom he might appoint as his proxy. The chief seems to have been expected to learn conjuring in order to send his ma’nitu spirit to fight against enemies or rivals.23
Although the patterns of social, political and territorial organization have been largely disrupted, it is noteworthy that, in certain respects, communities have attempted to adapt these elements to present circumstances both in terms of settlement patterns on the reserves and in villages and through the demarcation and survey of traditional territories or land use areas. The latter has generally been done in order to meet requirements of federal claims policy or to rediscover or affirm internal cultural, territorial and community integrity.

**Property and tenure**

You must recognize that although we exercised dominion over these lands prior to the coming of the foreigners, our values and beliefs emphasized stewardship, sharing and conservation of resources, as opposed to the foreign values of ownership, exclusion and domination over nature. Proprietorship over use of resources within a traditional land base was a well-established concept that influenced our relations among ourselves as a people, and with other people who entered our lands from time to time.

Chief George Desjarlais  
West Moberly First Nation  
Fort St. John, British Columbia  
20 November 1992

Aboriginal property systems can best be thought of as communal because they resemble neither individualized private property systems, nor the system of state management, coupled with open access, that currently prevails on public lands in Canada. Even where family and tribal territories existed, these systems combined principles of universal access and benefit within the group, universal involvement and consensus in management, and territorial boundaries that were flexible according to social rules.24

Specific property arrangements have varied widely among Aboriginal nations, but some basic principles are common to all. In no case were lands or resources considered a commodity that could be alienated to exclusive private possession. All Aboriginal peoples had systems of land tenure that involved allocation within the group, rules for conveyance of primary rights (and obligations) between individuals, and the prerogative to grant or deny access to non-members, but not outright alienation.

The land belongs exclusively to the Atikamekw people. There is currently a territorial organization whose division is based on the principle of family clans. At its head is a principal guardian and his role is to manage the clan lands. Generally, the principal guardian is the patriarch of the clan. The clan lands are then divided among the families of the same clan. This land structure is comparable to the Regional Municipal Council and to the administrative divisions of a province. [translation]

Simon Awashish  
Conseil de la Nation Atikamekw  
Manouane, Quebec  
3 December 1992

24
Formal arrangements could be made between groups, based on mutual recognition of each other’s needs and surpluses, but these required adherence to rules of conservation as well as norms respecting harvesting, exchange, sharing and consumption. Members of the group either had equal access to the communal lands or were assigned places within them on an ordered basis. In 1913, one of Frank Speck’s Ojibwa informants described how this process worked:

One time I went to visit Chief Michel Batiste ... at Matachewan post near Elk lake. He gave me three miles on a river in his hunting territory and told me I could hunt beaver there. I was allowed to kill any young beaver, and one big one, from each colony. He told me not to go far down the river because another man’s territory began there. Said he, “Don’t go down to where you see a tract of big cedars.” And I did not go there. This grove of cedars was the measure of his boundary. Later he gave me another lake where I could hunt marten.25

As can be seen from this example, Aboriginal tenure systems generally incorporate two seemingly conflicting principles: permission must be sought to use another’s territory, but no one can be denied the means of sustenance. The key is the acceptance of the obligations that go with the right. In general the bundle of rights included use by the group itself, the right to include or exclude others (by determining membership), and the right to permit others to use lands and resources. Excluded was the right to alienate or sell land to outsiders, to destroy or diminish lands or resources, or to appropriate lands or resources for private gain without regard to reciprocal obligations.

Available records of early treaty making confirm that Aboriginal systems allowed for a conception of land that included the notion of property. This can be seen from the report of a speech by Chief Ma-we-do-pe-nais, chief of the Saulteaux of Fort Frances in northwestern Ontario, to Commissioner Alexander Morris during the negotiations of Treaty 3 in 1873:

What we have heard yesterday, and as you represented yourself, you said the Queen sent you here, the way we understand you as a representative of the Queen. All this is our property where you have come. We have understood you yesterday that Her Majesty has given you the same power and authority as she has, to act in this business; you said the Queen gave you her goodness, her charitableness in your hands. This is what we think, that the Great Spirit has planted us on this ground where we are, as you were where you came from. We think where we are is our property. I will tell you what he said to us when he planted us here; the rules that we should follow — us Indians — He has given us rules that we should follow to govern us rightly. [emphasis added]26

Management

It is commonly assumed that when Europeans first arrived in North America, they found a vast wilderness dotted with occasional Aboriginal settlements. Even today, many people think of wilderness parks or similar protected areas as regions “untrammeled by man”.27 But while many parts of North America were certainly more heavily forested in
1500 than they are now, Aboriginal people have lived on this continent for tens of thousands of years, and during that long period, they have intensively modified the landscape in a variety of ways.

One important tool was fire. Environmental historians have shown, for example, that in the mixed deciduous forest areas of what are now New England, Nova Scotia, New Brunswick and southern Quebec, Aboriginal people not only cleared land for their corn fields and gardens, they burned forests at least once a year to keep them open and parklike. In northern Alberta during this century, Dene and Cree were still using fire as a management tool for increasing the abundance of crops and the diversity of animal species in certain locations. As one of ecologist Henry Lewis’s informants explained:

In the spring when there is still some snow in the bush that’s the only time most people could burn the open places. It is then that people think that it is best to start the burning. There are a lot of places they don’t burn; they don’t burn all over. But there are many places people know to burn. In time many animals go there; some like the beaver, about four to five years after. Especially the bear because of the new bushes of berries growing in the burned places.

Aboriginal management systems rested on their communal property arrangements, in which the local harvesting group was responsible for management by consensus. Management and production were not separate functions, although leadership and authority within the group were based on knowledge, experience and their effective use. For example, those individuals and families that possessed and demonstrated extensive knowledge, experience and ability regarding traditional medicines, including tending, harvesting, use and application, became the acknowledged community experts in that sphere of land and resource management.

Traditional ecological knowledge

Management data included not only immediate observations of variation and theories of cause and effect, but also the accumulated knowledge of countless generations of harvesters. Various tools and techniques are still employed to modify the land and its resources, both to encourage an abundant harvest and, in fulfilment of their roles of stewards and brethren to the earth’s creatures, to conserve the ecosystem and its inhabitants. In a case study prepared for the Commission, Andrew Chapeskie describes his experiences working with Aboriginal communities in northwestern Ontario:

One Anishinaabe “trapper” ... I work with, for example, told me in the spring of 1993 about his feeding of fish to certain species of the furbearers that he customarily harvests. When I asked why, he responded with the following explanation. By feeding these animals at certain times of the year they can be attracted to specific locations. This makes it easier to catch them. A trapper like himself will want to do this so that a certain amount of carnivorous furbearers can be caught to maintain balanced levels of other furbearers that they prey upon, but which at the same time are important to his livelihood.
As well, since the collapse of the market for furs, his livelihood rationale to trap has diminished. The consequence is that populations of predator species such as mink have risen sharply since the customary balance between the furbearer species mosaic and himself as a trapper is no longer maintained. If he did not feed them they would not only disturb this optimal species balance with prey species such as muskrats, but they would also turn to cannibalism. He felt obligated to assume some sort of responsibility to ameliorate this situation to the extent that his time permitted.31

Oral culture, in the form of stories and myths, was coded and organized by knowledge systems for interpreting information and guiding action. Spiritual beliefs, ceremonial activities, and practices of sharing and mutual aid also helped to define appropriate and necessary modes of behaviour in harvesting and utilizing resources. These techniques thus had a dual purpose: to manage lands and resources, and to affirm and reinforce one’s relationship to the earth and its inhabitants. Andrew Chapeskie describes the behaviour of another Anishnabé trapper from the Kenora region of northwestern Ontario:

She would open up beaver lodges at certain times of the year to see where the various ‘bedrooms’ and other rooms were located and to visit with the beaver in them. This work was also part of a broader spectrum of ‘census-taking’ activities designed to maximize the efficacy of her trapping work.32

Although these practices did not operate in the manner of western ‘scientific’ management, they regulated access to and use of resources. It was these cultural constraints on behaviour with respect to communal property, rather than ‘natural’ predator-prey relationships, that normally guarded against resource depletion.

When the people came and started hunting at hunting time, maybe we picked on one area too much. The elders used to get together and say, “That land is going to rest. There is to be no more hunting. There will be no deer hunting for two, three, four years.” But the system as it is now, the white man goes and gives a hunting permit, a hunting licence to everyone to shoot everything they see in sight and we have so much respect amongst our people we don’t even go to other tribes’ territory to hunt moose or deer or bear. We stay out of there unless we are invited by that tribe.

John Prince
Stoney Creek, British Columbia,
18 June 1992

We use the term ‘management’ for these practices and beliefs as an analogy, rather than a description. Aboriginal languages did not have such a term, and many Aboriginal people today do not feel comfortable applying that term to their own ways of doing things.33 However, social scientists have termed the content and use of such knowledge ‘traditional ecological knowledge’ or simply, traditional knowledge. The term itself is somewhat ambiguous, as it applies to a host of cultural concepts, understandings, tools and techniques from nations as diverse as the Wuastukwik (Maliseet) and the Shuswap. Given its cultural (and oral) context and the inherent difficulty of relating the underlying concepts, references to traditional knowledge tend to be general statements of principle.
This lack of precision has led to misunderstandings and sometimes outright rejection of its value by western scientific practitioners and administrators. 

We also have a considerable amount of information within our communities. There is a lot of wisdom there; there is a lot of experience there; there is a lot of knowledge. It is going to take time, it is going to take people and it is going to take resources to access that. We have research we have to undertake. We have to be able to collect that information, store it and retrieve it ....

When we sit down with the Ministry of Forests or Energy, Mines and Resources or any particular area, we find that we have to rely on their information. The things we know and believe, we often have a difficult time proving because we simply don’t have the detailed technical information at our fingertips.

Bruce Mack
Cariboo Tribal Council
Kamloops, British Columbia, 14 June 1993

Subsistence

The word subsistence is a western concept, which carries with it the negative connotation of a hand-to-mouth existence. According to former British Columbia Supreme Court Justice Thomas Berger, who learned first-hand about the northern economy when he headed the Mackenzie Valley Pipeline Inquiry of the 1970s, many people down the centuries have tended to dismiss Aboriginal economies as “unspecialized, inefficient and unproductive”. But while Aboriginal people have lived more “lightly on the land” than most of those who have come to join them, many of the resources they used were extraordinarily productive, even by modern standards.

A classic example, though far from the only one, is fisheries. On the east and west coasts of Canada, Aboriginal people harvested enormous quantities of fish and shellfish both for personal consumption and for exchange. Historian Dianne Newell has shown that, at the time of extensive non-Aboriginal settlement in British Columbia in the last quarter of the nineteenth century, the annual salmon catch of the Stó:lo and other tribes from the waters of the Fraser River and the coast was already close to modern levels for all fishers.

The same was true of inland fisheries. In the mid-nineteenth century on lakes Huron and Superior and in the later nineteenth century in the Rainy River-Lake of the Woods area of northwestern Ontario and southeastern Manitoba, Ojibwa and Odawa fishers were running the equivalent of full-fledged commercial operations for sturgeon, trout and other species. Historical and archaeological evidence suggests that such fisheries had been managed on a maximum sustained yield basis for centuries.

Even today, many Aboriginal communities — particularly in the far and mid-north — have mixed, subsistence-based economies, meaning that people continue to make their living by combining subsistence harvesting with wage labour, government transfer payments and commodity production. In particular, hunting, fishing and trapping
continue to be central economic activities, and, in a larger sense, subsistence has remained very much a part of the way of life (see Chapter 5 of this volume and Volume 4, Chapter 6).

Subsistence activities are economically productive as a source of income in kind, and they provide nutritious and highly valued food such as fish and wild meat, for which there is often no import replacement. Social scientists have estimated that Aboriginal people continue to eat about seven times as much fish as the average Canadian, and their relative consumption of wild game is even greater. There is a strong link between the consumption of such country food and lower instances of lifestyle diseases such as obesity and diabetes.

Without this subsistence base, the informal sector of the mixed, subsistence-based economy that typifies many communities becomes largely non-viable. Subsistence, in its broadest sense, is also a key means of reaffirming Aboriginal identity and of intergenerational transmission of skills and values. Subsistence is also valued as a sphere of Aboriginal autonomy; it provides for the retention of traditional and fundamental ties to the earth and is thus the aspect of life where control by federal or provincial management agencies is least appropriate. Gerry Martin, an Ojibwa from the Matagami First Nation community, explained to us that this close connection is not only economic, but also cultural, social and spiritual:

Most Indians ... will say, “If you take that money out in the bush it is worth nothing to you, but what you have in your mind, in experience, with how you know how to live with the land and what it offers you — that is worth something.” Money can’t buy that and the only way you are going to learn that is to listen to your elders and the teachings and take the time to learn those lessons — by being out on the land.

Thus, subsistence is part of a social and cultural system. Family ties form the basis of its social organization; kinship is in turn reinforced by hunting, fishing, harvesting and sharing. While some Canadians — residents of Newfoundland outports, for example — will recognize this kind of system, it is unknown to most non-Aboriginal systems of governance. Yet extended families and the many kinds of land-based activities they practised continue to be an integral part of Aboriginal nationhood and governance.

What Aboriginal peoples do on the land (and on the rivers, lakes and oceans) has certainly evolved over time, as has the way they do it. But it remains just as important to them as a means of securing the future as well as affirming their connection to the past.

To live on our land for periods of time throughout the year continues to be of central importance to maintaining our culture. We are a hunting people. Life in the country, away from the villages, is not sufficient for us. It is what is at the heart of who we are as a people. In the country, we have the skills passed to us from our mothers and fathers. In
the country, we are the teachers, passing on Innu skills to our children. It will be a major role of the Innu government to do whatever is necessary to ensure that our rights to use and occupy our lands are protected.

All of these are examples of what Innu government means. I think it is obvious how recognition of Innu government and the Innu rights will lead to political and economic self-sufficiency. Recognition of our rights means recognition of our nationhood, and recognition of our nationhood brings all we need to be politically and economically self-sufficient.

George Rich
Innu Nation
Davis Inlet, Newfoundland and Labrador
1 December 1992

To the Innu people of northern Labrador, as to other Aboriginal peoples in Canada, the link between self-sufficiency and self-government is an obvious one. But that link has been far from obvious to the broader society. Indeed, most of the land use rights and practices referred to in this section have survived with the greatest difficulty, for only in the past two decades have Aboriginal property rights begun to be reconsidered in the law and on the facts, after more than a century of atrophy. This is the subject to which we now turn.

4. How Losses Occurred

As we saw earlier in this chapter, Dene Th’a prophet Nógha warned his people that they would end up confined to small parcels of land. How Nógha’s prophecy became a reality is a tragic story of forgotten promises and abandoned responsibilities — and this story is not unique to Dene. Although the law of Aboriginal title initially promised respect for Aboriginal relationships with lands and resources, Aboriginal peoples increasingly were separated from their traditional territories and shunted to the margins of Canadian society. While they continued to occupy large regions of the country, their recognized land holdings — their reserves and settlements — had been reduced during the years between Confederation and the end of the Second World War to a series of small plots of land with few natural resources. The process of settlement and economic development had devastating effects on their traditional land use areas.

Aboriginal peoples were also ignored in the collective memory of Canadian society. Their history since Confederation was not taught in schools or recognized as integral to the founding of Canada. Government policy makers had little consciousness of Aboriginal issues. Some academics, mainly anthropologists like Diamond Jenness, Jacques Rousseau and Thomas McIlwraith, had developed close relations with Aboriginal people, but their publications did not reach a wide audience.

In recent years, there has been an explosion in historical, social, scientific and popular writing by and about Aboriginal people and their concerns. Some of it has been spurred by research into land claims and related issues, but much of it is the result of Aboriginal issues being recognized as legitimate areas of academic study. Various publications are
bringing about a reassessment of the history of the past century or more.\textsuperscript{43} We are only beginning to understand the myriad factors that made Nógha’s prophecy concerning Aboriginal lands and resources a reality. In the rest of this section we describe in some detail how, despite the law’s initial promise, these losses occurred. As our hearings showed, Aboriginal people have always known what happened to them, but many Canadians still do not.

4.1 The Law’s Initial Promise

Our songs, our spirits, and our identities are written on this land, and the future of our peoples is tied to it. It is not a possession or a commodity for us. It is the heart of our nations. In our traditional spirituality it is our mother.

Grand Chief Anthony Mercredi
Assembly of First Nations
Ottawa, Ontario, 5 November 1993

Despite claims of territorial sovereignty over North America by European nation-states at the time of contact, Aboriginal relationships to land and its resources were initially respected by imperial and colonial authorities.\textsuperscript{44} Indeed, the law of Aboriginal title, as initially expressed in British colonial law, emerged out of the very process of colonization and settlement, through practices of Aboriginal people and colonial officials in their attempt to maintain peace and co-operation with each other. The law of Aboriginal title initially took the form of consistent norms of good practice necessary for initiation and expansion of the trade in fish and fur, but grew quickly to reflect intersocietal norms that enabled the coexistence of colonists and Aboriginal peoples on the North American continent.\textsuperscript{45}

This body of law prescribes stable ways of handling disputes between Aboriginal and non-Aboriginal people, especially disputes over land. It recognizes Aboriginal title, namely, occupation and use of ancestral lands, including territory where Aboriginal people hunted, fished, trapped and gathered food, not just territory where there were Aboriginal village sites or cultivated fields. It restricts non-Aboriginal settlement on Aboriginal territory until there is a treaty with the Crown. It prohibits the transfer of Aboriginal land to non-Aboriginal people without the approval and participation by Crown authorities. And in its most developed form, it prescribes safeguards for the manner in which such treaties can occur and imposes strict fiduciary obligations on the Crown with respect to Aboriginal lands and resources.\textsuperscript{46}

That these norms are stable, consistent and intersocietal does not mean that they were always scrupulously observed by colonial authorities. Settlement frequently outran governmental authority and often was ratified retroactively by governments. Agents of government, attracted by the potential for profit in land speculation, occasionally connived in the evasion of the standards contemplated by the law. Aboriginal interests in land and resources were increasingly ignored in the formulation of public policy designed to open up the continent for non-Aboriginal settlement and exploitation.
But the initial story of colonial encounters with Aboriginal relationships with land and resources is one of respect and recognition, reflected in the law of Aboriginal title (see Volume 1, Chapter 5, and Chapter 3 of this volume). Although the existence of Aboriginal nations on the continent did not preclude European powers from asserting territorial sovereignty over North America, Aboriginal title survived such assertions and protected Aboriginal lands and resources from non-Aboriginal settlement. Whether Aboriginal title was extinguished by the French regime before 1760 is a matter of some scholarly controversy. The older view is that extinguishment did occur, but more recent scholarship working from a pluralist perspective, which we find persuasive, reaches a different conclusion. In the words of Andrée Lajoie, “the French cohabited with their Aboriginal allies in North America in ambiguity, without acquiring territory or subjugating any population other than, perhaps, certain individuals who had settled in villages.” In 1867, Justice Monk of the Quebec Superior Court described these initial relations between French settlers and trading companies and Aboriginal nations in the following terms:

The enterprise and trading operations of these companies and the French colonists generally extended over vast regions of the northern and western portions of this continent. They entered into treaties with the Indian tribes and nations, and carried on a lucrative and extensive fur trade with the natives. Neither the French Government, nor any of its colonists or their trading associations, ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usages of the aboriginal tribes, except where they had established colonies and permanent settlements, and, then only by persuasion.

Respect for and recognition of Aboriginal title is apparent in the Royal Proclamation of 1763, which codified British colonial practice with respect to Aboriginal lands and resources. The Proclamation forbids the purchase of Aboriginal territory by entities other than the Crown and provides rules governing the voluntary cession of Aboriginal territory to the Crown.

Recognition of the importance of land and resources to Aboriginal people is also reflected in a number of other constitutional instruments, including the Constitution Act, 1867, the Rupert’s Land and North-Western Territory Order and the Adjacent Territories Order, the Manitoba Act, the British Columbia Terms of Union, the Natural Resources Transfer Agreements and, of course, the Constitution Act, 1982.

Norms of conduct recognizing the importance of Aboriginal relationships with lands and resources and enabling Aboriginal and non-Aboriginal people to live alongside each other are also embodied in countless treaties entered into by Aboriginal nations and government authorities. As Justice Lamer of the Supreme Court of Canada said in Sioui:

Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.
The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.53

Respect for Aboriginal relationships with lands and resources is apparent not only in early treaties of alliance, but also in more contemporary agreements that authorize the sharing of territory by Aboriginal nations and the Crown (discussed at greater length in Volume 1, Chapter 5, in Chapter 2 of this volume, and in Appendix 4B to this chapter).

4.2 Losing the Land

Although the law recognizes Aboriginal title in terms of a range of inherent rights with respect to lands and resources, Crown respect for the existence of Aboriginal title, as we will see shortly, was most consistent during the eighteenth and early nineteenth centuries, when settlers and colonial officials still needed or valued Aboriginal people as friends and military allies. This respect was eroded by the decline of the fur trade and the concomitant decline of Aboriginal and non-Aboriginal economic interdependence. Increased demands on Aboriginal territory occasioned by population growth and westward expansion, followed by a period of paternalistic administration marked by involuntary relocations and resettlement, only exacerbated the erosion of respect. The treaty-making process fell into disuse, and treaties that had been concluded were often vulnerable to manipulation and misinterpretation by government officials.

The Loyalist settlers who fled to Canada at the close of the American Revolution brought with them the treaty-making practice that had been enshrined in the Royal Proclamation of 1763, and various agreements with Aboriginal nations cover southern Ontario and portions of southern Quebec.54 If the dates of first surveys in various parts of southern Ontario are compared with the dates of the creation of the first farms, it can be seen that (unlike the United States) Crown survey invariably preceded settlement. This was because, in accordance with the rules set down in the Royal Proclamation and subsequent regulations, lands did not become waste lands of the Crown — that is, lands available for disposition to settlers (now known as public lands) — until after a treaty with their Aboriginal inhabitants.55 In 1794, the commander in chief in British North America, Lord Dorchester, had enshrined such rules for all of His Majesty’s surviving colonies on that continent (including Upper and Lower Canada, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland).

While the language of the Dorchester regulations is that of a real estate transaction, this was not how the subsequent agreements were perceived by the Aboriginal participants. The Royal Proclamation of 1763 had stated that treaties would be made only if the Indian Nations were “inclined” to part with their lands. In effect, however, what had been designed originally as measures for the protection of Aboriginal people contributed to their dispossession. With large-scale immigration to Canada, particularly in the period after the War of 1812, the understanding that Aboriginal people had of the treaty
relationship — that they would continue to have access to their traditional lands and that the Crown was to function as the referee between their interests and those of the settlers — was, in their view, violated. In 1829, the chiefs of the Mississauga Nation of the Credit River, whose lands included what is now the greater Toronto area, expressed to Lieutenant Governor John Colborne their disappointment with the Crown’s interpretation of a treaty they had made in 1820:

Several years ago we owned land on the Twelve mile [Bronte] creek, the Sixteen [Oakville] and the Credit. On these we had good hunting and fishing, and we did not mean to sell our land but keep it for our Children for ever. Our Great Father sent to us by Col[onel] Claus and said. The White people are getting thick around you and we are afraid they, or the yankees will cheat you out of your land, you had better put it into the hands of your very Great Father the King to keep for you till you want to settle. And he will appropriate it for your good and he will take good care of it; and will take you under his wing, and keep you under his arm, & give you schools, and build houses for you when you want to settle.

Some of these words we thought good; but we did not like to give up all our lands, as some were afraid that our great father would keep our land. But our Great Father had always been very good to us, and we believed all his words and always had great confidence in him, so we said “yes”, keep our land for us. Our great father then thinking it would be best for us sold all our land on the Twelve the Sixteen and the upper part of the Credit to some white men. This made us very sorry for we did not wish to sell it.56

What the Aboriginal nations were not aware of was that, in the Crown’s view, once a particular treaty had been concluded, the lands covered by the agreement could be turned into private property. By the turn of the nineteenth century, Aboriginal people in southwestern Ontario were complaining that farmers were setting their dogs on them if they tried to cross an open field to get to a hunting or fishing site. And there were other consequences. In 1806, the same Mississauga people were protesting to Deputy Superintendent General William Claus that the waters of the Credit River at its entrance into Lake Ontario “are so filthy and disturbed by washing with soap and other dirt that the fish refuse coming into the River as usual, by which our families are in great distress for want of food”. They asked that the settlers be moved away from the river.57

In our area, Aboriginal people are denied access to most Crown lands because we have to cross private property to get to the land. As an example there is one person in our area who owns almost 1,000 acres and he has signs posted saying private property on his own property but he retains a hunt camp on Crown land. In order for us to get to that Crown land we have to cross his property but we can’t cross it.

On one piece of land where I hunted and fished for years, MNR [ministry of natural resources] changed it to a designated park and we were charged that fall for hunting there.
The Dorchester Regulations of 1794

To Sir John Johnson, Baronet, Superintendent General and Inspector General of Indian Affairs, or, in his absence to the Deputy Superintendent General.

Art. 1st. It having been thought advisable for the King’s Interest that the system of Indian Affairs should be managed by Superintendents under the direction of the Commander in Chief of His Majesty’s Forces in North America; no Lands, therefore, are to be purchased of the Indians but by the Superintendent General and Inspector General of Indian Affairs, or in his absence the Deputy Superintendent General or a Person specially commissioned for that purpose by the Commander in Chief.

2d. When Indian Territory shall be wanted by any of the King’s Provinces, the Governor or Person administering the Government of the respective Province will make his Requisition to the Commander in Chief, and also to the Superintendent General of Indian Affairs, or in his absence the Deputy Superintendent General, accompanied with a sketch of the Tract required, who will endeavour to find out the probable price to be paid therefor, in Goods the Manufacture of Great Britain, and Report the same to the Commander in Chief, that measures may be taken to get them out from England by the first opportunity. Presents sent to the Upper Posts for the ordinary purposes of the Indians inhabiting the Neighbourhood of, or visiting the said Posts, are not to be appropriated to the purchase of Indian Lands without the express Order of the Commander in Chief.

3d. All Purchases are to be made in public Council with great Solemnity and Ceremony according to the Antient Usages and Customs of the Indians, the Principal Chiefs and leading Men of the Nation or Nations to whom the lands belong being first assembled.

4th. The Governor or Person administering the Government of the Province in which the Lands lie, or two Persons duly commissioned by him, are to be present on behalf of the said Province.

5th. The Superintendent General or in his absence the Deputy Superintendent General negotiating the purchase shall be accompanied by two other Persons belonging to the Indian Department together with one, two, three or more Military Officers (according to the Strength) from the Garrison or Post nearest to the place where the Conference shall be held.

6th. The Superintendent General or Deputy Superintendent General negotiating the Purchase will employ for the purpose such Interpreters as best understand the Language of the Nation or Nations treated with, and during the time of the Treaty every means are to be taken to prevent the pernicious practice of introducing strong
Liquors among the Indians, and every endeavour exerted to keep them perfectly sober.

7th. After explaining to the Indians the Nature and extent of the Bargain, the situation and bounds of the Lands and the price to be paid, regular Deeds of conveyance (Original, Duplicate and Triplicate) are to be executed in Public Council by the Principal Indian Chiefs and Leading Men on the one part, and the Superintendent General, or in his absence the Deputy Superintendent General or Person appointed by the Commander in Chief on His Majesty’s behalf on the other part, and attested by the Governor or Person administering the Government in which the ceded Lands lie, or the Person commissioned by him and by the Officers and others attending the Council. Descriptive Plans signed and witnessed in the same manner are to be attached to the Deeds of Conveyance, one of which is to be transmitted to the Office of the Superintendent General to be there entered and remain on Record, a second to be given to the Governor or Person administering the Government of the Province in which the lands fall or the Person appointed by him, and the third is to be delivered to the Indians, who by that means will always be able to ascertain what they have sold and future Uneasiness and Discontents be thereby avoided.

8th. All other matters being settled, Indian Goods to the amount agreed upon are to be given in payment of the Territory ceded, the said Goods to be delivered in Public Council with the greatest possible Notoriety and the Delivery certified and witnessed in the same manner as the Deeds of Conveyance.

9th. When the Council is finished the Proceedings are by the first convenient Opportunity to be transmitted to the Office of the Superintendent General for the information of the Commander in Chief.

Guy Carleton, Lord Dorchester


The settlers believed that they had acquired a valid title to land, a fact acknowledged by Crown officials, and they were generally mystified by the Aboriginal response. They had their own cultural reasons for acquiring land. Except on the east coast, the vast majority of North American settlers until the mid-nineteenth century had arrived in search of land; many of them believed that they were fulfilling a biblical injunction to subdue the earth. Particularly for agricultural colonists from
England, where much of the forest cover had disappeared by Norman times (though not France, where large tracts of woodland remained) — forested lands were considered wild and unproductive. This meant that Aboriginal people were not making proper use of them. Lieutenant Governor Francis Bond Head of Upper Canada summed up the prevailing attitudes in a speech to Aboriginal nations assembled on northern Lake Huron in the summer of 1836:

In all parts of the world farmers seek for uncultivated land as eagerly as you, my red children, hunt in your forest for game. If you would cultivate your land it would then be considered your own property, in the same way your dogs are considered among yourselves to belong to those who have reared them; but uncultivated land is like wild animals, and your Great Father, who has hitherto protected you, has now great difficulty in securing it for you from the whites, who are hunting to cultivate it.

Even today, such sentiments have resonance, even though only a small percentage of Canadians remain on the farm. Government programs for farmers have until recently been regarded with greater favour that those for fishers or resource workers. Attitudes about “uncultivated land” also have had a subtle and lingering influence, leading to the view that what Aboriginal people did (or still do) on the land has been neither efficient nor productive enough to be considered real economic activity.

The first reserves

As early as the beginning of the seventeenth century in New France and Acadia, lands were being set aside for missionary orders to concentrate Indian people in a single location and instruct them in the Christian religion. These ‘reductions’, as they were termed, were modelled on earlier Jesuit missions to the Indigenous peoples of Central and South America. For example, the present lands of the Mohawk people at Kahnawake (Sault Saint Louis) and Kanesatake (Lake of Two Mountains) had been part of Christian missions run by the Jesuits and the Sulpicians, respectively, in the late seventeenth and early eighteenth centuries. The Mohawk people, however, regarded the lands as theirs, not the missionaires’; both during the French regime and with the arrival of the British, they continually pressed for recognition of their own titles. “It is our earnest prayer”, Agneetha, the chief at Kanesatake, told Superintendent General Sir John Johnson in 1788, “that a new Deed for the Lands we live on be made out for us, and that we may hold them on the same tenure that the Mohawks at Grand River and Bay de Quinte hold theirs.”

Throughout the first half of the nineteenth century, reserves continued to be set aside in the Maritimes, Quebec and Ontario, sometimes as part of treaties, sometimes not. Yet even these reserves were a target for settlement pressure. The purpose of Lieutenant Governor Bond Head’s trip to the upper lakes in 1836 was to persuade the nations of that region to allow the Bruce Peninsula and the Manitoulin chain of islands in Lake Huron to be set apart as reserves for any nations that might choose to locate there. This was so that people who were occupying smaller reserves in southern Ontario would give up their lands to settlers. As the settlement frontier moved northward, these areas in turn came
under pressure, along with the various reserves that had been set apart along Georgian Bay and Lake Huron under the 1850 Robinson treaties. New land treaties in 1854, 1857, 1858 and 1862 opened much of these reserved areas to settlement.  

It is interesting to compare the 1849 map of Lake Huron referred to earlier (Figure 4.6) with Figure 4.7, which shows what happened to reserves in the region. Figure 4.6 lays out original band territories along the north shore of the lake, as well as the reserves on the Bruce Peninsula and Manitoulin Island. Figure 4.7 shows both the original and present size of the Robinson treaty reserves, as well as the size of the reserved lands remaining on the Bruce Peninsula and Manitoulin islands. The two current reserves at Sault Ste. Marie (Garden River and Batchewana) have lost almost four-fifths of their territory since the 1850 treaty, and the Saugeen (Bruce) reserve is now represented on the map by a few tiny dots. Indeed, the Indian people of this region have been doubly dispossessed.

Reserves were regarded for much of the nineteenth century as places for people to be confined until they became ‘civilized’. Once they had learned ‘proper habits’ of industry and thrift, they could then be released (enfranchised, in the language of Indian legislation from this period) into the general society as full citizens with equal rights and responsibilities, taking with them a proportional share of reserve assets.  

The prairie west

The treaty-making process that had its origins in central Canada was continued in northwestern Ontario and the prairie west after Confederation. The Cree, Assiniboine, Saulteaux and Siksika nations saw that life would change with the arrival of so many newcomers, and they tried to secure both an economic base and a promise of continued
government support. Part of that economic base would be the various reserves set apart under the so-called numbered treaties.

The prairie treaty nations were not told that, with the treaties, they would be made subject to existing policies and legislation, particularly the Indian Act. In addition to its extensive list of measures governing the everyday lives of Indian people, the 1876 act specifically prohibited Indians from acquiring a homestead in Manitoba, the Northwest Territories, and the territory of Keewatin — unless they were enfranchised. Until that time, they were to remain on their reserves. Métis people, who had formerly used the open spaces of the west, along with their Indian brethren, were reduced to seeking a living on the margins of Crown land.

In 1885, the Indian department brought in a pass system, requiring Indian people to get signed permission from the Indian agent before they could leave their reserves. The system, which was used for about two decades, had been designed in part to prevent the movement of Indian leaders in the aftermath of the Riel rebellion. Once the military threat had diminished, however, both the settler population and government officials came up with other motives for keeping it. The settlers, who often complained that Indian people were killing their cattle, saw the pass system as a way of keeping Indians from loitering about their towns — and of preventing them from competing for game and fish. To government officials, the system was intended to discourage participation in ceremonies such as the sundance or thirst dance, to prevent nations such as the Plains Cree from asking for larger reservations, and to establish reserve agriculture by preventing Indians from travelling when there was work to be done in the fields (see Volume 1, Chapter 9).

Despite the latter goal, some prairie treaty nations never received their full entitlement of reserve lands and therefore never even had the opportunity to try farming. Moreover, in the land rush that accompanied the building of the Canadian Pacific Railway, many First Nations lost parts of their reserves. In southern Saskatchewan alone, close to a quarter-million acres of reserve land had been sold by 1914. In very few instances were First Nations willing vendors; usually they were subject to relentless pressure from government officials and local settlers to part with their land. Sometimes reserve lands were expropriated for railway easements or the needs of neighbouring municipalities. In other cases, reserve lands were lost through questionable transactions involving government officials and land speculators. In a famous case, documented in the 1970s by the Federation of Saskatchewan Indian Nations, forensic evidence established that fraudulent deeds for lands belonging to the White Bear First Nation community had been typed up in the office of the local Indian superintendent.

Whether or not outright corruption was involved in the transfer of reserve land, the reluctance of the new residents of western Canada — whether government officials, settlers, or elected politicians — to accept the continuing existence of reserves had a number of fundamental causes. One was the prevailing view that there ought to be a free market in land. No land would then remain ‘idle’ (as defined by the general society), and the most profitable use would prevail. The behaviour of government officials therefore
had a certain logic. By engineering the surrender and sale of reserve lands, they were ensuring that the broader public interest (as they interpreted it) would prevail over the Aboriginal interest in maintaining a land base.\textsuperscript{73}

The federal government, which retained control of lands and resources in the prairie provinces until 1930, also took reserve lands for other reasons that it considered to be in the broad public interest. In 1896, for example, the department of Indian affairs set aside 728 acres on Clear Lake in southwestern Manitoba as a fishing reserve for the Keeseekoowenin Band of Saulteaux. Some 30 years later, the federal government declared the enabling order in council inoperative and included the fishing reserve in the new Riding Mountain National Park, established in 1933. Keeseekoowenin Band members were evicted and their houses burned down. In 1994, the department of Indian affairs finally settled a specific land claim based on its actions; by order in council, the disputed portion of the national park was returned to the Keeseekoowenin Saulteaux.\textsuperscript{74}

\textbf{British Columbia}

At this very moment the Lieutenant-Governor of Manitoba has gone on a distant expedition in order to make a treaty with the tribes to the northward of the Saskatchewan. Last year he made two treaties with the Chippewas and Crees; next year it has been arranged that he should make a treaty with the Blackfeet, and when this is done the British Crown will have acquired a title to every acre that lies between Lake Superior and the top of the Rocky Mountains.

But in British Columbia — except in a few cases where under the jurisdiction of the Hudson Bay Company or under the auspices of Sir James Douglas, a similar practice has been adopted — the Provincial Government has always assumed that the fee simple in, as well as the sovereignty over the land, resided in the Queen. Acting upon this principle, they have granted extensive grazing leases, and otherwise so dealt with various sections of the country as greatly to restrict or interfere with the prescriptive rights of the Queen’s Indian subjects. As a consequence there has come to exist an unsatisfactory feeling amongst the Indian population.\textsuperscript{75}

\textbf{Frank Oliver and the Michel Band}

A prominent journalist and pioneer settler in Edmonton, Alberta, Frank Oliver (1853-1933) was one of the most powerful politicians in the history of western Canada. As minister of the interior and superintendent general of Indian affairs from 1905 to 1911 in Sir Wilfrid Laurier’s government, Oliver did his utmost to obtain surrenders of the various Indian reserves in and around his home city.

One of these reserves, located in what is now northwestern Edmonton, belonged to the Michel Band (of Iroquois, Cree and Métis ancestry) under Treaty 6. In 1906, after considerable pressure from Frank Oliver and officials of the Indian department (and the promise of horses and farm implements), the band agreed to part with some of its reserve lands. At the auction sale in December of that year (supervised...
personally by Oliver), 8,200 acres of Michel land sold in four hours at a price of $9.00 an acre. Three-quarters of the land went to two speculators, Frederick Grant and Christopher Fahrni, who were both political allies of Oliver and the Laurier government.

By 1910, neither speculator had yet paid a cent of the purchase price. Under the Indian Act, the sales ought to have been cancelled immediately for non-payment. In the case of the Grant lands, the sales were not cancelled until 1927, after continuing futile attempts to secure payment. Indian affairs had cancelled the Fahrni sale in 1910 — only to withdraw the cancellation a few days later without explanation. Shortly thereafter, the Fahrni lands were sold to Edmonton bank manager J.J. Anderson at a quarter of their original purchase price. In 1914, Anderson transferred title to these lands to his father-in-law — none other than Frank Oliver.


As the governor general noted in his official dispatch to the colonial secretary, treaties were being made in the prairie west but not in mainland British Columbia. The Earl of Dufferin had in fact been trying for more than a year to persuade the government of Canada to force British Columbia to follow the treaty-making policy stipulated in the 1871 act admitting that province to Confederation. The settlers, however, held firm views on the subject. “If you now commence to buy out Indian title to the lands of British Columbia”, Lieutenant Governor Joseph Trutch told Sir John A. Macdonald in 1872, “you would go back on all that has been done here for 30 years past and would be equitably bound to compensate the tribes who inhabited the district now settled and farmed by white people equally with those in the more remote and uncultivated portions”. With respect to the Indian nations, the most the provincial government was prepared to do was reserve from time to time “tracts of sufficient extent to fulfil all their reasonable requirements for cultivation and grazing”.

Like Manitoba in 1870, British Columbia actually had an overwhelming Aboriginal majority (at least 70 per cent) when it entered Confederation. The federal census for 1871 put the total population at 36,247 — of which 25,661 were Indian and another 1,000 Chinese — although other estimates place the Aboriginal population considerably higher. An 1872 provincial act had removed the right of both groups to vote in provincial and federal elections, however, so that all political decisions in the province were being made by the tiny settler minority.

It was therefore the settler minority that determined what the “reasonable requirements” of the Indian nations actually were. Crown land ordinances both before and after Confederation prevented Indian people from pre-empting land without the written permission of the governor, which was almost never given. Reserves in the colony/province were limited, on average, to less than 10 acres per family, compared to between 160 and 640 acres per family of five allocated under the prairie treaties. By Confederation, this had effectively transferred most of the land owned and used by Indian
nations in southern and central British Columbia to non-Aboriginal farmers and ranchers.\textsuperscript{82}

In 1875, the federal cabinet approved a legal opinion from the minister of justice that urged the Crown to disallow British Columbia’s first public lands act on the grounds that it did not make adequate provision for Aboriginal interests in land.\textsuperscript{83} In addition to citing the *Royal Proclamation of 1763*, the opinion argued that Aboriginal title constituted an interest other than that of British Columbia in the lands within its boundaries by virtue of section 109 of the *British North America Act*.\textsuperscript{84} Instead of proceeding with disallowance, however, the federal government proposed negotiations to the province, which agreed. In 1876 the governments set up a joint commission to investigate the Indian land question. Provincial commissioner G.M. Sproat suggested that the commission be instructed on the principle of Indian title in order to permit them to make treaties, but this was never done. During its five-year existence, the commission allotted several reserves for treaty Indians on Vancouver Island, but never completed its work on the mainland.\textsuperscript{85}

By national standards, reserves in British Columbia remained small, and they were to get even smaller. Another joint federal-provincial royal commission (McKenna-McBride), appointed in 1912 to deal with the long-standing Indian land question, recommended that 19,000 hectares, including areas long coveted by settlers, be eliminated from existing Indian reserves and communities in the province as surplus to their requirements.\textsuperscript{86}

From the time of the failure of the first joint commission in 1875-1880, Indian nations in British Columbia pressed the Crown for recognition of their land rights as well as compensation for lands taken from them. In 1913, for example, the Nisg\_a’a people of the Nass valley presented a petition to the imperial privy council asking for recognition of their Aboriginal title; the petition was referred to the Canadian government. The federal government bowed to provincial pressure, however, and did not proceed with a case by reference to the Exchequer Court of Canada with a right of appeal to the judicial committee of the privy council — then the country’s highest court.\textsuperscript{87} The failure of such attempts to settle their grievances eventually led the Nisg\_a’a to take both governments to court, an action that led to the 1973 Supreme Court decision in *Calder* and to a new era in federal land claims policy. The recent creation of the British Columbia Treaty Commission, then, is but the latest in a long series of attempts to deal with unresolved issues dating back to before the province’s entry into Confederation.

*The North*

The Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.\textsuperscript{88}

While the policy goal of turning Aboriginal people into farmers prevailed in much of Canada, even Indian department officials realized that such programs would be difficult,
if not impossible, in more northerly regions of the country where agricultural land was either scarce or non-existent. By the turn of the twentieth century, the resource development frontier extended from the north shores of lakes Huron and Superior, where minerals had been discovered in the mid-1840s, to the boreal forest and Arctic regions of Canada. The development of these resources went in step with, but was independent of, the colonization of fertile lands.  

### Indian Reserves in the Okanagan

James Douglas proclaimed colonial government on the mainland in 1858, but civil authority was not established in the southern interior until Governor Douglas himself visited the middle Fraser, Similkameen, and Okanagan valleys in the spring of 1860. Indian concurrence was necessary before settlement could proceed, so Douglas sought public agreement to a proposal....[Under the agreement,] the Okanagan and other interior Indians retained the right to hunt and fish on unoccupied Crown lands....The agreement which secured Okanagan Indian acquiescence in the settlement of their territory [also] included the maintenance of exclusive Indian rights to resources on reserves of land of whatever size and location they demanded. The Okanagan people...in 1861....chose most of the good bottom land at the Head of the Lake and at Penticton. They retained their village sites, their fishery locations and garden plots, and a good base for winter-ranging their livestock. However, both reserves were reduced to a small fraction of their previous size in 1865 after J.C. Haynes, the local Justice of the Peace, argued that the reserve awards were excessive and beyond the requirements of semi-nomadic Indians....Land on both the Head of the Lake and the Penticton reserves was reduced from approximately 200 to about twenty-five acres of land per household, of which perhaps ten acres was arable....With Indian holdings thus reduced, white stock holders moved to acquire the newly available bottom land as the nucleus of their livestock operations....

When the restricted size of the Haynes reserves began to hamper Native agricultural production and the implications of the English concept of private property began to be felt by the presence of fences and trespass laws, the Okanagan and neighbouring Indians became agitated and threatened war. In an attempt to assuage Indian discontent, the federal and provincial governments established the Indian Reserve Commission (irc) and dispatched it to the Shuswap and Okanagan in 1877. The irc scrutinized each reserve with a view to determining and meeting minimal Indian demands, and then recommended enlarged reserves (which were not formally granted until the early 1890s), based on a ratio of twenty-four acres per head of livestock then held. The new Nkamaplix (Head of Lake) Reserve, for example, with over 25,000 acres, plus a 25,000-acre grazing Commonage, was estimated to include 1,200 acres of arable land, or nineteen acres per male adult....However, in 1880 the settler-dominated government categorically denied Indians the right to purchase land off the reserve, and in 1893, the Indian Reserve Commissioner, Peter O’Reilly, was instructed to “cut off” the Commonages attached to the Nkamaplix, Penticton, and Douglas Lake reserves. The Indian land base was eroded again in the 1890s when the government allowed white settlers to purchase land immediately adjacent to
various reserves, thereby eliminating Indian access to Crown lands lying beyond. Further reductions were recommended by the McKenna-McBride Commission of 1912-1916, resulting in the Penticton, Westbank, and Spallumcheen reserves being reduced by 14,060, 1,764, and 1,831 acres respectively, and the Nkamaplix Reserve by the loss of various small outlying reserves.


There had been earlier attempts to deal with Aboriginal people living in resource-rich sections of the country. In 1851, the province of Lower Canada appropriated some 250,000 acres of land for Indian peoples resident in that province. The three largest reserves — established at Maniwaki, at the head of Lake Timiskaming, and at Manicouagan (Betsiamites) on the north shore of the St. Lawrence — were intended (mainly as a result of representations by Oblate missionaries) to protect the Attikamek, Algonquin and Montagnais peoples from the depredations of lumbermen and settlers in the upper valleys of the St. Lawrence, St. Maurice and Ottawa rivers, where the forest industry had been making serious inroads since the 1820s. In contrast to previous practice in Upper Canada, these reserves were not the result of treaties, nor did the enbling 1851 legislation refer to the cession or extinguishment of Aboriginal title. However, some of the Aboriginal nations in question — particularly the Algonquin and closely related Nipissing who maintained summer villages at Oka and Trois Rivières — had been protesting to the Crown since the late eighteenth century that settler governments had permitted settlement and development on their hunting grounds in the Ottawa and St. Maurice river valleys before any treaties had been made with them. Those unresolved grievances lie behind the current claims of the Algonquin people of Golden Lake in Ontario and the various Algonquin nations in Quebec (see Appendix 4B). The present claim negotiations with the Attikamek-Montagnais people are also based on the fact that their Aboriginal title previously had not been dealt with.

At the same time as lands were being set apart in the eastern half of the Province of Canada, Aboriginal protests in the western half (now Ontario) did result in the making of treaties. From the time that the first exploration parties arrived in 1845, the Ojibwa and Métis peoples of lakes Huron and Superior had taken strong exception to the use of natural resources without their consent. In the fall of 1849, a war party led by the elderly chief Shinguačśue actually took possession of an operating mine at Mica Bay, just up the shoreline from Sault Ste. Marie. The government sent troops, and the perpetrators were arrested, but at the same time, Governor General Lord Elgin ordered the province to make a treaty. A prominent politician, William Benjamin Robinson, was commissioned to undertake the task and in September 1850 made the two agreements that bear his name with the Ojibwa people of the upper lakes.

The Robinson treaties provided for the recognition of various reservations, mostly along the lakeshore. Commissioner Robinson knew the resources of the region first-hand, however, (he had been a fur trader and had managed one of the mining operations) and
insisted that the Ojibwa people were not being required to give up all connection to their traditional lands. He reported to the superintendent general of Indian affairs:

I explained to the chiefs in council the difference between the lands ceded heretofore in this Province, and those then under consideration: they were of good quality and sold readily at prices which enabled the Government to be more liberal, they were also occupied by the whites in such a manner as to preclude the possibility of the Indian hunting over or having access to them: whereas the lands now ceded are notoriously barren and sterile, and will in all probability never be settled except in a few localities by mining companies, whose establishments among the Indians, instead of being prejudicial, would prove of great benefit as they would afford a market for any things they may have to sell, and bring provisions and stores of all kinds among them at reasonable prices. [emphasis added]\(^95\)

The later-numbered treaties (8 through 11, plus adhesions to treaties 5 and 6) made in the period 1898-1930 (see Figure 4.8) can also be considered resource development treaties in whole or in part. While reserves were set apart out of the territories covered by agreement — often in a formula of 640 acres per family of five, rather than the 160 acres that had prevailed on the prairies — the nations that participated, like those on lakes Huron and Superior, were constantly reassured that they would not be forced to reside on those lands, nor would their traditional economies be interfered with. Thus, the commissioners for Treaty 9 noted the reaction of the chief of the Osnaburgh Band, from the Albany River region between northern Ontario and the Northwest Territories, in 1905:

Missabay, the recognized chief of the band, then spoke, expressing the fears of the Indians that, if they signed the treaty, they would be compelled to reside upon the reserve to be set apart for them, and would be deprived of the fishing and hunting privileges which they now enjoy. On being informed that their fears in regard to both these matters were groundless, as their present manner of making their livelihood would in no way be interfered with .... the Indians signified that ... they were prepared to sign, as they believed that nothing but good was intended.\(^96\)

While many of the reserves stipulated in these treaties were in fact surveyed and established, others were not. This was particularly true of treaties 8, 10 and 11, which cover much of northern Alberta, Saskatchewan, northeastern British Columbia and the Northwest Territories. Many Treaty 8 reserves in northern Alberta and British Columbia were not created until the 1950s, for example, and Treaty 10 reserves in northern Saskatchewan did not come into existence until the 1970s. The lack of reserve creation in the Northwest Territories was one of the reasons that led Justice Morrow of the Supreme Court of the Northwest Territories to conclude that there had been no valid extinguishment of Aboriginal title under Treaties 8 and 11.\(^97\) This court decision was a major precipitating factor behind comprehensive claims negotiations with Dene and Métis peoples of the Northwest Territories.
The idea of Aboriginal intent is essential to understanding the treaty relationship. In the case of the northern treaties, for example, there is considerable evidence that various groups were unaware of the actual content of the treaty document or were reluctant to take part. In 1903, agent H.A. Conroy explained to the department of Indian affairs about his difficulties with the Beaver Indians of the Fort St. John region:

The Indians at this place are very independent and cannot be persuaded to take treaty. Only a few families joined. The Indians there said they did not want to take treaty, as they had no trouble in making their own living. One very intelligent Indian told me that when he was old and could not work he would then ask the government for assistance, but till then he thought it was wrong for him to take assistance when he did not really require it.

Some groups never did take treaty, even though their traditional areas were included in the metes and bounds descriptions in particular treaty texts. A prominent example is the Cree people of the Whitefish, Little Buffalo and Lubicon lakes area of northern Alberta, who are considered to be covered by the terms of Treaty 8. For many years, the Lubicon Cree have disputed government claims that they are part of that treaty, and they have been asserting their Aboriginal title in a variety of forums.

Forgotten promises

The difficulties Aboriginal people experienced in securing or retaining a land base in the period between Confederation and the Second World War were intimately linked to the overall decline in the Crown’s respect for their rights to lands and resources. By the late nineteenth century, in all parts of the British Empire, the law was reflecting official doubts about the existence and nature of Aboriginal title. In 1888, the judicial committee of the privy council (JCPC) intimated that Aboriginal rights with respect to lands and resources did not predate but were created by the Royal Proclamation and, as such, were “dependent upon the good will of the Sovereign”. In 1919, in a case arising in Southern Rhodesia, the JCPC stated that some “aboriginal tribes ... are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society” and that, as a result, their Aboriginal title should not be recognized by colonial law. These kinds of views both reflected and were adopted by members of society. Thus, W.E. Ditchburn, federal Indian commissioner for British Columbia, described Aboriginal title in 1927 as “a canker in the minds of the Indians”.

Courts began to view treaties between Aboriginal nations and the Crown as at best private contracts, ignoring their historical and fundamental character. As late as 1969, the federal government could describe claims of Aboriginal title as “so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy” that included the termination of all distinct Aboriginal rights other than temporary benefits and rights to reserve land.
Official resistance to the existence of Aboriginal title did not occur without Aboriginal protests. As we will see in our discussion of claims policy, Aboriginal peoples made consistent demands for recognition of their rights to lands and resources and sought to enter into treaties that would protect their systems of land tenure and governance from encroachment and erosion. In 1913, for example, the Nisg̱a’a Nation sent a petition to authorities in London seeking the protection of Nisg̱a’a title:

We are not opposed to the coming of the white man into our territory, provided this be carried out justly and in accordance with the British principle embodied in the Royal Proclamation. If, therefore, as we expect, the aboriginal rights which we claim should be established ... we would be prepared to take a moderate and reasonable position. In that event, while claiming the right to decide for ourselves the terms upon which we would deal with our territory, we would be willing that all matters outstanding between the Province and ourselves should be finally adjusted by some equitable method to be agreed upon ...

But, as the remainder of this section will outline, these demands were all too often ignored. When Aboriginal peoples sought judicial assistance, they frequently found obstacles placed in their paths. Some of these obstacles were the result of legislative action. In 1927, for example, Parliament amended the Indian Act to require anyone soliciting funds for Indian legal claims to obtain a licence from federal authorities, impeding Aboriginal people from seeking to enforce their claims of Aboriginal title in court. And, as already mentioned, other obstacles were the product of judicial interpretation. As a result, Aboriginal peoples’ experience with the law of Aboriginal title was, until relatively recently, one of continuing frustration.

4.3 Failure of Alternative Economic Options

If we return to the map at the beginning of this chapter showing the present distribution of the Canadian population (Figure 4.5) and compare it with the treaties map (Figure 4.8), we can see that the boundaries of the northern resource development treaties generally
cover areas where Aboriginal people still make up either an absolute majority or a
sizeable minority of the population (though some of the majority areas, such as northern
Quebec and the eastern Arctic, would wait until the modern era of comprehensive claims
settlements for their agreements). In this sense, Robinson’s prediction, made in 1850 to
the Ojibwa people of the upper Great Lakes — that these regions would probably never
be settled except by mining or other resource industries — has proved substantially
accurate.

Robinson also predicted, however, that Aboriginal people would benefit from their
contact with the new arrivals, who would provide them with a market for their products
(fish, meat, fur, maple sugar and other fruits of the harvest). He even wrote into the text
of the Lake Huron treaty a clause guaranteeing the Ojibwa people an increased share in
government revenues if the value of the resources extracted went up:

Should the Territory hereby ceded by the parties of the second part at any future period
produce such an amount as will enable the Government of this Province, without
incurring loss, to increase the annuity hereby secured to them, then and in that case the
same shall be augmented from time to time, provided that the amount paid to each
individual shall not exceed the sum of one pound Provincial Currency in any one year, or
such further sum as Her Majesty may be graciously pleased to order.109

Robinson cannot be blamed for failing to predict the scale of resource development that
eventually took place across the north and the west or the fact that the Ojibwa and other
Aboriginal peoples would never get a share of the benefits. In 1850, railways were only
beginning to be built in eastern Canada; lumbering had just reached the upper lakes and
still had not seen the boreal forest; and no one had discovered yet that water could be
used to produce hydroelectricity. Gauging the impact of these kinds of developments on
Aboriginal people would have to wait until the new century.

For their part, neither did First Nations or Métis peoples foresee the scale and speed of
agricultural settlement and industrial development after Confederation — or the arrival of
so many immigrants to take up lands and jobs in frontier regions. But they did
acknowledge that life would change. The treaties and scrip entitlements were intended,
from their perspective, not only to protect the basis of their self-governance and economy
but also to secure access to new economic endeavours. Many of the numbered treaties,
for example, contain provisions for the supply of seed, cattle and agricultural implements,
because the Cree, Dakota and Ojibwa nations had expressed an interest in expanding their
economies to include farming. Other treaties provided for the distribution of fishing nets,
net twine, guns and ammunition so that First Nations could blend their subsistence
activities with participation in the new economy.110

Had those policies worked, there is no doubt that Aboriginal people would now be better
off. But they did not and they are not. Nominally, at least, Canada’s policies at the time
of Confederation were designed to integrate Aboriginal people into the national economy.
In practice, however, federal legislation (most notably the Indian Act), coupled with
federal and provincial policy and actions, made it more, not less, difficult for Aboriginal
people to pursue other economic options. As a consequence, change was abrupt and
sudden and by no means based on reciprocity.

As we will see, in all parts of Canada and in every major sector — land, timber, minerals,
fisheries, fur and game — First Nations and Métis peoples (and somewhat later, Inuit) not
only lost control of resources on what are now considered public lands, but were denied
even the same terms of access as non-Aboriginal people. In the process, governments
unwittingly — and, in some important instances, consciously — violated treaty and
Aboriginal rights. The net effect was to force increasing numbers of Aboriginal people
onto government relief or other forms of public assistance.

As for what were supposed to be their own lands — the reserves — Indian people found
themselves under the control of government officials rather than their own leadership.
Not only did the Indian department’s stewardship of reserve lands and resources turn out
to be abysmal, but the employment policies that were to be based on those lands and
resources were mostly a failure (see Volume 1, Chapter 9). By the time these policies
began to be reversed (by federal-provincial economic development agreements beginning
in the mid-1960s, as well as by court- or claims-imposed allocation freezes), Indian
participation in trapping, logging, fresh-water commercial fishing and farming had
already declined drastically and, in many cases, ceased altogether, and Indian people had
been largely excluded from the mining and forest industries. We begin with the
instructive case of federal Indian agricultural policy.

**Agriculture**

Several nations in eastern Canada — the Huron-Wendat, members of the Iroquois
Confederacy, and some Ojibwa nations — were already raising crops at the time of
contact, and many took easily to the introduction of European farming methods. Recent
research has shown, for example, that many Iroquois and Chippewa (Ojibwa) farmers in
southwestern Ontario were as productive as their non-Aboriginal neighbours in the
nineteenth century. Other nations, such as the Saulteaux (Ojibwa) of northwestern
Ontario and northeastern Manitoba, took up farming in the eighteenth century for the
purpose of commercial sales to fur traders. In principle, many western peoples
welcomed the introduction of agriculture at a time of social and economic change. As the
late George Manuel, a distinguished leader from the Shuswap Nation, put it in 1974:

The people of the plateau saw farming differently; it was an addition to the existing
economy and not a second-rate substitute. It did not bring down our whole social order. It
did not take children away from the family circle. It did not take men away from jobs at
which they were skilled to do menial work for strange men far away. Farming, for us,
was a change in land use that did not require a complete renunciation of the relationship
between the land and the men who lived on it.

But federal laws and policies after 1881 placed restrictions on commercial agriculture
carried out by First Nations members. As the example of the Dakota people shows (see
accompanying box), the department developed a policy of non-mechanized peasant agriculture that required the use of hand tools on small plots.114

### Dakota Farming in Western Manitoba: 1880-1900

The Dakota communities of Oak River, Birdtail and Oak Lake in southwestern Manitoba adapted easily to commercial-based agriculture by the mid-1880s. They had acquired a variety of livestock and were the first to plant test crops successfully, including Red Fife wheat, clover and alfalfa.

However, the orientation of federal Indian agricultural policy was not commercial in nature. Rather, the department of Indian affairs sought to create a form of ‘peasantry’ farming with a dual purpose: to ‘civilize’ the Indians and to prevent their direct competition with settler farmers.

The relative isolation of the Dakota had previously served them well. It prevented both the intrusion of Indian agents and competition for land and resources from settlers. This was to be short-lived. When the Dakota appealed to Indian affairs for more and better seed, implements and farming instruction, the department insisted that control over agriculture planning and practices be vested in Indian agent(s) and/or farm instructors. By the end of the nineteenth century, Indian agents or their designates (the reserve farm instructors) had control over every aspect of Dakota farming: seeding, deployment of labour, the division of reserve lands into individual plots, harvesting, marketing and the revenue gained, etc. In effect, the Dakota lost all political autonomy, and their social fabric was severely damaged. Previously, Dakota communities farmed on a communal basis, which enabled them to shift labour easily from farming to hunting and fishing, without disrupting either endeavour. The policy changes had the further effect of hastening soil depletion and erosion, and the practice of cattle farming soon declined, owing to the lack of communal land for grazing.

Dakota communities attempted to compensate for the changes by purchasing more efficient technology through private means. The Indian commissioner, however, was strongly opposed to Indian people using labour-saving devices. What proved to be fatal, however, was the Department’s introduction of the permit and ‘chit’ system in the 1890s. The former meant that Indian farmers had to obtain a permit to sell grain and other produce, or to buy stock and implements. The latter meant that all cash transactions became illegal; instead Indian farmers were to be paid in chits that could be exchanged at stores. The policy regulations were condemned by both Indian and non-Indian farmers: “They farm their own land, work hard all summer, and through the obnoxious order are not allowed the full benefit of the fruit of their own labour. They are thus placed at a disadvantage in competition with their white and more highly civilized neighbours.”

Although the federal government received numerous complaints and petitions, the department pressed ahead and began to charge Dakota who defied the policy,
threatening non-Indian businesses with the same treatment should they buy grain or sell implements without a permit. Eventually, Dakota farmers became completely frustrated and stopped complaining, as those who did were frequently refused permits. By the turn of the century, most Dakota had abandoned farming altogether. By this time, it appears that the federal government became equally frustrated, since the department turned its attention away from agricultural policy to social matters such as the residential school system.


In northwestern Ontario, after a promising start, Ojibwa people also abandoned farming because of the same federal policies; as a result, agriculture had virtually ceased in the area by the 1890s. By 1905, the Ontario minister of lands, forests and mines was noting complaints from settlers in the Rainy River district about “the large areas of agricultural land that are locked up by Indian reserves”. The minister wanted the department of Indian affairs to engineer surrenders of the reserves, “as the Indians are few in number and will never cultivate the land to any extent”.

By 1915, despite Ojibwa protests, the department had enforced the sale of over 43,000 acres of the best farming land in northwestern Ontario to local settlers. In British Columbia, it was provincial control of pre-emptions and of grazing and water rights, even more than federal policies, that made it difficult for Aboriginal people to take up commercial agriculture. In most areas of the province, arable land was scarce, and for reasons discussed earlier, reserves had ended up too small to be adequate for farms. When Aboriginal people looked elsewhere for land, they found themselves shut out. As late as the 1920s and ‘30s, federal officials in the Lytton and Williams Lake regions were complaining that “provincial authorities will not sell or lease lands to Indians”, were denying them water rights, and were “chasing the Indians’ horses off the Crown Ranges”.

The lack of guaranteed access to water was particularly important in the Okanagan region, where fruit farming is almost impossible without irrigation. The provincial government consistently denied water licences (known in B.C. as water records) to Indian people because they were not the owners of lands in fee simple. In 1911, for example, Paul Terrabasket applied for a licence to irrigate 50 acres of land, including an orchard, on Reserve No. 6 in the Lower Similkameen, which his family had been cultivating for decades. The board of investigation refused Mr. Terrabasket’s application and instead confirmed the licence held by the Similkameen Fruitlands Company, successor in title to the water record once owned by a local pioneer rancher. The company’s title, however, was conditional on its making beneficial use of the water by 1916, which it failed to do, although in 1921 it was able to secure an extension until November 1922. When the company finally began using the irrigation ditch, after decades of non-use, it tried to prevent Paul Terrabasket from using the water upon which his orchard depended. The
company obtained a restraining order from the British Columbia Supreme Court, and when Mr. Terrabasket ignored the order in an attempt to save his crops, he was jailed.\textsuperscript{117}

One of the major problems for policy makers was that the government’s Indian agriculture programs (and, indeed, all economic programs for Aboriginal people) were perceived by non-Aboriginal people as creating unfair competition. This may have been the way it looked to struggling pioneer farmers, but in fact Indian people were not eligible for the information and assistance that settlers themselves received from federal and provincial departments of agriculture. In the Cowichan area of British Columbia, for example, the only assistance available to Indian farmers was a single inspector whose job was to make sure that their orchards were sprayed with pesticides — not to improve their crop, but to prevent pests from spreading to adjacent non-Aboriginal orchards.\textsuperscript{118}

\textit{Minerals, oil and natural gas}

At present, mineral revenues from reserve lands are a significant source of wealth for some Indian people, although revenues have fallen drastically since the boom years of the late 1970s and early 1980s, when they amounted to as much as $200 million annually.\textsuperscript{119} Almost all the revenues derive from oil and natural gas on certain reserves in Alberta. While many Aboriginal people in other parts of the country live in regions rich in minerals, they derive far fewer benefits from those resources.

One important reason is that, in the parts of western and northern Canada covered by the numbered treaties, the federal government tried to ensure that the reserves selected contained no valuable minerals. In 1874, for example, the federal cabinet directed the officials in charge of locating reserves under Treaty 3 to ensure that they did not include “any land known ... to be mineral lands” or any lands for which patents had been sought by either the Ontario or the dominion government.\textsuperscript{120} In fact, because of what would become a long-standing federal-provincial dispute over the boundaries of those reserves and resource rights within them, an 1894 agreement between Canada and Ontario stipulated that any future treaties with the Indians of Ontario would “require the concurrence of the government of Ontario”.\textsuperscript{121} The province used this veto power during the negotiation of Treaty 9 in 1905-1906 to ensure that no water power sites or known mineral deposits were included within reserve boundaries along the Albany River.\textsuperscript{122}

Further to the northwest, one of the government’s principal motives for making Treaty 8 in 1899 was to prepare the way for resource development. The Yukon gold rush was already under way, and there was extensive exploration for gold and other minerals in the basins of the Peace and Athabasca rivers. But while officials hoped to protect the Aboriginal population from the worst effects of contact with the miners, they had no intention of including existing mining claims within the reserves set apart by treaty.\textsuperscript{123} At the time, however, few people suspected the existence of oil and natural gas, nor were those resources being actively sought. Like the province as a whole, therefore, the resource-rich Alberta bands are the accidental beneficiaries of the discovery of oil at Leduc in the late 1940s.
Had oil and gas been discovered in the 1920s and 1930s, the latter bands might not have been as lucky. In the northern parts of the prairie provinces, there was a long interval between reserve selection and survey, and many reserves were not even selected until many years after treaty. Here too there was considerable pressure to ensure that valuable minerals were not included within reserve boundaries. In a 1925 letter to the federal minister of the interior, Premier Dunning of Saskatchewan urged the minister not to allow the Lac La Ronge band to select the 30 or so square miles of treaty land entitlement in areas with mineral potential. “If mineralized sections are kept out of Indian Reserves,” wrote the premier, “there is a chance for their development in the future. The placing of them within the borders of the Reserves would hamper development very materially.” Band members, he said, were aware of the activity of prospectors in the area and wanted to prevent further development by having the territory in the vicinity made into reserve land.124

The premier was expressing a general societal belief that Aboriginal people were either uninterested in, or incapable of, taking part in resource industries. But Aboriginal opposition to resource development was not uniform, and some of the opposition was based on fears of being excluded from its benefits. During the copper boom of the 1840s on Lake Superior, Ojibwa chiefs from the Sault Ste. Marie area had protested to the governor general that prospectors were staking mining claims without their consent. The Great Spirit, said the chiefs, had originally stocked their lands with animals for clothing and food, but now these were gone; however, the Great Spirit had foreseen that this would happen and had “placed these mines in our lands, so that the coming generations of His Red Children might find thereby the means of sustenance”.125 In fact, most of the major deposits of copper (a mineral that had been used by Aboriginal people for centuries) had been found not by exploration, but after Aboriginal people told prospectors where to look.

In many parts of Canada, such as northern British Columbia, the Yukon and the Northwest Territories, and the mineral belt that straddles northwestern Quebec and northeastern Ontario, Aboriginal people not only guided geological surveyors and mining exploration parties, but they also staked claims themselves. Popular narratives of the Yukon gold rush tell colourful stories about the Tagish people: Skookum Jim (his actual name was Keish), his sister Kate (Shaw Tlaa) and his brother Tagish Charley (Kaa Goox) who, along with Kate’s non-Aboriginal husband George Carmack, triggered the rush with their strike along the Yukon River in 1896, then headed off to Seattle to spend their new-found wealth.126 Though Keish never made another major find, he continued to prospect along the Teslin, Pelly, Stewart and upper Liard rivers until his death in 1916.127

Though some Aboriginal people did explore for minerals themselves, they were more likely than other small prospectors to suffer discrimination in registering their claims. An Ojibwa named Tonene, a former chief of the Teme-Augama Anishinabai, took up prospecting during the Cobalt silver rush that began in 1903. He is credited with discovering the ore body near the Quebec border that led to the famous Kerr-Addison mine — at one time the largest single producer of gold in the western world.128 Unfortunately for the chief, his claim was jumped. “Damn the Indian who moves my
posts” the other prospector had written on Tonene’s own claim markers, after the chief had replanted them. The local mining recorder refused to recognize the chief’s grievance, and the department of Indian affairs was unable to secure him redress.129

With respect to the mineral rights of Aboriginal peoples, especially the status of minerals on reserve lands, the state of the law has played a particularly important role. We referred earlier to the overall decline in official respect for Aboriginal title during the late nineteenth century. In the most important judgement of that period, the judicial committee of the privy council characterized Aboriginal rights with respect to lands and resources in 1888 as “personal and usufructuary”.130 The provinces argued that this meant that the usufruct (a Roman law concept meaning ‘use’) of reserve lands, not being true ownership, did not extend to minerals, which therefore was vested in the provinces by virtue of section 109 of the Constitution Act, 1867. In 1921, the privy council ruled that this was indeed the case with respect to the minerals on reserves set apart in Quebec before Confederation.131

Other provinces (especially Ontario) also claimed rights to gold and silver on reserve lands, on the grounds that such “royal mines” had always been regarded as belonging to the Crown (not the landowner) by virtue of the royal prerogative. In 1900, in Ontario Mining Company v. Seybold, Chancellor Boyd agreed with this argument, ruling that the precious metals on reserves set apart under Treaty 3 of 1873 had already passed to Ontario under section 109; that decision was upheld by the Supreme Court of Canada a year later.132

First Nations people maintained that the provincial position violated their treaties, which in their view guaranteed them full rights to the minerals on their reserves. That understanding is reflected, for example, in the wording of the 1850 Robinson treaties, which refer to the rights of the “said Chiefs and their Tribes ... to dispose of any mineral or other productions upon the said reservations”.133 During the negotiation of Treaty 3 in 1873, Commissioner Alexander Morris had assured the chiefs that “if any important minerals are discovered on any of their reserves the minerals will be sold for their benefit with their consent ... ”.

While federal officials had tried their best to exclude mineral lands from subsequent reserve selection, in 1876 the Indian Act basically reflected the Indian understanding, in that it defined reserves as including the “stone, minerals, metals and other valuables thereon or therein”.134 But the provincial position, buttressed by court decisions, made it virtually impossible to develop mineral resources on reserves. Once a band had surrendered mineral rights for the purposes of development (a requirement of the Indian Act), the beneficial interest automatically flowed to the province, not the band.

As a result, Canada entered into a series of federal-provincial statutory agreements that gave many of the provinces a measure of control over reserve lands, as well as a share in resource revenues.
Under the terms of the 1924 Indian lands agreement with Ontario, for example, the province obtained 50 per cent of the revenues from mineral development on reserves. An identical provision was included in the 1930 natural resource transfer agreements, under which Canada transferred ownership and jurisdiction of Crown lands and resources to Manitoba, Saskatchewan and Alberta, although it was not to apply to reserves set aside before 1930. In 1943, Canada reached a similar agreement with British Columbia, recognizing the province’s right to 50 per cent of mineral revenues from reserve lands.

**Forestry**

The action of the Band in this matter exemplifies in a marked degree the incapacity of the Indians to manage their own affairs. Because of the stubborn waywardness of one old man, their Chief, they refuse to execute an act that would place all in the most comfortable circumstances ... . In view of the incapacity of the Dokis Band to exercise any judgement in the matter of the surrender of their timber, the Department should seek or take the exceptional authority to dispose of their Timber without their consent or without previously having obtained from them the surrender of same.

What one elderly chief from a reserve on the French River in northern Ontario had done was very unusual in the late nineteenth century. He and his band had refused to allow their white pine timber to be cut down. Many other reserves east of the Great Lakes were not so lucky; most had already been stripped of their valuable trees. In the department of Indian affairs’ defence, the pressures on them were enormous — lumbermen from Canada and the United States were after what remained of the virgin white pine stands that had once covered much of eastern Canada. By 1900, all that was left were small pockets on eastern Georgian Bay and a narrow strip along the north shore of Lake Huron; by 1920, these stands, including the pine on the various reserves along the shore, were gone as well. The scale of forest operations had been prodigious, with sawmills along Georgian Bay and Lake Huron producing hundreds of millions of board feet every year, but once the trees had been cut down, most of the sawmills closed and the lumbermen moved on.

In addition to the revenues they received from the surrender of their reserve timber, some Indian people worked in the sawmills or on river drives. But if they sought cutting rights themselves on the reserve, they were almost invariably advised that logging was better left to the large companies; if they sought timber rights off-reserve, the Crown timber office told them that those rights had already been allocated, or that only the most uneconomic areas were available.

In their recent report respecting timber management on Crown lands, the Ontario environmental assessment board criticized the provincial government for pursuing policies over the past century that have denied Aboriginal people access to forest resources and a share of their social and economic benefits. But blame was also placed squarely on the federal government for allowing First Nations to be deprived of their reserve timber resources. The example the board used was the fate of timber in northwestern Ontario (see accompanying box).
In British Columbia, which was as heavily forested as eastern Canada, Aboriginal people were at first able to benefit from the logging economy. As settlements expanded in the immediate pre- and post-Confederation period, so did the demand for lumber. While colonial ordinances had declared timber a Crown resource, Aboriginal men were nonetheless able to cut trees on their ancestral lands and sell them to sawmills without being harassed by government officials. In 1888, however, the province of British Columbia changed the law to require a handlogger’s licence for cutting timber anywhere in the province not already licensed or leased to larger companies. Because of this regulation, many coastal Aboriginal people acquired licences.

By the turn of the century, handlogging was a major source of income for the Kwakwa ka’wakw, Haisla, Tsimshian, Sechelt and other coastal peoples. But between 1904 and 1907, a great timber rush alienated more than 11.4 million acres of the best forest land. Not only did Aboriginal people find their access limited, but the government also stopped issuing licences for handlogging in 1907. Though some Aboriginal men subsequently found work as wage labourers and some bought the equipment necessary to bid on smaller timber sales, they found other obstacles, including general stereotypes about Aboriginal people. “There is a good body of timber in here,” one assistant district forester wrote in 1924 on the rejected application of a Haisla logger, “and we do not want it alienated by any Indian reserve applications.”

### Treaty No. 3 First Nations Forestry Experience

During the mid-1880s, Ojibwa nations in the Treaty 3 area of northwestern Ontario sold or traded cord wood to road contractors and steam barges operating along the Dawson Road (near Kenora). During treaty discussions, the Ojibwa negotiated unsuccessfully for compensation for resources, including timber, that they argue were not surrendered to the Crown. Subsequent to the Ojibwa peoples’ relocation to reserves, large-scale non-Aboriginal logging occurred in the area.

Initially, Ojibwa people were employed by logging companies; however, employment declined steadily as settlers took over cutting jobs. Denied employment off-reserve, by the early 1900s, most Ojibwa had returned to their communities and attempted to cut timber on reserves. However, attempts at establishing viable commercial operations were often frustrated by the department of Indian affairs, which would frequently give permits for dead and downed timber to Indian bands while pressuring communities to surrender more valuable timber to the department for sale to non-Aboriginal companies at auction. Monies from such auctions, as well as stumpage fees for cutting reserve timber, were not paid directly to the band(s) but held in trust and controlled by Indian affairs.

By the time the federal department began undertaking surveys of timber resources on each reserve (1920s), the resource had been severely depleted as a result of external contractors, trespass and theft. Further, there are few records of any regeneration
With access to Crown forests becoming more restricted, Indian people found, as in eastern Canada, that federal government regulations prevented them from harvesting their own reserve timber. Indian agents would permit their charges to cut timber for bona fide land clearing purposes, but they were not allowed to log for the purpose of sale. In the words of the McKenna-McBride commissioners, who seemed astounded to discover this during their 1913 tour of investigation, Indian people were “not allowed to do what a white man could do on his own land”. 141

Provincial policy throughout Canada continues to restrict Indian access to off-reserve forest resources for commercial purposes. British Columbia remains the sole provincial jurisdiction that has made specific legislative provision for Indian access to Crown timber — although the Ontario environment assessment board ruling requires the ministry of natural resources to find allocations, if at all possible, for First Nations. 142

The way Aboriginal people were treated in the immediate aftermath of Confederation can be attributed in large part to misunderstandings, to the division of constitutional responsibilities between federal and provincial governments, or to differing priorities with regard to lands and resources. But in one area — wildlife harvesting — the agents of the Crown consciously and openly violated Aboriginal and treaty rights.

Wildlife harvesting

In October of 1914, two Ojibwa men from the Nipissing Band in northern Ontario — Moses Commanda and his son Barney — appeared before High Court Justice Frank Latchford at the Sudbury Criminal Assizes. One had been charged with wounding a police officer and the other with wounding with intent. In the spring, provincial game wardens came onto their reserve, found a beaver and some beaver skins, and charged the two men with taking animals in the closed season, contrary to provincial law.

Justice Latchford was astounded to find out that, in June, the local magistrate had sentenced the two men to a year in jail for possession of the beaver skins and had also bound them over for trial on the criminal charges. On the facts adduced before him, the judge held that the shooting had been started by one of the game wardens, “and the only wounding that took place resulted from the fact that when one of the wardens had his revolver pointed at the younger Commanda, the father struck down the revolver with a birch stick, slightly injuring the game warden’s hand”.

Though the two men were acquitted by the jury, they were immediately returned to jail on the previous conviction. Justice Latchford appealed to the attorney general of Ontario to have them released and wrote to the superintendent general of Indian affairs to protest the “gross injustice” that had been done. He suggested that the department should consider entering a claim for compensation on the Commandas’ behalf against the government that had wrongfully imprisoned them.

Under the Robinson-Huron Treaty which should be as sacred as any treaty, Shabokishick and his band to which the Commandas belonged — and other Indians inhabiting French River and Lake Nipissing — were accorded the full and free privilege to hunt over the territory which they ceded, in the same manner that they had heretofore been in the habit of doing. There seems to be no possible doubt as to the meaning of the Treaty in regard to the district in which the Commandas were hunting; and yet I find that the representatives of His Majesty, in violation of the Treaty made with His Majesty’s predecessor, Queen Victoria, have interfered with the rights guaranteed by that Treaty and incarcerated the Indians for doing what they were given the right to do.143

The following spring, the Sudbury lawyer who had defended the Commandas free of charge chastised the department of Indian affairs for “assuming your own wards to be guilty without hearing anything from them”. J.A. Mulligan argued that the department had a duty to provide for their defence. “If you listen only to the side of the prosecution for information,” he argued, “you will not often be called upon to spend money in the defence of your wards.” The Commandas were eventually released by provincial order in council, though not before they had served well over two-thirds of their sentence.144

It may seem astonishing that, apart from any arguments about treaty and Aboriginal rights, an individual could be jailed for trapping a beaver out of season. But since Confederation, and particularly since the First World War, countless Aboriginal people, in all regions of the country, have been arrested and punished for violations of federal, provincial and territorial fish and wildlife legislation. They have had their guns, nets, fishing boats and motor vehicles seized. They have paid sizeable fines. And, like the Commandas, some individuals have gone to jail, often because of their inability to pay fines. This is a particularly unfortunate and relatively unknown chapter in Canadian history, and one that is far from being over.

While some of the Crown’s agents may have acted out of malice, what Aboriginal people really are experiencing is the logic of state management of lands and resources, particularly as it applies to fish and wildlife. Aboriginal peoples that signed treaties in the nineteenth and twentieth centuries may have believed that their rights with respect to harvesting — their customary laws and practices — were to be protected. What they did not know, nor could they have anticipated, was that the treaty commissioners had brought with them a whole complex of societal attitudes toward fish and wildlife and how those resources were to be managed.

A number of legal and policy developments had produced the situation in which the Commandas and other Aboriginal people now found themselves. While there had been
laws governing the taking of fish and game in both New France and the Anglo-American colonies, these laws were not applied to Aboriginal people, who, for reasons set out earlier, were generally treated by colonial officials as independent nations with their own usages and customs. By the mid-nineteenth century in Canada and the United States, however, two related trends were taking hold. East coast fisheries were beginning to be regulated by the colonies, and some politicians and members of colonial society had come to believe that the inland fisheries were also a matter of public right — even if that supposition was not legally correct — and that they should therefore be regulated by the state in the public interest.\textsuperscript{145} The second phenomenon, which gathered momentum toward the end of the century, was the rise of the scientific conservation movement.

Concern for vanishing wildlife was a continent-wide phenomenon, which had been particularly influenced by the disappearance of the buffalo.\textsuperscript{146} In the United States, conservation developed a high profile when prominent sportsmen like Teddy Roosevelt took up the cause. Sport hunting had become a mass movement by the 1870s, and over the following decades, popular magazines like \textit{Rod and Gun in Canada} mobilized their readers for preservation of game and fish.\textsuperscript{147}

In the fur trade economy, Aboriginal people had harvested the furs, fish, meat, wild rice, maple sugar and other goods for trade and provisioning. Ojibwa and Algonquin people built the great bark canoes that travelled the inland waterways of central Canada; M\text{\'}etis boat builders constructed the flat-bottomed vessels that plied the Hudson Bay drainage and the Mackenzie River system. Aboriginal people also worked as boat men, packers and guides along the transportation network. In the new industrial and agricultural economy, settlers took over much of this work, and governments regulated access to key resources on their behalf. Aboriginal people therefore experienced progressive encroachment and restriction, both as direct competition for fish and fur and through legislated restrictions on their harvest.

Fishing

One of the very first targets in the nineteenth century was commercial fishing. There is no question that fisheries required regulation on the Great Lakes and in northwestern Ontario, where the situation was becoming a free-for-all, particularly as Americans entered Canadian waters.\textsuperscript{148} But the effect of regulation was to eliminate or severely reduce existing Aboriginal commercial fisheries.

The first fisheries legislation in the Province of Canada (1857-58) gave the commissioner of Crown lands the power to lease fishing stations on all “vacant public lands still belonging to the Crown”.\textsuperscript{149} Because of the potential conflict with treaty fishing rights, the superintendent general of Indian affairs reached an agreement with the commissioner of Crown lands that would recognize an Aboriginal right of first refusal on fishing leases located in front of “inhabited Indian lands”. In one sense, this agreement can be considered an early precursor to the kind of priority allocation for Aboriginal people enjoined by the 1990 \textit{Sparrow} decision of the Supreme Court of Canada.\textsuperscript{150}
As implemented by government officials, however, the policy had the opposite effect, because most existing Aboriginal fishing grounds were thereby opened to commercial lease. Of the 97 leases issued on Lake Huron during the first regulatory season in 1859, 71 went to non-Aboriginal ‘practical fishermen’, 14 to the Hudson’s Bay Company and only 12 to ‘Indian Bands’. Over the following four years, the number of Aboriginal leases dwindled to almost none.151

In the case of the sturgeon fishery, government regulations not only favoured non-Aboriginal commercial operations, they effectively destroyed the fishery itself. Until the turn of the century, sturgeon was an enormously abundant resource and the basis of many Ojibwa and Cree economies. For generations, sturgeon had been taken for both subsistence and commerce, but not overfished. In the great inland sturgeon lakes — Lake Nipissing, Lake Huron, Lake of the Woods, Lake Winnipeg — the settler commercial sturgeon fishery, newly established in the 1870s and 1880s to supply distant markets, proved completely unsustainable, and catch levels plummeted to a small fraction of peak levels within a decade or two. Repeated pleas to federal authorities by First Nations to save the fishery and their livelihoods failed to reduce the magnitude of mismanagement.152

A similar situation prevailed on the west coast, where the federal government took over regulation of the fishery after 1871 and explicitly regulated the Aboriginal fishery from 1888.153 There, the “white preference” in the licensing system was an explicit, rather than implicit, goal of government regulation.154 Nevertheless, Aboriginal people did play an important role in the British Columbia canning industry.

Subsistence hunting and fishing

But it wasn’t just the Aboriginal commercial fishery that was affected by government regulations and policies. Many techniques of the Aboriginal food fishery — including the use of spears and gill-nets, as well as night fishing by torchlight — were offensive to sports anglers, as were certain hunting activities. During the legislative debate on the 1857 Fishing Act of the Province of Canada, M.L.A. John Prince attacked the use of spears and other Aboriginal techniques:

There was no skill requisite to use the spear; it was a dastardly and mean thing to hold a torch at the surface of the water, waiting until the fish came up, and then to stick it with a fork. It was as bad to do this as to follow the practice of some individuals who go out into the woods with hounds, and hunt the poor deer into the lake, and then take a canoe, paddle over to the poor animal, and shoot it. No sportsman would follow such discreditable sport. He himself would rather take deer on the bound, or cast a fly at the fish he wished to capture.155

Such techniques were not offensive to rural settlers, who learned how to spear and net from their Aboriginal neighbours.156 In fact, spearing can be much more efficient than angling as a means of selecting fish by size and age class.157 What John Prince’s comments indicate is a continuing conflict between the goals of those who take fish and
game for food and those who do so for sport. Prince was an affluent English emigrant steeped in the literary lore of the rod and the chase. As the first judge in northern Ontario (in the 1860s), he tried to persuade the Indian department to ban Aboriginal hunting and fishing altogether on the grounds that such activities were better left to sportsmen like himself. This tension between sport and support characterized much of the game and fish legislation in the first century after Confederation. Laws passed in Ontario (1892-1893), Quebec (1894), British Columbia (1895) and for the Northwest Territories (1897), as well as their many later amendments, were uniformly based on recommendations from recreational hunters and anglers and strongly influenced by the scientific conservation movement. They closed seasons for many species, limited take, and banned certain techniques of harvesting — including the use of spears and gill-nets and hunting with dogs.

All of these laws placed a ban on so-called market hunting — that is, the sale of wild meat. The latter was a traditional activity not just of Aboriginal people but of settlers in remote regions. Supplying wild game to urban or rural markets, or to logging, mining and survey camps became a penal offence. Since fresh domestic meat was scarce or nonexistent in frontier areas, the latter prohibition was often honoured in the breach (and not just by Aboriginal people). Later legislation limiting the Aboriginal harvest included acts that prohibited the spring hunt for waterfowl in the far north and gave the prairie provinces certain regulatory powers over Indian hunting and fishing.

Aboriginal Participation in the British Columbia Salmon Fishery

The early history of the British Columbia salmon fishery was characterized primarily by rapid and significant expansion of fishing and cannery operations into the interior and northern British Columbia. From 1871 to 1966, when the last cannery was built, more than 220 individual cannery sites were established, with over half of them by 1905. It was not until the 1960s that the federal government first began to introduce licence limitations in the commercial salmon fishery, at about the same time that the provincial government began to promote fish farming and the sport fishery.

Many of the prime fishing and cannery sites were on the traditional and reserve lands of Aboriginal peoples, since their primary source of food and livelihood centred on the sea and its resources. As salmon is a perishable good, the canneries had to be built close to fishing grounds. As a consequence, the fishery’s development is marked by exploitation of Indian land, resources and labour. In 1902, writes historian Dianne Newell, Henry Doyle, the general manager of the newly formed British Columbia Packers Association “casually staked claims for cannery locations even where he suspected that they were located on Indian reserves. In at least one case, he negotiated with the Indians concerned for a lease on their land and a guarantee of employment for local Indian fishers and shoreworkers should a cannery ever be built there”.

Until the First World War, Indians dominated the labour market, given the industry’s reliance on transient labour that could quickly respond to a ‘run’ lasting two to three
weeks. But then the situation began to change. With the onset of the war, the demand for canned food escalated sharply, prompting heavy overfishing and the licensing of new cannery operations. In 1919, the federal government lifted a pre-war policy of limited entry in fishing and canning in order to accommodate the needs of returning war veterans. Fishing licences specifically excluded Japanese fishers; and while licensing included Aboriginal people, in practice, according to Dianne Newell, it had the opposite effect:

Indians were not treated on equal terms with whites. Indian fishing licences were concentrated in the north. As numbers of licences issued to Japanese declined, only the number of licences issued to whites increased, while those to Indians remained roughly the same. In order to keep up the number of Indian cannery workers it became customary in the major district for cannery operators to use only those Indian fishers who had female relatives who could work at the cannery. Even then the Indian fishers reported they often received insufficient and sub-standard gear.

This licensing policy has had a lasting impact on the relative distribution of Aboriginal people within the commercial fishing industry. Not only did the absolute number of Aboriginal licence holders continue to drop, but the proportion of Aboriginal people involved in canning continued to outnumber those engaged as employees in the fishery itself. At present, for example, the United Fishermen and Allied Workers’ Union estimates that about 40 per cent of the shoreworkers in its membership are Aboriginal, while about 10 per cent of those working in fishing vessels are union members.

The Commission would not want to suggest that there were no valid conservation objectives behind such legislation. The assault on North American wildlife in the late nineteenth century is a fact. But even at the time, there were differing views about the primary causes of species depletion. Some individuals, including Nova Scotia-born William Whitcher, federal deputy minister of fisheries in the 1870s, assigned Aboriginal people a considerable portion of the blame. A hero of the early Canadian conservation movement, Whitcher was an avid fly fisherman and had worked as a fisheries overseer on the Restigouche River and then on Lake Huron in the 1850s and ‘60s. Replying in 1878 to a letter from his counterpart at Indian affairs, who had complained that the fisheries department’s new regulations were interfering with the rights and livelihoods of Indian people in the maritime provinces, Ontario and the lower St. Lawrence River region of Quebec, Whitcher asserted the necessity of federal control as well as the paramountcy of statute law over any treaty rights:

The protection of certain kinds of fish during their breeding time has proved a great public benefit to the whole country, as well as to the Indians themselves, the fish having again become plenty in districts where they had formerly been netted and speared unrestrictedly and were nearly exterminated. The rapid disappearance of game which is
stated in the same letter to be a cause of destitution amongst the Indians is due almost entirely to unrestricted hunting, pursued also by Indians; and a similar condition of things would inevitably result to the inland fisheries were the habit of indiscriminate fishing to be restored, thus imposing still further deprivation on whites and Indians alike.

On referring to the treaties mentioned, it does not appear that any unrestricted fishing or hunting was guaranteed; but, on the contrary, the Statutes then in existence specified restrictions applicable to the whole community, but which were until lately inefficiently enforced ... . It is well known that much of the laxity which prevailed in former times, and the prevalence of destructive practices of fishing, particularly by Indians, were due to false sympathy with the pretended sufferings which it was alleged they must sustain if prevented from indulging their habitual preference for spearing fish on their spawning beds ... .

The question would undoubtedly be asked — What claims are possible and sufficient in favor of Indians to injure and destroy a valuable public property that are paramount to the rights and interests of a great majority of the inhabitants to preserve and increase it for the benefit of the trade and industry of the whole country? Besides, it is well known that, as a matter of fact, the Indians are themselves benefitted through the operation of the present system. 164

By contrast, at least some Indian department officials felt that treaty rights were entitled to respect. The Indian agent for Georgian Bay, Ontario, Charles Skene, agreed with William Whitcher that some sort of restriction on the times and seasons for fishing and hunting was necessary. But as he told his departmental superiors, environmental damage, along with pressure from the general society (and American fishermen), were largely responsible for the precipitous decline in fish and game populations:

I am at the same time of opinion that the scarcity of game and fish has been caused more by the pollution of the rivers & spawning Beds by throwing in Saw Dust and other Mill refuse and by the great quantities of fish and Game of all kinds killed by the white men for the purpose of sale than by the Indians spearing on the Shoals and Banks. As far as my experience goes all that the Indians killed by spearing or with the small nets or other limited means was not of much consequence — and certainly so long as only the Indians fished & hunted no one heard of the great scarcity of Game & fish that now prevails ... .

With regard to the Salmon and Trout I entirely agree with Mr. Whitcher that interfering with the Spawning beds should be entirely put a stop to but I think that the greater evil of casting in Saw dust should also be entirely put an end to. And the rivers being entirely within the Dominion this could be done effectually. As to the Spawning Beds in the Large Lakes — where the Lake Salmon and the White Fish spawn — of course it is in the power of the Government to stop spearing etc on them within the Line between the Dominion and the United States — but I much question the United States aiding the Dominion by a like prohibition on their side — yet I think something should be done in the way of Restriction.
But any such law will come hard upon the Indians who depend so much upon the fishing — the fish they kill in the Fall forming a principal part of their support during the winter and for this they depend so much upon spearing — as they are unable to procure the large number of nets required and with their small boats and canoes they would be unable to set them if they had them. And as for their small nets the fishing along the Shore where they used to set them has been so destroyed by the Saw Dust and mill refuse that they are of little or no use ...

Mr. Whitcher says ‘On referring to the treaties mentioned it does not appear that unrestricted fishing or hunting was guaranteed’. Now I differ from him there as I think that the Robinson Treaty does guarantee this in as much as when that Treaty was made and the Indians ceded their Territory no restriction was known by the Indians but they hunted and fished as best suited them and a clause in the Robinson Treaty says ‘And further to allow the said chiefs and their tribes the full and free privilege to hunt over the Territory now ceded by them and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting such portions of the said Territory as may from time to time be sold or leased to individuals or companies of individuals and occupied by them with the consent of the Provincial Government’.

I consider this clause very distinct and explicit and that unless it can be proved that the Indians did not at that time spear fish the right to do so cannot be taken from them without breaking faith with them.

The preceding correspondence has a very modern ring to it. Different views about what, if anything, constitutes a justifiable infringement of Aboriginal rights are still at the heart of the conflict between government regulators and Aboriginal people. For more than a century, this conflict has pitted the rights of all members of society to harvest fish and wildlife for sport or commerce (under state regulation) against the rights of Aboriginal people (often enshrined in treaty) to take fish and wildlife for their own purposes — even according to their own rules.

The agent’s observations about pollution from the sawmills of Lake Huron and Georgian Bay were repeated by agents in northwestern Ontario and British Columbia, who were receiving complaints from First Nations about the impact of sawdust on the rivers and streams of their traditional territories. It is also interesting to note that, despite agent Skene’s concern for his charges, neither department believed that Aboriginal people themselves should have any role in the management or regulation of game and fish.

For a time, provincial and territorial laws did recognize the subsistence needs of settlers and Indian peoples in certain remote regions. For example, section 12 of Ontario’s game protection act of 1892 provided that game laws would “not apply to Indians or to settlers in the unorganized districts of this Province with regard to any game killed for their own immediate use for food only and for the reasonable necessities of the person killing the same, and his family, and not for the purposes of sale and traffic”. Similar clauses appeared in British Columbia and Northwest Territories legislation. The frontier ideal of a free man with deer or moose in his larder still has currency in many parts of Canada.
Settlers — farmers, woodworkers, and prospectors — hunted and fished for their own subsistence. Many immigrants from Great Britain, where in the eighteenth and nineteenth centuries rural folk who hunted for sustenance on private land — that is, most of the country — could be jailed, exiled or sentenced to hang, valued highly their new freedom in North America.\textsuperscript{170}

The provision of a subsistence harvest for non-Aboriginal people was particularly useful for Métis people, since provincial, federal and territorial regulators did not think that Métis people had any special rights to take game and fish. But by the 1920s, such clauses had also been dropped from legislation. The laws, then, were as much about allocation as they were about conservation — about who was entitled to take what, and for what purpose. By the 1930s, recreational hunting and angling had triumphed. As David Taylor, Ontario deputy minister of game and fisheries, explained to the department of Indian affairs in 1936, the fish and game resources of the province were far too important to be left to Aboriginal people or settlers:

I think you will appreciate where we have a natural resource by way of game and fish that is instrumental in attracting to this Province annually Tourist trade valued at from $50,000,000 to $80,000,000, that the Province would be much better off annually to keep these Indians in more or less luxurious fashion than to allow them to slaughter, particularly for dog feed, the game and fish of this Province ...

I presume your Department will be only too anxious to cooperate with us in this respect to the extent of having your local Indian Agents cease informing the Indians that they have privileges beyond what the laws of the Province permit, as this has from time to time a tendency to give us considerable trouble.\textsuperscript{171}

The privileges to which the deputy minister referred were those set out in agreements such as the Robinson treaties of 1850, Treaty 3 (1873) and Treaty 9 (1905-1906; 1929-1930), entitling Indian people to hunt, fish and trap on unoccupied Crown land. In the prairie west and north, wildlife officials took the same position on the treaties that applied to their areas. In the 1930s and ‘40s, employees of the Northwest Territories commission — one arm of the federal department of mines — explicitly rejected statements from the Indian affairs branch — another arm of the department — that treaty Indians had any specific harvesting rights on public lands.\textsuperscript{172} In 1954, the superintendent of welfare for the Indian affairs branch advised one of his officers, with respect to an individual who had been charged with a hunting offence, that “it is not the desire of the [Indian Affairs branch] to inform Indians fully concerning their Treaty rights because conservation and management could be defeated by so doing”.\textsuperscript{173} Ontario was still prosecuting treaty Indians for hunting on unoccupied Crown lands as late as the 1970s.

In the maritime provinces, neither the federal nor the provincial governments conceded that there were treaty harvesting rights at all. In 1925, Indian affairs official J.D. McLean told Moncton, New Brunswick, lawyer George Mitton, who had been retained by Chief Dan Paul of the Eel Ground Reserve near Newcastle, that Canada did not recognize a 1752 treaty that the chief was insisting had acknowledged Aboriginal rights to hunt and
fish. “This department,” McLean added, “has recognized the exclusive right of the provinces to legislate with respect to hunting and fishing and has advised the Indians that they must obey the laws of the provinces with respect thereto.” On the rare occasions when Aboriginal people used a treaty defence in court, they usually lost — as in the 1928 Syliboy case, when a member of the Mi’kmaq people from Cape Breton Island was convicted of illegal hunting. The Nova Scotia County Court dismissed the effect of the 1752 treaty with the Mi’kmaq on a number of grounds, among them that the treaty applied only to a small band living near the Shubenacadie River in Nova Scotia.

In the 1985 Simon case, the Supreme Court of Canada upheld the validity of the 1752 treaty, but this was half a century too late for Syliboy and the many other Indian people from the Maritimes who paid the price for violating provincial game and fish laws. The wife of Peter William Narvie of the Eel River Reserve in New Brunswick wrote the Indian department in April 1929 that “my husband is in jail for having venison in his possession”. He had believed, she said, in the treaties which said that “the Indians could fish and hunt any time of the year for their own use”:

Dear Sir my husband and three other Indians went by those Treatys and went in the forest to get enough meat for a few meals because we were almost starving and couldn’t get help from our Agent neither could the men get work of any kind around here to make a living and we were very hungry. And he was arrested for that and put in jail to serve fifteen days sentence or thirty one dollars fine. Now while he is in jail my two babies and I are going from one house to another begging our meals. While my husband was out on bail in between the trials he found a job for all summer and just because of this case, he is going to lose his job, and God knows when he will be able to find another because the jobs are not plentiful for the Indians especially.

Most Aboriginal defendants could not afford lawyers. In this particular instance, however, Narvie and the other defendants had hired a lawyer from Dalhousie, New Brunswick to defend them, believing that they could pay him out of band funds. But the department refused to honour the account because, by virtue of amendments to the 1927 Indian Act, the lawyer’s services had not been engaged by proper authority. Moreover, as officials in Ottawa explained to the angry barrister, “it is not the policy of the Department to provide a defense for Indians in cases of this kind”.

A century of effective prohibition of activities that treaty beneficiaries believed had been guaranteed to them by treaty has had a major impact on government and on society generally. Part of the corporate memory of provincial resource management agencies is that Aboriginal and treaty rights do not exist. It is no accident that groups such as the Ontario Federation of Anglers and Hunters continue to maintain that “Treaty Indians do not possess any exclusive claims to Crown land or resources within the geographic boundaries of Ontario, with the exception of their reserves”.

Tourism
In some parts of Canada, Aboriginal people worked in the early tourism industry, which began to flourish in the late nineteenth century as steamboats and railways opened previously inaccessible regions to recreational travel. Aboriginal people served as guides, packers and cooks for parties of hunters or fishermen in frontier regions. In the lake districts of southern Ontario and Quebec, they were employed by the growing numbers of tourist lodges and youth camps. But as the example of commercial guiding in the Yukon shows (see box), with increasing competition from non-Aboriginal people and increasing government regulation, Aboriginal people found themselves gradually excluded from this industry as well.

In some cases, the effect of government regulation on Aboriginal livelihoods was unintentional but just as severe. Legislation passed in New Brunswick in 1897 and 1898, for example, required persons not “resident and domiciled” in that province to obtain a licence if they wished to act as a guide or camp help. Such activities had been a significant source of income for Mi’kmaq people living on the Restigouche Reserve just across the provincial boundary in Quebec, the Restigouche being a popular destination for tourists from the eastern seaboard of the United States. But although they protested to the department of Indian affairs that they could not afford the non-resident licence fee of $20 (10 times the resident rate, and equivalent to more than a month’s wages), New Brunswick would not make any exception for those they referred to as “Quebec Indians”.

Trapping

One industry in which Aboriginal people were the exclusive primary producers during much of the nineteenth century was the fur trade. As with hunting and fishing, however, the imperatives of provincial and territorial regulation ran head-on into the assumption by Aboriginal people that the treaties protected their rights to trap. Earlier in the chapter we described the case of the Commandas, jailed in Ontario in 1914 for trapping a beaver contrary to provincial regulations. The same collision occurred in all regions of the country. In March 1915, a Mohawk trapper from Kanesatake, Andrew La Fleche, was arrested by two Quebec game constables for attempting to sell 101 muskrat skins to a trader in Montreal. In his defence, Mr. La Fleche cited the Royal Proclamation of 1763 and a proclamation of Quebec Governor James Murray in 1762 as support for his contention that he had a treaty right to hunt and trade fur. His furs were confiscated, he was fined and the department of Indian affairs, to which he had appealed for assistance, advised him that the proclamations to which he referred were “repealed many years ago and the Game Act is now in force”.

It is not difficult to see why Quebec officials, like those in other jurisdictions, thought Aboriginal people should be treated no different than the non-Aboriginal population when it came to hunting and fishing regulations. The provinces were not accountable for Indian people and Inuit, who were considered wards of the federal government. Armand Tessier, the Indian agent at Pointe Bleue, who tried for many years to have Aboriginal rights recognized, explained his problem in a 1913 article in the newspaper L’Action sociale:
I understand that the provincial government is not responsible for these people, who are under the guardianship of the federal government, and that, if injustices are done to their detriment by the imposition of laws, it is due simply to the fact that not having direct relationship with them, the government forgets them or does not think about them. [translation] 

In asserting their trapping rights, however, Aboriginal peoples had one powerful and influential ally: the Hudson’s Bay Company. Before the First World War and between the two world wars, the company took legal action against provincial game officials who confiscated furs from Aboriginal people, arguing that such behaviour violated treaty rights. If Aboriginal people had a right to trap, they said, then necessarily they had a right to sell. The precipitating factor had been the arrest and conviction in 1910 of one of the company’s northern Ontario managers for illegal possession of furs. George Train had been given a penalty of $6,150 or, in default of payment, imprisonment for 20 years, six months. Company lawyer Leighton McCarthy had intended to appeal the conviction to the privy council, if necessary. Although both sides agreed to put the points of law — including the treaty rights of the people from whom George Train had purchased the pelts — directly to the Ontario Court of Appeal, Ontario managed to delay the appeal hearing until 1913. A year later, Chief Justice William Meredith informed the parties that he considered it best not to render a decision and urged Ontario and the company to negotiate. The only official rationale the chief justice gave was that a judgement might affect the “real interests of the Indians”; the company’s lawyer claimed to the department of Indian affairs that the real reason for the non-judgement was that the court did not want to find that treaty harvesting rights prevailed over Ontario’s game laws.

Aboriginal Guiding in the Yukon

Until 1920, guides for big game hunting in the Yukon did not require a licence, and the industry as a whole was unregulated by the territorial council. Aboriginal and non-Aboriginal guides maintained an equal footing within the community and in commerce. Many Aboriginal people in the Yukon worked as guides because they had intimate knowledge of the terrain and habitat, and because guiding complemented their overall lifestyle. Indeed, the success of the industry depended largely on Aboriginal people for the same reasons.

However, as overkill provoked concern from the fledgling conservationist movement, and as revenue generated from the industry grew, big game hunting came under increasing territorial regulation, to the distinct disadvantage of Yukon Aboriginal people. First, overkill was blamed largely on Indian guides, rather than on overall hunting pressure and habitat disturbance. “Of late years”, stated the 1916 official Yukon Guidebook, “game of all kinds has been very scarce in some localities...The Indians, having lately acquired high-powered magazine guns are responsible for a great deal of the slaughter as the average Indian who gets into a band of big
As a direct result, many guides gave up their Indian status and attendant rights in order to start or maintain a business. However, many who chose to become enfranchised were still blocked in their attempts to obtain a chief guide’s licence through bureaucratic delays or unreasonable terms. For example, after waiting a year, George Johnson, a Teslin Lake Indian, was turned down in 1934 for a chief’s licence because he had no horses, even though, as he reasoned, there was no point in purchasing horses on speculation.

The same issue came before the court of appeal almost two decades later in the case of *R. v. Padgena and Quesawa*. The defendants, who were Robinson treaty beneficiaries from Pic River on Lake Superior, had been convicted by a magistrate in 1929 of illegal possession of beaver pelts and fined $600. The Indian affairs branch (by now part of the department of mines) had instructed the Indian agent for Port Arthur to attend the trial and ask for leniency but specifically directed him not to raise any question of treaty rights. (He managed to get the fine reduced to $200.) With the support of the local Hudson’s Bay Company manager, however, the two defendants hired a lawyer and appealed. In April 1930, district court judge J.J. McKay overturned the convictions, finding that provincial regulations should not annul the defendants’ rights under treaty. Ontario appealed, and the Indian affairs branch found that it now had no choice but to act for the two individuals. In a letter to the Ontario minister of mines, the minister responsible for Indian affairs explained that the federal government did so reluctantly, “not in any hostile spirit but simply as a natural obligation that devolves upon the department in its capacity as guardian of the Indian interest”:

The Indians in question have no funds to defend this appeal and have asked the department to employ counsel for them. In the circumstances I think you will agree that it is scarcely possible for the department to refuse to comply with their request ... In view of the constitutional question involved, it would seem desirable that the case should be fully expounded pro and con by eminent counsel inasmuch as the subject has become a source of perennial dispute between the Indians and Game Wardens, and a source of embarrassment to both our departments.
Indian affairs retained a Toronto law firm to act in the appeal, which was set to take place in December 1930. As with the earlier *Train* case, however, Ontario was granted a delay of proceedings until October 1931. In the meantime, the province continued to prosecute trappers in the region, despite Justice McKay’s decision.\(^{190}\) Ontario, in fact, wanted a negotiated settlement that would preserve their right of regulation, as, apparently, did the court of appeal. Lawyer M.H. Ludwig advised Indian affairs that Chief Justice Mulock “does not want to hear the case for the reason that his view is in favour of upholding the treaty obligation”.\(^{191}\) In late 1931, Canada and Ontario agreed to halt the legal proceedings on a promise from the province to negotiate an accommodation. But those negotiations never took place, and Ontario continued to enforce its regulations. As for Joe Padgena and Paul Quesawa, the Indian defendants from Pic River, they never got back the $200 they paid in fines, despite the fact that their convictions had been overturned.\(^{192}\)

With the building of railways in eastern and western Canada, Aboriginal people came to face another severe problem, namely, competition from non-Aboriginal trappers. Particularly in the aftermath of the First World War, when fur prices skyrocketed, droves of trappers and traders entered previously remote regions of the country in search of pelts. Many were young, single men who intended to make as much money as possible and then leave. To that end, some of them used poisoned bait, much to the revulsion of Aboriginal communities. Hudson’s Bay Company official Philip Godsell, then working in the Northwest Territories, described the stark contrast between the trapping methods of these new arrivals and those of Dene with whom he regularly traded:

> The professional trapper does not make an occasional short trapping journey as does the Indian, then forget about his trapline for a while, neither does he “farm” his territory as was done by Indians until just a few years ago. Instead he brings in a complete grub-stake from the “outside” in the fall ... From the first snowfall until the ice breaks up he is tirelessly on the go, and in the course of a single season will accumulate three or four times as much fur as an entire Indian family has been in the habit of taking out of the same territory over a period of years.\(^{193}\)

The department of Indian affairs did attempt to secure the co-operation of provincial and territorial officials in protecting Aboriginal trapping. But most jurisdictions rejected the department’s preferred approach, which was either to ban non-Aboriginal trappers from the industry entirely or to set aside areas where only Aboriginal people could trap. In the Yukon, the territorial council sided with non-Aboriginal trappers, arguing that it would be impossible to exclude them. In Ontario, the province allowed non-Aboriginal trappers to follow the Temiskaming and Northern Ontario Railway north of Cochrane, despite urging from the Indian affairs branch that the Moose River basin area be zoned exclusively for Aboriginal people. In British Columbia, the province assumed the right to allocate traplines in 1921, and many traplines were given to the new arrivals. George Pragnell, inspector of British Columbia Indian agencies, reported in 1924 that the “almost universal complaint by the Indian is that their lines are seized by white men under cover of the law”. The inspector pointed out that virtually every area of the province was already allocated to traplines according to Aboriginal custom.\(^{194}\)
Only in the Northwest Territories and Quebec did a different system prevail. In the N.W.T., a 1923 federal order in council set up four large zones — the Yellowknife preserve, the Thelon preserve, the Peel River preserve and the Slave River preserve — where only Aboriginal people could hunt and trap.\footnote{196} Between the 1920s and the 1940s, Quebec co-operated with the Indian affairs branch in establishing a series of beaver preserves throughout the north, where only Aboriginal people could trap, and banning non-Aboriginal people from trapping north of the Canadian National Railway line.\footnote{197} Quebec’s regulations are also interesting because they did not discriminate against Métis people, simply assigning the trapping rights to all those of Aboriginal ancestry. Within the beaver preserves, Aboriginal people were paid as “tallymen”, to count the number of live beaver each year.\footnote{198} This kind of work-substitution program accords well with the traditional economy and can be considered a forerunner of the income support programs introduced by the James Bay and Northern Quebec Agreement. (See our discussion of income support programs for harvesters in Volume 4, Chapter 6.)

The climax in the trend of provincial control came in the 1940s. By then, most provinces and territories had introduced systems requiring everyone, Aboriginal people included, to apply for and register their traplines.\footnote{199} Because of the importance of existing systems of animal harvesting among the treaty nations, this system proved deeply controversial and was one of the precipitating factors in the rise of organizations such as the North American Indian Brotherhood, headed by Chief Andrew Paull of British Columbia and Henry Jackson of Ontario, and the North American Indian Nation, headed by Jules Sioui of Village Huron. These men urged Aboriginal trappers not to take out licences or registrations on the grounds that they violated treaty and Aboriginal rights, statements for which they were soundly denounced by the Indian affairs branch.\footnote{200}

Particularly galling to Indian rights associations was the treatment of Aboriginal veterans of the Second World War, many of whom returned from their years overseas to find that provincial governments were already awarding their traplines to non-Aboriginal people. On the eastern side of Ontario’s Algonquin Park, for example, none of the members of the Golden Lake First Nation who applied for registration of their existing traplines were successful. “Military service is apparently not taken into consideration”, complained Hugh Conn, fur supervisor for the Indian affairs branch, in a 1947 letter to the head of Ontario’s fish and wildlife branch, “as we find approved applications of men without military service in preference to Indians with four years’ overseas service”. Conn pointed out that the Golden Lake people had already lost most of their traditional trapping territories in the 1890s “without compensation” when Algonquin Park was created and hunting and trapping banned within its boundaries.\footnote{201}

Despite these protests, Aboriginal people lost out to non-Aboriginal trappers in all but the most remote areas. In part the motive was financial. In British Columbia, for example, the province earned fees from the trapline registrations of non-Aboriginal people, but not from Indians. Aboriginal people were also accused of not being efficient enough in trapping fur. Thus, replying to Hugh Conn’s 1947 inquiry about why so many existing traplines in Ontario were being given to non-Aboriginal people, the head of the fish and wildlife branch, W.J.K. Harkness, replied that it was “because the standard of trapping
practice on which the priorities were decided favoured the white trapper over the Indian trapper, and not because the Indian trapper was discriminated against because he was an Indian”.

The consequences for the Aboriginal economy of the loss of traplines were devastating in many regions of the mid-north. By 1956, according to the game commissioner for British Columbia, only 10 per cent of the province’s traplines were being operated by Aboriginal people.

There is a direct link, therefore, between government regulations and policies that favoured non-Aboriginal trappers, commercial fishers, and recreational hunters and anglers and the decline in Aboriginal self-sufficiency. In the spring of 1939, Kenora Indian agent Frank Edwards reported to his superiors in Ottawa that he had asked Ontario game and fisheries deputy minister David Taylor the previous summer “how the Indians were going to make a living”. According to Edwards, Taylor had replied that “it was nothing to do with him ... .It was our department’s baby, not his, and the Indians were not going to live on the province’s moose, deer, fish, etc. and some other way of their making a living should be devised by us”. The problem for the department was that there were few other sources of livelihood. In many cases, the only real alternative was government assistance.

Disrupting the harvest: 1950-1970

As we have just seen, for more than a century, progressive encroachment and restriction of their land-based activities have been the common experience of Aboriginal people living in the rural and near-northern areas of Canada. There has been substantial variation in the intensity of the disruption, even north of settled agricultural lands. Up to about 1950, the effects of settlement and resource development were probably greatest in the railway belts of northern Ontario and Manitoba, perhaps least in northern Quebec and the Labrador interior. They were hardly experienced at all in the Arctic before that time.

The Second World War and the development boom that followed it in the 1950s and ‘60s transformed the north. First there was the rapid construction of military bases, airfields and radar stations; then there was a significant northward advance of all major resource activities. These included chiefly hydroelectric development (often involving large-scale impoundment, diversion, and regulation of waterways); mining and forestry in the boreal region; and oil and gas exploration and mining in the Arctic. In the mid-north, these were often accompanied by an infrastructure of roads, railways and new towns, many of which constituted major projects themselves. These developments were accompanied by newly expanded and activist government administrations. They also enabled much readier access to the north by a newly prosperous and mobile southern population.

These developments intensified — and geographically extended — familiar forms of encroachment and restriction, such as regulation and enforcement of subsistence harvesting and competition from non-Aboriginal people for subsistence resources. They also introduced new and previously unimagined threats to the viability and autonomy of
Aboriginal ways of life. These included the seizure of lands for industry, transport and settlement; disruption of waterways for hydroelectric development and water storage; alteration, destruction or pollution of habitat, whether by design or accident; a growing network of roads and trails giving transients and tourists easy access to traditional harvesting areas; increased stress on animals because of noise, harassment, obstructions or other consequences of human activity that result in death, ill health or dispersal; and contamination of fish and other wildlife (by heavy metals such as mercury or by organochlorines or radionuclides, for example) making the wildlife unfit for human consumption. These changes, caused relatively recently by development, concerned many of the Aboriginal witnesses at our hearings, as we saw earlier in this chapter. The adverse effects of forestry and hydroelectric development, for example, are keenly experienced by Aboriginal people in small communities especially.

Highly mechanized logging (mostly for pulp) is a relatively new phenomenon, one that has been on the upswing since the early 1960s. Because it involves clear cutting of very large areas, important wildlife habitat (and thus valued hunting and trapping land) is suddenly and completely denuded. Other adverse effects of clear cutting include stream degradation, road construction and, in rugged terrain, slope destabilization and erosion. Contamination also occurs, primarily in association with pulp mills. The northward extension of mechanized pulp cutting into slower-growth forests, particularly in Quebec, Ontario, Manitoba and Alberta, has exacerbated this trend.

For Aboriginal people, one of the most significant adverse consequences of the pulp and paper industry’s practice has been the building of an extensive network of forest access roads that sport anglers and hunters can use. As we saw earlier in this chapter, Dene Th’a and other Aboriginal people have been protesting the impact on their traditional economy of the resulting increase in competition for fish and other wildlife, particularly big game species like moose, caribou and elk. During the fall hunting season, many northern Aboriginal residents stay out of the bush altogether.

Since the turn of this century, there has also been massive hydroelectric development across the mid-north, most notably in Labrador, Quebec, Ontario, Manitoba and British Columbia. As the example of Manitoba Hydro’s Nelson-Churchill River project shows (see box, overleaf), such development has generally resulted in the flooding of large areas, seasonal reversal of flow, reservoir draw-down, and sometimes river diversion and dewatering. These physical effects, which occur in varying combinations upstream and downstream of major installations, are normally associated with reduced biological productivity in littoral zones, the elimination of rapids and hence spawning areas for certain fish, the disruption of productivity in large lakes, and the creation of unpredictable and often unsafe travel conditions, especially on river ice. As well, large developments have resulted in methyl mercury contamination, leading to commercial fishery closures and threats to domestic fishing, which is often the most important local food source. These effects are very long lasting, if not permanent, and can be exacerbated by changing operating regimes. Harvest disruption and community relocation are common consequences (see Volume 1, Chapter 11).
As in the period before 1950, whenever fish, fur and wildlife resources were depleted or perceived by management agencies to be in danger of depletion, Aboriginal use was a prime target for control. Wherever they were perceived as abundant, Aboriginal people were regarded as not using them to maximum efficiency, and others were given priority access. Moreover, treaty and Aboriginal rights continued to be interpreted as providing for food and family use only. This interpretation is noteworthy in light of the structure of Aboriginal traditional economies. While distinct from market-based economies, Aboriginal economies were by no means limited to subsistence. Instead, if Aboriginal economies are understood in relation to the broader structure of Aboriginal societies, ‘commerce’ was and remains an integral part:

The survival — and prosperity — of the Indian nations has always flowed from their ability to choose freely how they would use their land and resources for collective benefit. If Indigenous peoples’ economic activities and land use patterns — and their rights and interests — are seen in this context, then the conventional ‘hunter-gatherer’-’frozen rights’ analysis begins to wear thin ... This means that the arbitrary line between subsistence use and commercial use of resources no longer exists. Resources within the territory were there to be used for the benefit of the people first and foremost. This could mean taking for personal use, for distribution within the community, or for commerce with other communities and peoples. In this sense the result was the primary objective, not the destination of the product.206

Protection of Aboriginal access to resources, though in diminished form, served the state only in so far as it kept Aboriginal people at a distance from the expanding settler economy and from dependence on the public purse. Some jurisdictions took this view to the extreme, believing that treaty Indians who were gainfully employed should, in turn, lose their treaty harvesting rights. In 1945, for example, the Ontario department of game and fisheries refused to issue trapping licences to Indian people working on the railway or in lumber camps.207

It is not surprising, given the barriers continually thrown up, that Aboriginal communities have consistently expressed frustration at their inability to develop healthy, self-sufficient economies. Not only did communities lose access to lands and resources in exchange for a limited land base (and, for many, no land base at all), but the guarantees provided in the treaties with respect to harvesting and access to new forms of economic enterprise were slowly eroded or completely denied. Moreover, when Aboriginal people sought wage labour outside their own communities, many were refused employment. Union practices, for example, did little to ameliorate the situation during this period.

In June 1958, for example, two organizers from the lumber and sawmill workers union visited the New Post Reserve north of Cochrane, Ontario, where 34 Indian men were cutting under a subcontract to Kimberley-Clark, and explained that those who did not join the union would have to leave immediately. As a result of this threat, 28 of the 34 men paid $29 each and $4 for monthly dues, while the remaining six returned to their homes at James Bay. It turned out that there was no clause in the original timber licence for the New Post Reserve specifying that Indian people would have to be hired, nor had any
previous arrangement been made for an exemption to the union agreement, although the subcontractor had agreed orally with the department of Indian affairs to hire Indian labour. On the basis of a discussion with the Indian foreman, the department tried to secure a refund of the money collected, arguing that the organizers had used intimidation. As regional supervisor Fred Matters explained, the “wood belongs to the Indians and is on their own reserve”, and the primary purpose of the licence was to provide them with employment. He also pointed out that, because the men in question only worked seasonally, they would be compelled to rejoin the union every year for only a few weeks’ work. Apparently none of the men had understood what they were signing; as far as they were concerned, they had simply been exploited by white men.  

Hydroelectric Development of the Nelson and Churchill Rivers

While the enormous potential of Manitoba’s northern water resources for hydroelectric development has been recognized since the early part of this century, it was not until the late 1950s that hydroelectric development was seriously considered. Subsequent to numerous joint studies undertaken by the federal and provincial governments, Manitoba Hydro (the provincial utility) developed the Kettle project, in the mid-1960s, at Kettle Rapids in northern Manitoba, in anticipation of gaining approval for the much larger high level diversion of the Churchill River to the (Lower) Nelson River, with storage at Lake Winnipeg, Reindeer Lake and Southern Indian Lake on the Churchill River.

This diversion scheme met with serious opposition, however, focused on the concerns of the local Aboriginal community at Southern Indian Lake, which would have to be relocated, and on the environmental impact of flooding. Following the election of a new provincial government under the leadership of Ed Schreyer, Manitoba Hydro gained approval for a lower level Churchill River Diversion scheme. The South Indian Lake community, which was opposed to any flooding, failed to block the development, despite attempts to gain an injunction and appeals to the federal government.

The Churchill River Diversion has subsequently become well known for its massive scale and detrimental effects on the northern Manitoba environment and the Aboriginal peoples who live there. Although the project directly affected the lands and livelihood of five treaty communities (York Factory, Nelson House, Norway House, Cross Lake and Split Lake) and one non-treaty community (South Indian Lake), they were not consulted, nor did they give approval for the undertaking.

Reserve and community lands were either flooded or affected by dramatic changes to levels in surrounding lakes and rivers, and traditional land use areas were damaged or rendered inaccessible.

In return, community leaders and members assert, they have gained little benefit, in the form of employment, business-related activity or a share of revenues from the project, and have instead been mired in a continuous negotiation and litigation.
process to obtain compensation for the damages.

The controversies surrounding the development did succeed, however, in raising public awareness of northern Aboriginal communities and concerns and about the detrimental effects of such development. The Northern Flood Committee was formed in 1975 to negotiate a compensation settlement for the affected First Nations communities and resulted in the Northern Flood Agreement (nfa), which was signed in 1977 between the treaty nations, Canada, Manitoba and Manitoba Hydro.

The nfa itself has been the subject of much controversy (in many respects the agreement has become the model of how not to reach resolution), as its history has been marked by little or no action in implementation of nfa obligations and a long, drawn-out (and continuing) process of arbitration to force governments to implement their obligations. In 1988, the parties attempted to reach a global settlement of virtually all outstanding elements; however, agreement was never reached. Currently, two communities have reached a settlement outside of this process, with the balance still attempting to do so.


Related to such practices was the general attitude that northern resource-related jobs, such as those in hydroelectric development and mining, were for southern non-Aboriginal workers. As a report submitted to the provincial government in 1963 by the committee on Manitoba’s economic future explained:

Industrial concerns in this area should not be expected to employ native labour which is not as productive as white labour ... It is difficult enough to persuade large investors to put money in resource development in the north without expecting them to assume the added cost of solving the welfare problems of the native population.209

More recently, the organized labour movement has been trying to rectify past problems. In its written submission to the Commission, the Canadian Labour Congress (CLC) acknowledged that Aboriginal peoples have a right of self-government and a concurrent requirement for more lands and resources. As part of the latter goal, the congress is encouraging union initiatives that would remove current obstacles to the hiring of Aboriginal workers. At the same time, however, CLC is concerned about the impact of the implementation of Aboriginal rights on union members in the resource industries, particularly forestry and commercial fishing, as well as on union members in non-Aboriginal organizations that deliver public services to Aboriginal people.210

For the CLC and many Canadians, the interests of Aboriginal peoples must be balanced against the broader public interest. The difficulty for Aboriginal peoples, as we have seen throughout this section, is that any invocation of the common good has tended to leave them disadvantaged. The historical record shows that while Aboriginal communities
contributed capital in the form of lands and resources to the accumulated wealth of Canada, they derived little benefit in return. Instead, Aboriginal communities have borne the brunt of the social, economic and environmental costs of development. Thus, not only did government policies and practices impede alternative economic pursuits, they generated and subsequently perpetuated dependence.

Many of the current conflicts over Aboriginal issues are an enduring reflection of the fundamental and forced separation of Aboriginal societies from the land. Land acquisition through treaties and other arrangements and subsequent resource allocations to other interests have meant that Aboriginal people have been dispossessed not just of their lands. All the elements that encompass their relationship with the land have been expropriated as well: nationhood, governance, and territoriality; customary forms of social and community organization; and conceptual and spiritual views.

Our traditional laws are not dead. They are bruised and battered, but alive within the hearts and minds of the Indigenous peoples across our lands. Our elders hold these laws within their hearts for us. We have only to reach out and live the laws. We do not need the sanction of the non-indigenous world to implement our laws. These laws are given to us by the Creator to use. We are going to begin by using them as they were intended. It is our obligation to the children yet unborn.

Sharon Venne
Treaty 8 First Nation
Fort St. John, British Columbia, 20 November 1992

4.4 The Impact of Crown Land Management Systems

In the majority of the land, we are the sole users and occupiers. The government, with its various ministries, has studied and prepared management plans in which we have had no input. The majority of the management plans are not geared to meeting the First Nations’ needs or priorities. They have forced us to be reactive instead of proactive.

Steven Jakesta
Manager, Dease River Band Council
Watson Lake, Yukon, 28 May 1992

As we have seen, the way lands and resources are controlled and allocated presents significant difficulties for Aboriginal peoples, who, with relatively few exceptions, do not have a share in jurisdiction or management. Our goal is to reconcile the interests of Aboriginal peoples with those of society generally. To begin, we examine Canada’s system for managing lands and resources in an international context and identify the institutional constraints that need to be overcome.

Crown lands and resources are managed by provincial and territorial government agencies, acting on the Crown’s behalf. These agencies contribute to the development of legislation and regulations, make land and resource use policies and issue guidelines. They grant the leases, licences and other forms of tenure agreements that permit private corporations, groups and individuals to use resources such as trees, water power, oil and
natural gas, or to graze their livestock on public lands. They also monitor the subsequent operations. These same agencies control access to and use of parks, forest reserves and other protected areas. Access to Crown lands is permitted for many purposes, including hunting, fishing, trapping, boating and recreational snowmobiling, but government agencies set and enforce policies and regulations for all such activities.211

**State management and open access**

Canada’s system of state property and open access is similar to that of, among others, the United States (at least in federal lands west of the Mississippi) and Australia. But no other jurisdiction has such a large percentage of lands and resources under state control. More than 80 per cent of our country — millions of square kilometres — remains Crown land. Because of this geographic reality, Canadians have developed unique expertise in this kind of property regime.

The prevailing Canadian system is not the only possible resource regime, although it is generally considered to be the most appropriate. In Argentina, which has many similarities to Canada in terms of size and resources, most land is private property. Cattle ranches are enormous even by North American standards, and what would be grazing rights on public lands in Alberta or British Columbia are private rights in Argentina. Forested lands, although not nearly as extensive as in Canada, are also under private ownership. In the former Soviet Union and East Bloc countries, by contrast, all lands and resources belonged to the state, all resource users worked as state employees and there were few rights of open access.212

Our state property system is not without its critics, who suggest that it is simply a private property regime under a different guise. Important resources such as forests, they argue, are effectively controlled by private interests under long-term tenures, and those interests are becoming increasingly concentrated. In British Columbia, according to the 1976 Royal Commission on Forest Resources, 10 companies held 59 per cent of all harvesting rights on Crown lands. By 1990, that share had increased to 69 per cent.213 In Nova Scotia and New Brunswick, vast tracts of forest land have been held under virtually perpetual concessions since the last quarter of the nineteenth century.214 The effects of concentration have been criticized by groups as diverse as small sawmill owners and independent loggers, mill workers, environmentalists, and Aboriginal people. The critics do not always (or even often) agree among themselves. But they do argue that it has been consistently difficult for small producers to gain access to the woodlands and that forest conservation has suffered badly in the process.

Conflict between the state and local communities over the control of forests is a worldwide phenomenon, one with a very long history. In the European countries from which settlers came, the term ‘forests’ meant both designated areas of forested land and open waste lands that were not suited to agriculture. Such areas were originally administered through complex laws and customs (which in England were independent of the common law) governing the rights of monarchs, lords, churches and communities to hunt and fish, to graze livestock, to cut timber or firewood, and to make charcoal.215
By their nature, forests were also a zone of freedom; think of Robin Hood and Sherwood Forest. In that sense, they were the only genuinely public lands, that is, lands to which there were public rights more or less autonomous from those of the state (represented by the Crown). As medieval monarchs sought to assert control over forests in order to extract more revenue, their subjects fought back. This was one of the concerns at issue in Magna Carta; thus, in 1215, King John’s barons forced him to assent to a forest charter that would uphold customary laws. (Another clause in Magna Carta prevented the monarch from establishing new private fisheries in public rivers.)

Although the terms ‘Crown lands’ and ‘public lands’ are now used synonymously, such was not always the case. Crown lands were state lands, meaning not only the estates of the feudal monarch, but all lands over which the monarch claimed paramountcy and the right to derive revenue. Monarchs (but not always their subjects) considered forests to be “waste or ungranted lands of the Crown”. The trees and other resources could be privatized as a source of revenue for the state (originally the monarch), and such lands could also be privatized by being granted, cleared of their forest cover and turned into farms. This is what the Crown meant by public lands.

This second sense of the term is the one that became common in the Anglo-American colonies such as New York and that has come to predominate in Canada. It is not hard to see why. In contrast to Europe, all of eastern North America was forested land when the colonists arrived. The amount of “waste and ungranted land” was vast. While the forests were clearly to be a source of revenue and of supplies to the Crown (white and red pine timber in both the French and Anglo-American colonies was reserved as masts for the royal navy), the forests, at least in the Anglo-American colonies, at first existed as an enormous reservoir of lands to be granted for agriculture.

**Excluding customary uses**

This approach had significant consequences for Aboriginal people and their customary laws — their rights to use the forest and forest clearings. While Aboriginal rights were generally respected until treaties were made (although not, as we have seen, in areas like British Columbia where there were no treaties), once lands had entered the category of “waste lands of the Crown”, those customary rights were drastically diminished. Not only did Aboriginal people lose access to agricultural lands; the farming that took place promoted deforestation, which in turn drastically affected wildlife habitat. Deer and moose, for example, were gone from most of the eastern seaboard by the end of the seventeenth century.

The rise of industrial-scale forestry in the nineteenth and twentieth centuries was an entirely new phenomenon, one unknown to medieval Europe and colonial North America. It too has greatly diminished the ability of Aboriginal people to follow their customary laws and to use the resources of the forest. The role of the state management system is to make decisions about allocation, and in making those decisions, Crown agencies have consistently ranked Aboriginal interests at the very bottom. In this respect,
state management has meant that forests have become resources to be protected against their former users.

This is a controversial subject in other parts of the post-colonial world, where new states are also banning or limiting customary uses of the forest in the interests of large-scale forestry. In fact, it has been argued that foresters and other resource professionals are bringing with them to their consulting work overseas a strong predilection for comprehensive government resource management on the North American model, one that trivializes customary law.218

In Canada, as in the developing world, a policy to protect resources against their former users dictates both how resource rights are allocated and how certain kinds of development are disallowed. Until very recently in Canada, for example, Aboriginal customary uses were consciously excluded by regulation and policy from parks and protected areas established on Crown lands. As a result, parks have been extremely unpopular among Aboriginal people not only in Canada but also in Africa, for example, where they are seen as private preserves for the rich. In Zambia and Zimbabwe, recent government programs have tried, with considerable success, to reconcile park management with the economic needs of local residents.219

The Yellowstone model for designating and managing park lands is a significant part of the corporate memory of land and resource management agencies in Canada, one that until very recently has made it difficult to bring Aboriginal people into management decisions, as it is based on professional management. In British Columbia, the 17,683-hectare Anhluut’ukwsim Laxmihl Angwing’a’asanskwhl Nisg’a’a (Nisg’a’a Memorial Lava Bed Provincial Park) was set apart in 1991 in the Nass valley, north of Terrace. The Nisg’a’a Tribal Council approached the provincial government to create the park, and it is being managed jointly. The national parks set apart as a result of recent land claims agreements in the Yukon and the Northwest Territories are also improving relations between park staff and Aboriginal people who will be sharing in their management.220

Although parks have very high levels of support in urban areas for both conservation and recreational reasons, they have been deeply unpopular with many residents of rural and remote parts of Canada who, like Aboriginal people, have felt that their customary uses of particular areas were being eliminated. State management of natural resources and concomitant disputes over issues such as industrial forestry and park creation have thus revived a centuries-old conflict over customary rights. This debate pits public lands in the Crown definition — in this case, the right of the state effectively to privatize the forest by granting long-term tenures or setting aside large areas in the public interest (but to which public access is strictly controlled) — against public lands in an older sense — the sense in which communities and individuals have customary rights of access to the forests and resource use is subject to community, not state, control. Much of the current discussion of decentralizing forest management in British Columbia and other regions of Canada, to which governments have been responding in a variety of ways, flows from this tension.

Differing views of common property
As communities worldwide debate who should benefit from resources and resource access, differing views of common property have become apparent. Many Canadians, and not just Aboriginal people, now consider trees and other natural assets common property resources. In its brief to the Commission, the Ontario Federation of Anglers and Hunters classified fish and other wildlife as “common property resources” since, in our legal system, they cannot be “owned” by any one individual or group. The federation went on to elaborate its belief that wildlife should therefore be managed by the state on behalf of all members of the public.221 This is somewhat different from the views of supporters of community forest initiatives, who give greater primacy to local, rather than state control. Others who appeared before the Commission, such as Lorne Schollar of the Northwest Territories Wildlife Federation, implied that the state system, when coupled with Aboriginal rights, effectively discriminates against the rights of local non-Aboriginal people to harvest fish and other wildlife.222

The classic critique of common property systems is an influential 1968 article entitled “The Tragedy of the Commons” by Garrett Hardin, then a professor of human ecology at the University of California.223 Hardin argued that in a system supporting a publicly owned resource — a commons — the pursuit of private interests leads automatically to resource depletion. He used the example of herdsmen on a common pasture, each of whose rational pursuit of his own best interests would lead him to increase the size of his herd, thus resulting in the ruin of the commons for all. Hardin cited overgrazing on public lands in the western United States and overfishing in the oceans as examples.

The examples have particular resonance for Canadians in light of recent troubles in the Atlantic fishery. The historical examples cited earlier in the chapter — the decline of the sturgeon fisheries in various inland lakes — also appear to bear out Hardin’s thesis. Another example from the recent historical literature concerns the Bay of Quinte in Ontario. At the turn of the century, fishers there were anxious to preserve the viability of their industry but were unable to practise conservation on an individual level because of the need to cover operating costs and turn a profit. If they conserved fish stocks, their competitors simply reaped the benefit by landing more fish.224

The Bay of Quinte fishery was originally not managed at all and was therefore not common property, but rather a resource to which there was completely open access. This is an important distinction. Common property is actually private property for the group, since it means that the group controls the resource and excludes all non-members from use and decision making.225 In the case of the Bay of Quinte, the department of fisheries ended uncontrolled access by bringing in conservation and restocking measures, and the fishery partially rebounded. There is considerable historical justification, then, for federal and provincial decisions to manage access to these kinds of resources in order to counteract species depletion.

As we saw earlier, however, control of open access has had major implications for the Wabanaki, the Haisla, Dene and all other Aboriginal peoples, who had existing common property systems that functioned under their customary laws. Swept up in the movement to control open access, they were severely penalized by the state. As with the forests and
other resources, when management agencies subsequently made decisions about the allocation of wildlife, all other users were given higher priority, whether they were commercial fishers or trappers, tourist operators or recreational hunters and anglers. It is only with the *Sparrow* decision that this order of priorities is being re-examined.

The purpose of Aboriginal management systems, based on traditional ecological knowledge, was to counteract resource depletion and ensure the survival of the group. Aboriginal people have not abandoned their traditional tenure and management systems, either in concept or practice. These systems exist today (where the means and the access to exercise them still survive), although often in semi-covert fashion and in the context of a mixed economy. In various parts of the country, such as northwestern Ontario and southeastern Manitoba, where Ojibwa people continue their traditional practice of planting, tending, harvesting and cultivating wild rice, Aboriginal peoples still manage their common property by employing “a complex set of customary arrangements”.

If we look again at the maps of the Lake Huron region presented earlier in the chapter (Figures 4.6 and 4.7), we can see that traditional land use areas — the band territories marked on the 1849 map (Figure 4.6) — surround the reserves along the northern and eastern shores of the lake. They are also adjacent to modern cities and towns like Sudbury and Blind River. These boundaries do not appear on any government maps, but it is within them that First Nations people hunt, fish, trap, gather, cut firewood and perform cultural ceremonies, and it is from these traditional territories that First Nations people want to derive the resources to build their reserve-based economies. The present state management system does not recognize traditional land use areas, and resource allocation decisions are made within that system based on other criteria.

**The theory and practice of land and resource management**

While many employees of resource management agencies know that Aboriginal people living on reserves continue to harvest on Crown lands, they are generally unaware that most do so in accordance with their own rules of common property. Nor are they aware that Aboriginal people generally consider state rules an unfortunate imposition. In part, this is a reflection of the way those agencies are structured. Authority is centralized and flows from the top down, and the environment is reduced to conceptually discrete components, such as forests, parks, fish and wildlife, that have traditionally been managed independently (although less so as governments commit to principles of sustainable development or holistic management).

This arrangement reflects long-standing government policy and practice as well as the way resource managers are trained as foresters, biologists, planners and technicians. Managers bring to their jobs the systems of knowledge and understanding that prevail in those disciplines, and those systems have become part and parcel of the corporate memory and institutional interests of resource management agencies.

These disciplines share certain common objectives, which are traceable to theories of scientific management that date from the ‘progressive era’ of the late nineteenth century.
As summed up by Robert McCabe, former chair of the department of wildlife ecology at the University of Wisconsin, an influential training ground for many Canadian biologists, “the basic responsibility of professionals is to the resources, not to resource users. If professionals exercise that responsibility, the resource user is automatically served”.228

This focus on resources has had many positive benefits, but one result was that for a long time managers favoured efficiency in resource use above other considerations, and based on their professional training, managers defined what efficiency is. We have seen, for example, how Aboriginal people lost traplines to ‘more efficient’ non-Aboriginal trappers. Even now, government licensing systems favour economies of scale. ‘Use it or lose it’ has been the consistent message from resource managers to Aboriginal people and indeed all small commercial producers in rural and northern regions, including wild rice harvesters, logging contractors and tourist operators. Questions of resource allocation continue to be influenced, then, by the doctrine of efficiency.

Another essential feature of modern management systems is the fundamental divide between managers and users. Managers in effect become the owners (or at least custodians) of resources on public lands, while those who actually use resources — hunters, fishers, recreational boaters, trappers, loggers — become their clients. As we saw with parks (and forest and game reserves), the guiding principle is that the best way for state managers to protect resources is to control or exclude users.229 This principle, which assumes that only managers have knowledge (which is scientifically based), gives little weight to the experience and customs of all people (not just Aboriginal people) who harvest resources.

The effect on Aboriginal governance

When users have constitutionally protected rights to harvest resources, as Aboriginal people do, conflict is guaranteed. In its brief to the Commission, World Wildlife Fund Canada pointed out that when resource managers discuss biologically sustainable and culturally desirable levels of harvest with Aboriginal groups, “It is important that the idea of a quota which is enforced by a ‘policeman’ who distrusts the harvester, be avoided as much as possible. The result is often resentment and non-compliance.”230

Like the control of reserve lands, which has been exercised by the department of Indian affairs, state management of natural resources has had a negative impact on Aboriginal systems of governance. The Commission acknowledges that conservation of resources has been an important goal. Nor would we deny that individual Aboriginal people have occasionally been involved in the abuse of resources. As Patrick Madahbee, former grand chief of the Robinson-Huron Treaty First Nations, reminded a recent treaty gathering in Sault Ste. Marie, Ontario, Aboriginal people have an obligation to exercise their harvesting rights in a responsible manner.231 But because government resource managers have been unaware of (or have discounted) surviving Aboriginal common property institutions on public lands, Aboriginal people have had no reason to respect the state system. This in turn has made it difficult for Aboriginal governments to maintain or
enforce their own rules among their own membership. The result, in some cases, has been the worst of all possible worlds.

4.5 Conclusion

The distinctive relationship between Aboriginal people and the land — where they live, what they do there, and the connection between land, livelihood and community — has been problematic for Canadian society since the days of the early settlers. In the final sections of this chapter, we propose an approach to resolving the issues for the long term. We recommend changes to the current system of Crown land administration and jurisdiction, in the context of a new approach to treaty making and to the implementation and renewal of historical treaties. These changes make sense not just for Aboriginal peoples, but for all Canadians. Many individuals and groups expressed concerns about the present system at our own hearings. Canadians may differ about the exact nature of the changes needed to address these concerns, but the outlines are clear. They want a great deal more control over broad policy decisions about the zoning and allocation of resources on Crown lands, and particularly at the local level, they want a great deal more involvement in land and resource management in general.

Aboriginal peoples have been leading this movement for structural change, as they seek to build their own communities and economies in a sustainable manner. Experiments in regional public government, shared jurisdiction and shared management — now being introduced as part of land claims agreements in the north or developed in partnership with some provincial governments — are largely the result of pressure from Aboriginal peoples. These experiments are a positive model for us all, but structural change is not occurring nearly quickly enough. While the legal, political and institutional constraints discussed here continue to play a major role in hampering substantive change, current federal government policies for dealing with Aboriginal claims, coupled with the institutional interests of the Department of Indian Affairs and Northern Development, present a much more fundamental obstacle. In the next section, we examine how resistance by Aboriginal peoples to the loss of their lands and resources led eventually to modern claims policies, and why those initiatives remain inadequate.

5. The Inadequacy of Federal Claims Processes

Indian grievances are not new to Indians nor are they new to the Department of Indian Affairs. The rest of us, however, have not known much about them and the Indians have never been in a position to put their claims forward in a clear and forceful way which would make them fully understandable to us .... Over the years, the relationships between Indians and the government have been such that strong feelings of distrust have developed. This distrust goes far beyond distrust of government to the entire society which has tried, since day one, to assimilate Indian people. Indian people, who once dwelt proud and sovereign in all of Canada, have resisted with stubborn tenacity all efforts to make them just like everybody else .... They have given up much in this country, and they feel that the assistance they receive from government must be seen as a right in recognition of this loss and not merely as a handout because they are destitute. In short,
the grievances are real, the claims arising from them are genuine, and redress must be provided if our native peoples are to find their rightful place in this country....Recent experiences in Kenora, Cache Creek and Ottawa must have made even the most indifferent Canadian aware that native frustration is building up and that we cannot expect that native people will much longer confine their misery to their own communities as they have in the past.232

5.1 A Background of Aboriginal Protest

In 1947, leaders from major Indian rights associations and the Iroquois Confederacy travelled to Ottawa to appear before a special joint committee of the Senate and the House of Commons struck the previous year to consider amendments to the Indian Act. These leaders presented oral and written briefs on a host of topics, including the resolution of grievances dealing with treaties, lands and resources. Their submissions focused on the following issues:

1. resolution of the British Columbia Indian land title question;

2. resolution of the land ownership dispute at Kanesatake (Oka);

3. Iroquois Confederacy claims to sovereign nation status as British allies based on various wampum belt treaties, the Royal Proclamation of 1763, the Haldimand Grant (1784) and Simcoe Patent (1763), Jay’s Treaty (1794) and other legal instruments;233

4. government’s failure to fulfil specific treaty obligations;

5. complaints concerning improper government management of reserve land transactions and band trust funds,232 and

6. complaints about government discrimination against Indian war veterans, who were not considered eligible for veteran land grants (see Volume 1, Chapter 12).

Thus, Aboriginal claims are far from a recent phenomenon. Fifty years later, these issues, as well as many others involving lands and resources, remain unresolved. How did this happen? Why have so many attempts to deal with the problem failed?

Aboriginal peoples have consistently protested their exclusion from their traditional territories, the continuing alienation of reserve lands and resources, and governments’ failure to honour the terms of treaties. Aboriginal peoples have also protested the characterization of these disputes as ‘claims’, since this suggests that it is the undisputed rights of others that are being challenged, whereas it is the established rights of Aboriginal peoples that are being asserted. Chief Joe Mathias of the Squamish Nation in British Columbia made the point in this way: “We’re not talking about being granted our rights — they are our rights!”233
Aboriginal peoples have used petitions, protests and direct action in their continuing attempts to secure a just resolution of their grievances. But apart from intermittent and ad hoc attempts to deal with individual issues, Canada paid scant attention to Aboriginal claims until after the Second World War.\(^{236}\) In fact, strong measures were taken at times to suppress any assertion of Aboriginal rights and title. In the 1920s, for example, when Iroquois representatives were having some success in promoting their cause at the League of Nations, the council house at the Grand River was invaded by the RCMP and the traditional longhouse chiefs replaced by an elected council. Shortly afterward, the *Indian Act* was amended to make raising funds to advance an Indian claim or retain a lawyer for that purpose an offence.\(^{237}\)

Following the 1946-1948 hearings, the federal government made serious and laudable attempts to streamline the administration of Indian affairs and to better the condition of reserve residents through improvements in education and social services. But at the same time, senior officials of the Indian affairs branch did their best to forestall any attempts to deal with broader land and resource issues. Deputy minister Hugh Keenleyside found the 1947 parliamentary hearings particularly unsatisfactory because they were a national platform for “venal” and “self-serving” Indian politicians to sound off on issues that he considered to be unimportant.\(^{238}\)

The special committee recommended the creation of an independent administrative body to deal with Indian grievances, to be modelled on the U.S. Indian Claims Commission, which had begun operations in 1946.\(^{239}\) The creation of such a body enjoyed multi-party support in the House of Commons, with prominent opposition members (such as John Diefenbaker) speaking in its favour along with Liberal members of Parliament from the special committee.\(^{240}\) The Indian affairs branch did conduct an internal investigation into the types of matters that might be brought before such a commission; that investigation actually foreshadowed modern claims categories by distinguishing, for the first time, between specific grievances relating to treaties and reserve lands and resources and larger claims dealing with issues of Aboriginal title. But the claims commission idea was rejected at senior levels of the department, a decision announced by Walter Harris, minister responsible for Indian affairs.\(^{241}\) Harris and his officials expected that Indian people would instead pursue treaty and land claims cases in the Exchequer (now Federal) Court of Canada. This became possible, at least theoretically, in 1951, when the notorious section prohibiting the use of band funds to advance claims was dropped from the newly revised *Indian Act*.\(^{242}\)

The repeal of that section, however, was the only real concession to protests about land and resource issues. During formal consultations between 1948 and 1951 on *Indian Act* revisions, the Indian affairs branch tried to discourage participation by the Indian rights associations — a hostile attitude that continued over the following decade. Thus, at a series of regional Indian conferences held across Canada in 1955-1956, officials set the agenda items in advance, and questions relating to treaties, land claims or special rights were avoided or deflected. When the Indian leadership finally gained another chance to appear before Parliament — during the joint Senate-House of Commons hearings of
1959-1961, co-chaired by member of Parliament No'l Dorion and Senator James Gladstone (a Treaty 7 beneficiary from the Blood reserve in southern Alberta and the first member of a Treaty First Nation appointed to the Senate) — virtually all of their submissions reiterated long-standing concerns about land claims, violations of treaties and unresolved Aboriginal title issues. Chief James Montour of Kanesatake spoke in Mohawk about the land dispute at Oka, introducing in evidence the same historical documents that had been filed at the 1947 parliamentary hearings. Spokesmen for the British Columbia allied tribes once again raised the Indian land question in that province, and the Six Nations Confederacy reiterated its assertions of sovereign nation status and border-crossing privileges.  

Finally, the federal government began to take these specific grievances seriously. Some of the credit belongs to James Gladstone, who used his position on the committee — and his influence with certain ministers of the Conservative government that had appointed him — to lobby for substantive change. In accordance with the committee’s recommendations, draft legislation prepared in 1962 would have created a three-member administrative tribunal, the Indian Claims Commission. The proposed commission (of which one member was to be Indian) would have been empowered to hear a broad range of grievances, with no restriction on claims arising from before Confederation. As a concession to Aboriginal oral traditions, strict evidentiary rules would not be followed, and the commission would be allowed to develop its own procedures. However, it was not clear that broader issues of Aboriginal title (as in British Columbia) could be dealt with, and there was to be no renegotiation of existing treaties. Also, claimants were to be limited to Indian people as defined by the Indian Act, thus excluding Métis people. Internal policy debate centred on whether the commission (like its American counterpart) should have binding decision-making powers. Although initial proposals had favoured such powers, the draft legislation was altered so that the commission would simply make recommendations to Parliament concerning decisions and awards.

The Diefenbaker government fell before the legislation could be introduced, but the new Liberal government of Lester B. Pearson brought forward similar legislation, Bill C-130, in December 1963. The proposed Indian claims commission — now expanded to five members — was to have jurisdiction over claims concerning unextinguished Indian title, the expropriation of reserve lands without compensation or consideration of Indian interests, the failure to discharge the obligations of treaties or other agreements, the improper use of trust funds, and the general failure of the Crown to act fairly and honourably with the Indian people. As before, however, these categories excluded the renegotiation of existing treaties, and claims could be brought by Indian Act bands only, not by national or regional organizations. Bands were to be given two years to bring forward their claims.

The Pearson government’s bill differed in two important respects from the Conservative’s proposal. One was that the commission was to have binding decision-making powers. The second was a proposed appeals process. Either side could appeal jurisdictional questions to the Exchequer Court and the Supreme Court of Canada. Appeals concerning the unreasonableness of an award, or the failure to grant an award,
could be taken to a new Indian claims appeal court to be composed of judges of the Exchequer Court, to be created along with the claims commission.

Following first reading, there was an 18-month delay as copies of Bill C-130 were sent to all Indian bands and organizations (as well as other interested bodies) for comment. The legislation was reintroduced to Parliament in June 1965 as Bill C-123. Several amendments had been made in response to criticism, including an extension to three years of the time limit for filing claims, as well as provisions that one of the five commissioners be Indian and that financial assistance be provided to help claimants document their grievances. However, this bill died on the order paper when the Liberal government went to the electorate in the fall of 1965.

The re-elected Pearson government remained committed to the idea of establishing an Indian claims commission over the next two years, but the continuing pressures of minority government left the issue relatively low on the parliamentary agenda. In addition, the British Columbia Native Brotherhood had asked the government to delay submitting the necessary legislation. Because the proposed commission would not have jurisdiction over claims against the provinces, and because it was not clear whether their claim was against British Columbia or Canada, many Indian leaders there believed the title issue in that province should be settled by negotiation before the claims commission bill became law. However, negotiations never got off the ground, in part because of the federal government’s insistence that at least 75 per cent of B.C. Indian people be represented in negotiations by a single organization, a requirement that proved to be an insurmountable problem.  

Two subsequent events caused change, though for widely different reasons. These were the Trudeau government’s white paper on Indian policy in June 1969 and the Calder decision in 1973. The white paper proposed the termination of Indian status under Canadian law and a complete overhaul of the relationship between Indian people and Canadian society based on liberal ideals of equality (see Volume 1, Chapter 9 and Chapter 2 in this volume). Developed by the government as a whole, not just the department of Indian affairs, the white paper, which was totally and angrily rejected, denied the existence of Indian title and considered other claims to be of only limited significance. As a result, efforts within the Indian affairs department to bring forward an Indian claims commission bill, under way since 1961, were suspended during the winter of 1968-1969.  

Although the white paper policy did call for the appointment of a claims commissioner, there was little similarity between this and earlier legislative proposals. The commissioner, Lloyd Barber of the University of Saskatchewan, appointed by order in council in December 1969, was given a mandate to receive and study specific grievances (but not those involving Indian title) and to recommend alternative measures to provide for the resolution of claims. The Barber commission continued until 1977, though the fact that it was an exploratory and advisory commission only, rather than one with explicit adjudicatory powers, was strongly criticized by Indian leaders. Most Indian organizations were unwilling to proceed with negotiations of claims in the absence of a more concrete
mechanism for resolving them. In one area of Canada, however, a successor to the Barber commission has remained in operation. The Indian Commission of Ontario was created in 1978 as a tripartite council of representatives of First Nations, Ontario and Canada. Its powers remain confined to facilitating and assisting in negotiations.

The federal government was forced to reconsider at least some elements of its policy on land claims because of *Calder*, a decision that confirmed that Indian title is a valid right in common law. In 1990, the Supreme Court of Canada summarized the effect of these events on the development of claims policy:

For many years, the rights of the Indians to their aboriginal lands — certainly as legal rights — were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For 50 years after the publication of Clement’s *The Law of the Canadian Constitution*, 3rd ed. (1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (p. 11) that ‘aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community’. In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument: see the *Quebec Boundary Extension Act, 1912*, S.C. 1912, c. 45. It took a number of judicial decisions and notably the *Calder* case in this court (1973) to prompt a reassessment of the position being taken by government.

In the light of its reassessment of Indian claims following *Calder*, the federal government on August 8, 1973, issued ‘a statement of policy’ regarding Indian lands. By it, it sought to ‘signify the Government’s recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians’, which it regarded ‘as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people’s interests in land in this country’ ... .See *Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People*, August 8, 1973. The remarks about these lands were intended ‘as an expression of acknowledged responsibility’. But the statement went on to express, for the first time, the government’s willingness to negotiate regarding claims of aboriginal title, specifically in British Columbia, Northern Quebec, and the Territories, and this without regard to formal supporting documents. ‘The Government’, it stated, ‘is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest.’

5.2 Three Existing Claims Policies

There are now three published federal policies relating to Aboriginal claims. Provinces also participate, to varying degrees, in claims negotiations — as in the British Columbia Treaty Commission — but there are as yet no published provincial policies. The following three federal policies flow from the government’s original statement of claims policy in 1973:

1. The comprehensive claims policy is intended to deal with claims based upon unextinguished Aboriginal title. As will be seen, these are effectively claims to negotiate a treaty with the Crown. First Nations and Inuit may advance a comprehensive claim.

2. The specific claims policy is intended to cover claims based upon failure to discharge treaty obligations, improper alienation of reserve lands or assets, and other claims based upon breach of “lawful obligation” by the federal government. Such claims can be advanced by First Nations only.

3. Claims of a third kind were formally acknowledged in 1993. They are amorphous in nature, described as providing “administrative solutions or remedies to grievances that are not suitable for resolution, or cannot be resolved, through the Specific Claims process”. While they lack both definition and process, it is clear that such claims can be advanced only by First Nations.

Notable procedural features are common to all three policies:

• The burden of proving a claim is on the Aboriginal claimants.

• Government determines the validity of the claim (without prejudice to any position that it might subsequently advance in court proceedings).

• Government can accept a claim for negotiation as an alternative to litigation; litigation takes claims outside the scope of the policies.

• Government determines the parameters of what can be negotiated.

• Existing treaties will not be renegotiated.
• Government determines the basis for compensation.

• Negotiation funding can be provided to claimants in the form of loans.

• Third-party interests are not to be affected by a claims settlement.

Over the years since their inception, these claims policies and processes have been much and justly criticized, but they have shown themselves particularly resistant to change.255 As the Indian Commission of Ontario noted in 1990, “What all the intervening review, comment and recommendations [about claims policy] have most in common is the fact that they have all been ignored” 256

A quick review of the three policies illustrates their deficiencies. Many claims can be abandoned at the discretion of the government. This is almost always the case with specific claims, where the parties might grapple for years with the compensation guidelines, only to have these jettisoned if the government determines to settle a claim and make a lump-sum offer. The significant role of the department of justice in advising on the validity of claims and appropriate compensation is seen by claimants as a clear conflict of interest, especially given the lack of funding available to them for litigation.257

In addition, it will be seen readily that there is no federal process to deal with Métis claims, although there are claims that need to be addressed (see Volume 4, Chapter 5). This supports the complaint advanced by all Aboriginal groups that federal policies are exclusionary in nature by virtue of the categories government has established unilaterally. Where the policies do not explicitly exclude certain groups or certain types of claims, subsequent interpretation of the policies by the departments of Indian affairs and justice has resulted in de facto exclusions, such as the government’s refusal to deal with treaty harvesting rights as claims.258 Part of the solution would be more general processes, accessible to all Aboriginal groups, in respect of their Aboriginal, treaty and other rights.

These factors have combined, over the years, to make the claims process a dilatory and frustrating one for all concerned. Although there have been settlements, and while the rate of settlements has increased in recent years, there has not been any significant policy change, and the outlook remains bleak. In central and eastern Canada alone, for example, the Indian Commission of Ontario notes that only 13 of 215 specific claims submitted have reached settlement. “This equates to less than one settlement per year, an alarming figure considering that 124 claims remain under review or negotiation.”259

The delays that plague claims resolution are notorious among those involved with the process.260 They are not so well known to the public, except when tensions reach the breaking point. There have already been tragic consequences, as with the shooting deaths of a Quebec police officer at Kanesatake in 1990 and an Aboriginal protestor at Ipperwash Provincial Park in Ontario in 1995. Even the extensive press coverage of the Oka crisis was not successful in communicating the fact that the issue was a land claim the Mohawk Nation had been advancing for nearly two centuries. The claim did not fit into any of the policy pigeon holes, however, and repeated intrusions into their territory
brought some Mohawk people to the point where armed resistance seemed valid. In the case of Ipperwash, the federal government’s unconscionable delay in fulfilling its promise to return reserve lands, originally expropriated by the military in 1942, to the Kettle and Stoney Point First Nation contributed to the decision by some of its members to occupy the adjacent provincial park. The Commission rejects violence as a tactic for redress of grievances. But it is essential that Canada adopt policies and procedures to usher in an era of true coexistence. Processes must be established immediately to address all Aboriginal rights and title issues. These processes will require independent supervision, adjudication, funding and non-adversarial dispute resolution.

The comprehensive claims process

As originally defined by government and set out in the 1981 publication, In All Fairness, a comprehensive claim is one based on unextinguished Aboriginal title and is, in effect, a request for the negotiation of a treaty. This is reinforced by subsection 35(3) of the Constitution Act, 1982, which recognizes and affirms existing Aboriginal and treaty rights: “‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired”.

The comprehensive claims policy has three elements:

1. the criteria for acceptance under the policy;
2. the rights the Aboriginal group in question is asked to relinquish; and
3. the type and quantity of benefits the federal government will consider providing the Aboriginal group in exchange for the relinquishment of the group’s rights.

Criteria for acceptance of claims

Under the comprehensive claims policy (as amended in 1986), the minister of Indian affairs will determine whether to accept a claim on advice from the minister of justice about its acceptability according to legal criteria. An Aboriginal group is therefore expected to submit a statement of claim that complies with the following requirements:

• the claimant has not previously adhered to treaty;

• the claimant group has traditionally used and occupied the territory in question, and this use and occupation continue;

• a description of the extent and location of such land use and occupancy together with a map outlining approximate boundaries; and

• identification of the claimant group, including the names of the bands, tribes or communities on whose behalf the claim is being made, as well as linguistic and cultural affiliation and approximate population figures.
This list might suggest relatively liberal criteria for accepting claims, but in practice the criteria used by the department of justice to assess validity are more rigorous, set out in the 1979 Federal Court decision in *Baker Lake*. Under this decision, as elaborated by the federal government, an Aboriginal group must demonstrate all of the following:

- It is, and was, an organized society.

- It has occupied the specific territory over which it asserts Aboriginal title from time immemorial. The traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations.

- The occupation of the territory is largely to the exclusion of other organized societies.

- There is continuing use and occupancy of the land for traditional purposes.

- Aboriginal title and rights to use of resources have not been dealt with by treaty.

- Aboriginal title has not been extinguished by other lawful means.

The last part of this test appears to have been somewhat altered by the 1990 *Sparrow* decision, which held that if the federal government’s position is that Aboriginal title has been eliminated by “other lawful means”, then its intention to extinguish Aboriginal title must have been “clear and plain”. Federal policy continues to reflect other parts of the *Baker Lake* decision, however, despite Supreme Court decisions like *Simon* and *Bear Island* that implicitly reject evidentiary tests for Aboriginal claims that are impossible to meet in the absence of written evidence.

In practice, the federal government has applied the policy with varying degrees of stringency, depending on its broader political agenda. For example, it has negotiated and settled the Tungavut Federation of Nunavut claim in the eastern Arctic on the basis that Inuit had historically used and occupied all the lands now included in the new territory of Nunavut. In fact, as the Indian Specific Claims Commission has pointed out, the southwestern portion of the territory just north of the sixtieth parallel continues to be traditionally used and occupied by Athabasca Denesuline (Dene) and Sayisi Dene, whose communities are in northern Saskatchewan and Manitoba. The government has thus far refused to acknowledge that Denesuline have any treaty or Aboriginal rights within the territory in question.

As well, the geographic criteria for claims validation have had a negative impact on the public perception of Aboriginal issues. A popular misconception in British Columbia, for example, is that Aboriginal people are claiming 110 per cent of the province.

What Aboriginal people must relinquish

As discussed in our special report, *Treaty Making in the Spirit of Co-existence*, the Crown’s interpretation of the treaty relationship was, historically, that Aboriginal nations
had received specified benefits in exchange for a blanket extinguishment of their title or rights. In keeping with this practice, the original comprehensive claims policy specified that an Aboriginal group must surrender all Aboriginal rights in return for a grant of rights specified in a settlement agreement. The government has moved very little from this position. In response to widespread objections by Aboriginal people and the Coolican report in 1985, the amended federal policy allows for an “alternative” to the surrender of all Aboriginal rights — “the cession and surrender of Aboriginal title in non-reserved areas”, while “allowing any Aboriginal title that exists to continue in specified reserved areas, granting to beneficiaries defined rights applicable to the entire settlement area”. The policy also notes that the only Aboriginal rights to be relinquished are those related to the use of and title to lands and resources. In practice, however, only one of the recent settlements, the Yukon Umbrella Final Agreement, comes under this “alternative”. In that agreement the only Aboriginal rights that are not surrendered are surface interests in the lands that are retained as Indian lands. Thus, it would appear that the current policy allows for only a minimal divergence from the basic position of requiring a total surrender of all Aboriginal rights.

Scope of the benefits Aboriginal groups can negotiate

Federal policy sets out a number of areas where benefits can be negotiated, including lands (including offshore lands), wildlife harvesting rights, subsurface rights, natural resources revenue sharing, environmental management, local self-government and financial compensation. Certain limitations on each of these areas are especially noteworthy.

First, until the recent federal announcement on self-government, these issues were based on delegated authority, not the inherent right, and were the subject of separate negotiations governed by the federal policy on community self-government negotiations. Under the comprehensive claims policy, issues of self-government will be contained in separate agreements and separate enacting legislation. They will not receive constitutional protection unless there is a general constitutional amendment to this effect.

Second, natural resources revenue-sharing provisions will be subject to limitations, which might include an absolute dollar amount, the duration of the revenue-sharing provisions or a reduction of the percentage of royalties generated. Thus, natural resources revenue-sharing arrangements are seen more correctly as a way of spreading cash compensation over a longer period of time, rather than securing a significant continuing source of revenue for Aboriginal claimants.

Third, on the issue of Aboriginal participation in managing lands and resources, the policy requires that any arrangements recognize the overriding powers of non-Aboriginal governments. While numerous management boards and committees have been set up under the various comprehensive land claims agreements (see Appendix 4B), these bodies remain advisory, although some have found innovative ways to prevent their
recommendations from being ignored. Nonetheless, non-Aboriginal governments retain full jurisdiction and final decision-making authority.

The lack of interim measures

One of the most significant weaknesses of comprehensive land claims policy is the lack of any provision for interim measures before submission of a comprehensive claim and during negotiations. Governments are free to create new third-party interests on the traditional lands of Aboriginal claimants right up until the moment a claims agreement is signed.

The continuation of activities such as logging, mining and hydroelectric development before and during negotiations has, as we have seen in this chapter, provoked confrontation with Aboriginal people. Virtually all the co-management regimes established to date, including the Barriere Lake Trilateral Agreement in Quebec and the Clayoquot Sound Agreement in British Columbia, were created because of Aboriginal protest over resource development. It should not be necessary for Aboriginal people to mount blockades to obtain interim measures while their assertions of title are being dealt with.

The incentive to negotiate

Developing parallel to federal claims policy is the underlying law of Aboriginal title. Continuing uncertainty about legal recognition of Aboriginal title and the rights that adhere to such a title, as well as the absence to date of any truly effective judicial remedy, give Aboriginal and government parties sufficient reason to enter into treaty negotiations. Yet this incentive is offset by the fact that the federal government continues to contemplate blanket extinguishment of Aboriginal title as a possible option.

In addition, Aboriginal parties asserting an unextinguished Aboriginal title often find themselves involved in a constitutional dispute. Their assertions are typically opposed, primarily by a province protecting its jurisdiction over lands and resources, and frequently by Canada as well. This was the situation in Calder and subsequently in Delgamuukw, both cases relating to the assertion of Aboriginal title in British Columbia. In other provinces, Aboriginal groups have found themselves subject to a further gloss on existing policy. In Bear Island, an Ontario case, the federal government communicated its position that there could be no subsisting Aboriginal title in treaty areas even if the Aboriginal party had not actually joined in the treaty. This was the situation of the Lubicon Cree as well. Moreover, as previously noted, Métis people are excluded from asserting Aboriginal title under the policy.

The Coolican report and revisions to policy

There has been one searching examination of existing policy. The task force to review comprehensive claims policy, which released its findings in 1985 (commonly known as...
the Coolican report), noted a fundamental difference in the aims of the parties to an Aboriginal title claim:

The federal government has sought to extinguish rights and to achieve a once-and-for-all settlement of historical claims. The aboriginal peoples, on the other hand, have sought to affirm the aboriginal rights and to guarantee their unique place in Canadian society for generations to come.275

The report recommended a policy and process that would

• be open to all Aboriginal peoples using and occupying traditional lands whose title has not been subject to a treaty or to explicit legislation;

• recognize and affirm Aboriginal rights;

• allow for variation based on historical, political, economic and cultural differences among Aboriginal peoples and their circumstances;

• focus on negotiated settlements;

• be fair and expeditious;

• encourage the participation of provincial and territorial governments;

• allow for the negotiation of Aboriginal self-government;

• enable Aboriginal peoples and government to share responsibility for the management of lands and resources and to share the benefits of their use;

• deal with third-party interests in an equitable manner;

• be monitored for fairness and progress by an authority independent of the parties; and

• provide for effective implementation of negotiated agreements.

Government responded to these recommendations the following year in a publication entitled Comprehensive Land Claims Policy.276 To the disappointment of Aboriginal groups and others who supported the Coolican report, the federal response offered an alternative to extinguishment of rights that was more illusory than real: self-government negotiations, if they resulted in an agreement, would receive no constitutional protection or independent monitoring authority. By and large, this remains the federal position with respect to comprehensive claims.277

Existing claims settlements
There have been eight major settlements of Aboriginal title claims affecting huge segments of northern Canada, the last six of which were concluded under the federal comprehensive claims policy:

- The James Bay and Northern Quebec Agreement, 1975
- The Northeastern Quebec Agreement, 1978
- The Inuvialuit Final Agreement, 1984
- The Gwich’in Comprehensive Land Claim Agreement, 1992
- The Nunavut Final Agreement, 1993
- The Sahtu Dene and Métis Comprehensive Land Claim Agreement, 1993
- The Yukon Umbrella Final Agreement, 1994, consisting of four final agreements signed with the Vuntut Gwich’in First Nation, the First Nation of Na-cho Ny’a’k Dun, the Teslin Tlingit Council, and the Champagne and Aishihik First Nations
- the Nisg’a’a agreement in principle, 1996.

The main provisions of these settlements are set out in Appendix 4A, along with the Quebec government’s 1994 offer of settlement to the Atikamekw-Montagnais people, whose Aboriginal title claim covers a large area of north-central Quebec. This example is included for comparative purposes only, since the offer has been rejected by the claimants, although technical discussions continue. Similar claims are expected from the 10 Algonquin First Nation communities that border the Atikamekw to the west. The Algonquin community of Kitigan Zibi (River Desert), the easternmost of these 10 communities, formally submitted its comprehensive claim to the federal government in 1994. It is currently being assessed by the department of justice. In the province of Newfoundland and Labrador, the Innu and Inuit of Labrador have asserted title claims. As well, the British Columbia Treaty Commission is now undertaking the negotiation of nearly 50 claims in that province.

The majority of modern treaties relating to Aboriginal title have been reached in the territories, where Canada has exclusive jurisdiction over lands and resources. The two modern treaties concluded in a province are the 1975 James Bay and Northern Quebec Agreement and the related 1978 Northeastern Quebec Agreement from (see Appendix 4A) and the recent Nisg’a’a agreement in principle in British Columbia. In the first case, Quebec’s desire to develop hydroelectric resources motivated its participation in the settlement. There have been problems with the implementation of that settlement and others. The Commission therefore repeats, with emphasis, the Coolican recommendation that an appropriate policy, and indeed the treaties themselves, must include appropriate provisions for implementation. An independent monitoring authority would help to ensure that result.
The British Columbia Treaty Commission

In British Columbia the process for negotiating comprehensive claims settlements has been somewhat modified by the presence of the British Columbia Treaty Commission, created jointly by the First Nations Summit, Canada, and British Columbia in 1992.\textsuperscript{280}

The establishment of an independent body to monitor the negotiation process was also a recommendation of the Coolican report, one intended to redress the massive imbalance of bargaining power between federal and provincial governments on one hand and Aboriginal parties on the other.\textsuperscript{281}

In that regard, the method of appointment of the commissioners is certainly promising. Canada and British Columbia each nominate one commissioner and the First Nations Summit nominates two; the chief commissioner is nominated jointly by the parties. However, the commission remains purely facilitative. While the involvement in negotiations of an outside party is certainly a step in the right direction, its true effectiveness remains to be assessed. Continued arguments between Canada and British Columbia, for example, have contributed to a delay in the commission’s operations. Moreover, the fact that a number of First Nation communities in British Columbia have refused to join the First Nations Summit means that the Aboriginal side is not fully representative.

We note particularly that federal negotiators do not have the authority to depart from existing comprehensive claims policy. Without significant policy changes, therefore, extinguishment of Aboriginal title will remain one of the criteria for any new treaties in British Columbia.

The 1995 fact finder’s report on surrender and certainty

In December 1994, the minister of Indian affairs appointed Alvin C. Hamilton, a former associate chief justice of the Manitoba Court of Queen’s Bench, as an independent fact finder to explore and report on existing federal claims policies and other potential models for achieving certainty of rights to lands and resources through land claims agreements. The appointment was made in response to a June 1994 report of the House of Commons standing committee on Aboriginal affairs that asked the minister to “consider the feasibility of not requiring blanket extinguishment”. The fact finder’s report, entitled \textit{Canada and Aboriginal Peoples: A New Partnership}, was released in September 1995.

In his report, Mr. Hamilton explicitly rejected the current federal policy requiring extinguishment or surrender of some or all Aboriginal rights to lands and resources in exchange for rights and benefits set out in an agreement or modern treaty. He offers an alternative to eliminate the need for a surrender clause while achieving the necessary level of certainty. This alternative has six essential and interconnected elements:

1. recognition in the preamble that the Aboriginal party to the treaty has Aboriginal rights in the treaty area;
2. as much detail as possible concerning the rights to lands and resources of each of the parties to the treaty and of others affected by it;

3. mutual assurance clauses in which the treaty parties agree that they will abide by the treaty and exercise rights only as set out in the treaty;

4. mutual statements that the treaty satisfies the claims of all parties to the lands and resources covered by the treaty and that no future claims will be made with respect to those lands and resources except as they may arise under the treaty;

5. a dispute resolution process with broad powers, including binding arbitration and judicial review, to ensure that treaty obligations are met and disagreements about the treaty are addressed; and

6. a workable amendment process whereby the parties can, if they agree, amend certain provisions of the treaty to respond to changing circumstances.282

We are pleased to observe that the fact finder’s recommendations are similar to the alternative presented in our special report on extinguishment, *Treaty Making in the Spirit of Co-existence*, as well as to recommendations later in this chapter dealing with the content and scope of new or renewed treaties.

The fact finder was asked by the minister to consider our special report when conducting his deliberations. Mr. Hamilton did express some disagreement with our second recommendation, which he sees as endorsing partial extinguishment in certain circumstances. He does not believe that “there are any circumstances that warrant even a partial extinguishment or surrender of Aboriginal rights whether one is dealing with Aboriginal rights in general or more specific Aboriginal rights with respect to lands and resources”. 283 In our view, his disagreement is one of degree more than of kind, particularly if our recommendation is read in light of our discussion in the special report:

Requiring partial extinguishment as a precondition of negotiations is also an inappropriate means of achieving co-existence. Partial extinguishment often results in the extinguishment of rights to far more territory than the term ‘partial’ perhaps implies. Because of its permanent effects, any decision to agree to partial extinguishment of Aboriginal title should be made after a careful and exhaustive analysis of alternative options. We do not wish to suggest in this report that an Aboriginal nation should never be entitled to exchange some of its territory for certain treaty-based benefits. Nor do we wish to foreclose the availability of bargaining solutions that rely in part on partial extinguishment techniques. Nevertheless, we hope that the approach we propose will prove more attractive in most instances.284

The Commission cannot support the extinguishment of Aboriginal rights, either blanket or partial. It seems to us completely incompatible with the relationship between Aboriginal peoples and the land. This relationship is fundamental to the Aboriginal world view and sense of identity; to abdicate the responsibilities associated with it would have
deep spiritual and cultural implications. However, we recognize that there will be circumstances where the Aboriginal party to a treaty may agree to a partial extinguishment of rights in return for other advantages offered in treaty negotiations. We would urge, however, that this course of action be taken only after all other options have been considered carefully.

Mr. Hamilton had a number of useful suggestions to improve treaty documents. He was critical, for example, of the language of the recent Yukon Umbrella Final Agreement:

I attempted to read the *Umbrella Final Agreement, Council for Yukon Indians*. While I have some years of experience as a practising lawyer and as a judge, I must say that I found the document convoluted and very difficult to follow. I understood what a presenter meant when he said one would need to be a lawyer or a negotiator who has been involved in the negotiation of a treaty to be able to understand it.\(^ {285} \)

Mr. Hamilton’s opinion, which we share, is that the language used in treaty documents should be clear, plain and understandable to everyone, not just to those involved in preparing the draft.

Mr. Hamilton also believes that the certainty desired by all parties can be provided by clearer, more concise treaties than those of recent years. Concerning land regimes, he suggests that the treaty simply state at the outset the nature of each type of land within the treaty area and then give a general outline of the rights of each party with respect to each category. This is an excellent suggestion. Our point of disagreement is that Mr. Hamilton proposes only two categories — settlement land (that portion owned by the Aboriginal party) and non-settlement land (the rest of the land within the treaty area that is owned by the government or is privately owned and to which the Aboriginal party has special rights). We envision instead a tripartite land scheme involving settlement land, shared land (land under joint jurisdiction and management by the Crown and Aboriginal parties) and non-settlement land. We believe this land regime would provide greater self-sufficiency for Aboriginal peoples than the bipartite scheme favoured by current claims policy.

We share Mr. Hamilton’s view that the federal government’s present approach to the treaty process is inappropriate. We also agree with his comments on the lack of government response to the many criticisms of claims policy made over the years.

*The specific claims process*

As defined by government and set out in the 1982 publication, *Outstanding Business*, a specific claim is one based upon a “lawful obligation” of Canada to Indians. Claims based on unextinguished Aboriginal title are expressly excluded, as were pre-Confederation claims until 1991.\(^ {286} \) A specific claim, from the government’s point of view, is little more than a claim for compensation.
Although the term ‘specific claim’ was derived from earlier departmental policy discussions and the 1969 white paper, which stated that Canada would continue to honour its “lawful obligations” in respect of claims “capable of specific relief”, the concept of lawful obligation remains at the centre of specific claims policy, although there is no agreement upon what facts or relationships might constitute such an obligation. In a paper prepared for the department of Indian affairs before publication of the policy, G.V. La Forest suggested that “we are not so much concerned with a legal obligation in the sense of enforceable in the courts as with a government obligation of fair treatment if a lawful obligation is established to its satisfaction”. [emphasis added]²⁸⁷ He made a distinction between claims that might be enforceable in the courts, under court procedures, and obligations that could be upheld under a lower administrative standard. The department of justice, however, assesses the validity of claims in terms of their chances of success in court and applies technical rules of evidence.²⁸⁸ Thus, legal validity informs the government’s assessment of whether a claim properly falls within the scope of federal policy. This assessment is further informed, if not defined, by the examples of lawful obligations set out in the policy itself:

A lawful obligation may arise in any of the following circumstances:

1. The non-fulfilment of a treaty or agreement between Indians and the Crown.

2. A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.

3. A breach of an obligation arising out of government administration of Indian funds or other assets.

4. An illegal disposition of Indian land.²⁸⁹

The more restrictive view of lawful obligation is that a claim must fall within one of these examples in order to come within the policy. The most restrictive view is that a claim must fall within one of the examples and also within the compensation guidelines; that is, compensation in the form of money or land must be possible.²⁹⁰

A narrow and restrictive reading of the policy leads to the exclusion of many claims based on non-fulfilment of treaty obligations. Assertions of the right to exercise hunting and fishing rights, for example, or of rights to education, health and other benefits, are not seen by government as coming within the policy even though they are justiciable rights. Even seemingly uncontroversial obligations, such as the provision of land under the terms of treaties, have been subject to the same narrow reading. This was the 1983 conclusion of a commission appointed by the Manitoba government to make recommendations about treaty land entitlement:

One may be compelled to conclude that the Office of Native Claims’ interpretation of Canada’s ‘lawful obligation’ is unfair and unreasonable ... .The Office of Native Claims, by its words and conduct, is acting actively against the interests of the Indians to arrive at
a mutually acceptable agreement. The Office of Native Claims is acting inconsistent with the Canadian Government policy and the expressed position of its present Minister and the Ministers who preceded ... . This is a harsh comment, but the facts presented to this Commission do not permit any other conclusion.291

It is the great irony of the policy, and the most common complaint against it, that it was intended to broaden the concept of negotiable claims beyond those that might be proven strictly in court. In fact, it does precisely the opposite. Nowhere is this more evident than in the failure to incorporate, as a basis of claim, breach of fiduciary obligation, which was established as actionable in 1984 by the Supreme Court of Canada.292

In addition, the government’s determination of validity involves a clear conflict of interest. The department of justice faces a conundrum, because the policy directs it to ignore technical rules of evidence and the issue of justiciability. Yet how can it advise government that a treaty includes one set of terms, with one meaning for purposes of claims policy, but another set of terms, with a different meaning, for purposes of litigation? It is not clear how these conflicting demands can ever be reconciled in the absence of significant institutional reform, but it is not at all difficult to identify the ensuing tensions and inconsistencies.

As a result, the department of justice advises on treaties in the same way that it litigates them. In many ways, stances taken by the department in litigation portray treaties as contracts and downplay the fact that they reflect and are the product of a fiduciary relationship between the Aboriginal nation and the Crown. At issue in a fiduciary relationship is conduct, not contract. The law of fiduciary obligations holds the Crown to its substantive promises, regardless of the language used in formal agreements.293 As Justice Wilson wrote in the Guerin decision, “Equity will not permit the Crown to hide behind the language of its own document”.294

The policy interpretations and practices noted here create the perception, if not the reality, of a policy that is arbitrary, self-serving and operating without due regard to established law. If negotiated settlements are meant to be achieved according to a broader range of rights and obligations than those otherwise enforceable in a court of law, then federal policy must set a clear standard by which their validity can be determined. If the department of justice cannot advise on such a standard in a manner consistent with its other responsibilities to the Crown, then the advice must come from elsewhere. At a minimum, Canada cannot continue to articulate standards that exclude justiciable claims from its policy for negotiated settlements.

The specific claims policy also contains restrictions on compensation, in the form of guidelines, which ensure much delay and confrontation in negotiations. The policy’s first rule is that compensation will be based on “legal principles”, but nine other guidelines qualify it. Of particular concern is guideline number 10:

The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim,
the burden of which rests with the claimant. As an example, where there is doubt that the lands in question were ever reserve land, the degree of doubt will be reflected in the compensation offered.\textsuperscript{295}

In practice, guideline number 10 means that the federal government may, at any stage, reduce the amount of compensation being offered by 25 per cent, 50 per cent or 75 per cent. The perception is widespread that such determinations are made arbitrarily, or with a view to the budget rather than the facts. In many cases, contract not conduct has determined the degree of doubt, leaving the Aboriginal party wondering whether it still has a valid claim.

More generally, the compensation guidelines do not reflect the reality of claims negotiation. When the federal government determines that it wishes to settle a specific claim, it offers a lump sum payment unrelated to the compensation criteria and settles without further reference to them. Years can be wasted negotiating on the guidelines, only to have the government abandon them in a final offer. Such guidelines are, in our view, unnecessary and provocative.

Of an estimated 600 specific claims in Canada as a whole, approximately 100 have been settled under the specific claims policy. As is often the case, however, these statistics do not reveal the full story. Most of the specific claims settlements have been made during the past five or six years, when increased funding has been available.\textsuperscript{296} The majority of claims had been in the process for as many as 15 years or more. For example, a recent settlement with the Nipissing First Nation community in Ontario resolved a claim that had first been submitted in 1973. There are also regional variations that further skew the numbers due to ‘batch’ settlements like those relating to cut-off lands in British Columbia or treaty land entitlement in Saskatchewan. As noted by the Indian Commission of Ontario, about one settlement a year is made in central and eastern Canada; several hundred claims remain to be dealt with across the country.

Government and the public may take some satisfaction in the number of settlements that have been achieved, frequently despite the obstacles created by federal specific claims policy. However, a study of 17 settlements, prepared for the department of Indian affairs in 1994, disclosed that only two of those communities were satisfied with the result.\textsuperscript{297} The others felt that the claims process had diverted them from the original grievance in favour of financial compensation. Where, for example, the communities wanted reserve land in return for loss of territory, they received cash. This continuing sense of grievance calls into question whether current federal policy can ever lead to durable settlements.

Where a specific claim is based on the misappropriation or loss of trust funds, financial compensation is clearly appropriate. But where the claim is for loss of land, provision for land must be a major component of the settlement. For a number of reasons discussed later in this chapter, Commissioners believe that the transfer of Crown land (or private land, where there is a willing seller) is both less costly and more effective than cash payments for resolving specific claims. A recent review of Indian land claims policy in
the United States, for example, has shown that those who benefit from cash settlements are most often lawyers and the economies of surrounding non-Aboriginal communities.  

Federal policy is not solely to blame, however, for the failure to include land in claims settlements. Because of the existing division of constitutional powers, any transfer of Crown lands or resources necessarily involves negotiations with the provinces. In some instances, either the federal government has not invited provinces to take part in negotiations, or provinces have refused to put any land on the table. In cases where Aboriginal territory has become provincial Crown land as the result of a breach of Crown duty, provincial governments must make Crown land available to an Aboriginal nation as a replacement. In our view, the provision of land in such circumstances is not only just, it is a matter of fiduciary obligation.

The 1994 study noted other perceptions about the federal specific claims policy and process that have been advanced consistently on behalf of Aboriginal groups over the years:

• Government is seen as having a conflict of interest (acting as both judge and jury).

• The policies incorporate restrictive criteria that lead to confrontation and inhibit flexible and creative solutions.

• The process is too time-consuming and too confrontational.

• It is not directed at ameliorating the original grievance.

• Government negotiates on a ‘take it or leave it’ basis.

• Settlements do not have a long-lasting or positive effect on communities.

Notably, the study disclosed that both government and Aboriginal parties saw claims negotiation as a “trying” process that did not work for them. The truth of these observations is sadly borne out by the confrontation at Ipperwash in the fall of 1995. A cash payment to the Kettle and Stoney Point First Nation in 1992, as compensation for the 1942 military expropriation of the Stoney Point Reserve, did little to resolve the underlying grievance, which was the federal government’s failure to return the expropriated lands in a timely fashion. Even with the return of the land, we believe that the federal government should give serious consideration to reinstating the Stoney Point community.

While it is possible to reach a negotiated claims settlement within the policies, it is far from clear that these settlements will deal ultimately with the underlying causes of grievance or implement any significant change over the long term. The Commission believes the number of settlements does not vindicate the specific claims policy or rebut the criticisms levelled against it. Our review of the specific claims policy and process shows that major change is needed.
Claims of a third kind

Claims of a third kind, acknowledged since 1993, are really a subset of specific claims. Such claims are intended to attract “administrative solutions or remedies to grievances that are not suitable for resolution, or cannot be resolved, through the Specific Claims process”. The policy provides no definition of what kinds of claims might fall into this category. The only example given is the Kanesatake claim, which has lingered in this category without resolution for the past five years. Many other claims previously rejected by the departments of Indian affairs and justice because of their failure to fit within existing claims policy, such as those of the Mi’kmaq Nation and the Lubicon Cree, have not yet been considered as candidates for this category.

If the Kanesatake claim is an appropriate example, then such claims can be negotiated, but no indication is given of the purpose of negotiation or the potential results. Quite simply, the problem with claims of a third kind is that there is no purpose, no definition, no process, no conclusion and no review.

An appropriate claims process would not require an unarticulated catch-all category like claims of a third kind. Such a policy would include these claims as part of the overall objective of achieving reconciliation and coexistence.

5.3 Specific Claims Initiatives: 1990-1995

In the fall of 1990, prompted by that summer’s events at Kanesatake, government took several steps in relation to specific claims: the budget for claims settlements was increased, a ‘fast-track’ process was implemented for claims of relatively small value, and the bar on claims originating before 1867 was to be removed. Also an independent review body was promised in tandem with an overall review of claims policies.

The chiefs’ committee on claims was formed as an ad hoc group of interested parties to advise on the policy review. Co-chaired by Chief Manny Jules of Kamloops and Harry LaForme, then Indian commissioner of Ontario, and with the administrative support of the Assembly of First Nations (AFN), the committee produced a position paper on claims that was forwarded to the minister of Indian affairs in December 1990.

As a result of subsequent discussions, it was agreed in 1991 that government would enter into a policy review protocol with a joint government-AFN working group on claims policy. At the same time, and as an interim measure while this policy review was under way, the federal government undertook to establish an Indian specific claims commission.

Indian Claims Commission

The Indian Specific Claims Commission was established in July 1991 and came to be known as the Indian Claims Commission. It had powers under the Inquiries Act to review certain ministerial decisions under the specific claims policy and advise government...
about them. There was, however, an immediate dispute between AFN and government over the wording of the order in council creating the commission, which was seen as tying it too closely to the policy to make recommendations of any value. This dispute simmered for nearly a year until a revised mandate was issued in July 1992 and a full complement of commissioners was appointed.\textsuperscript{302}

Under its revised mandate, the commission is directed to inquire into and report upon the following ministerial decisions under the specific claims policy:

1. whether a claimant has a valid claim for negotiation under the policy where that claim has already been rejected by the minister; and

2. which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the minister’s determination of the applicable criteria.

The commission is also authorized to provide mediation services for specific claims issues at the parties’ request.

By March 1995, the Indian Claims Commission had filed seven reports with the parties to particular claims. The reception to these reports has been mixed, especially in government. The commission has had some success with its mediation efforts, despite the federal government’s earlier refusal to participate in mediation. To date, it seems too closely linked to the existing specific claims policy to work effectively, and the entire process needs to be improved. In 1994, the commission expressed frustration at the time lag in government response to its reports and envisioned a role of facilitating claims through alternative dispute resolution techniques. It suggested that claims might be submitted to the commission before going to the departments of Indian affairs and justice.\textsuperscript{303}

In its early reports, the commission has not addressed difficult issues of law, although legal issues are crucial to a policy ostensibly based on lawful obligation. Such issues cannot be avoided if the commission, or some version of it, is to have the power to make binding decisions. There are lessons to be learned from its experience. Since the commission is only in a position to make recommendations, it has favoured the role of an informed but objective entity that can help the parties refrain from becoming too adversarial. A different balance must be struck if an effective, independent tribunal is to be established.

Recently, the Indian Claims Commission published a special volume of its proceedings intended to serve as a discussion document for land claims reform. It suggests that where it sees broad consensus, the following steps should be taken immediately:

- create an independent claims body (ICB);

- validate claims by some other body (such as ICB) to remove the conflict of interest that exists for the federal government in the present system;
• facilitate claims negotiations by ICB (or some other body) to ensure fairness in the process; and

• recognize the need for ICB (or some other body) to possess the authority to break impasses in negotiations regarding compensation.304

We support these measures, as far as they go, and see them as consistent with the recommendations later in this chapter.

The joint government/First Nations working group on claims policy

The second initiative was a joint working group to conduct an overall review of claims policy. This group did not finalize its operating mandate until the spring of 1992. Unfortunately, that mandate required consensus among government and First Nations representatives on major recommendations, and that consensus proved elusive. A mediation expert retained by the joint working group produced a neutral draft, signalling points of agreement and disagreement, shortly before the group’s mandate expired in July 1993.305 It wound down without achieving its purpose or even agreement on what constitutes a claim. We have incorporated some elements of the neutral draft in the interim specific claims protocol recommended later in this chapter.

The AFN chiefs’ committee on claims

The chiefs’ committee continues, although a lack of funding has prevented it from undertaking any major work. In August 1994, the committee produced a summary report on the reform of federal land claims policies. It pointed to 32 concerns about the current policies and recommended the following:

• an independent body, involved in facilitating claims throughout the entire process, from the research, development and submission of claims, through negotiations and on to the implementation of settlements;

• a fair and equitable process with the power to bind government;

• an appeal mechanism; and

• independent funding.

The chiefs’ committee also emphasized the importance of linking claims and treaties in an appropriate manner. There has been no formal response from government to this report.

Public awareness

Canadians generally expect that Aboriginal claims will be resolved fairly and expeditiously. Public expectations are easily identified. There is a general desire that
government discharge this task at minimal cost and without serious disruption to the established order of things. Specifically, Canadians do not want the resolution of Aboriginal claims to intrude upon private rights or private claims on public resources. They do not seem inclined to explore the dilemma this creates when constitutional rights and government’s historical fiduciary obligations to Aboriginal peoples are at stake.

The fact remains that most Canadians are generally aware of and to some degree intimidated by Aboriginal claims but have little knowledge of the facts or circumstances of these claims. While aware of settlements as they are concluded and announced, people are not aware of the investment of time, energy and money or the many delays and frustrations involved in achieving those settlements.

Our review of these issues makes it clear that major change in federal claims policies is long overdue. This is an urgent issue. We note that before the 1993 federal election, the Liberal Party of Canada announced its intention to overhaul claims policy and expressed a commitment to an independent process and a tribunal. To date, the government has taken no action to implement those commitments.

We believe a major reason for the delay is the central role played by the department of Indian affairs in the development and implementation of federal policy on Aboriginal issues. As we will see, the department’s role generally has been more harmful than helpful.

5.4 The Institutional Interests of the Federal Government

In 1994, the Indian Claims Commission criticized the department of Indian affairs for its consistent failure to produce documents quickly, attend meetings, consider mediation and respond to the commission’s recommendations in a timely manner. Although intended to help speed the resolution of claims, in practice the commission has been unable to exercise this part of its mandate because the department appears to treat its operations as an interference with the normal workings of claims policy. Such behaviour is symptomatic of the department’s adversarial attitude toward First Nations.

This is far from a new phenomenon. The late George Manuel experienced it when serving as co-chair of the National Indian Advisory Council, appointed by the Pearson government in 1964:

[The] National Indian Advisory Council ... was to be the first time that Indian people would actually participate in an official inquiry into Indian matters. There was finally to be a distinction made within government between the way Indian Affairs related to Indian people and the way Transport related to trains, planes and ships ....

[The] Indian affairs people who sat with us in those conferences tended to blame the [Indian] Act itself for the lack of development on reserves and for the control it held over Indian lives. The Indian consensus went very much the other way ... There was a common belief among us that the primary problems lay with Indian Affairs, and the
relations the bureaucracy maintained with our people. None of that is prescribed in the Act. The source of the problem lies mostly in the attitude that no legislation can change so long as the present staff continues in the traditional structure, so long as the traditional structure of civil service roles is passed on from one generation to another, like an hereditary title, and the relationship between bureaucrat and Indian never becomes a relationship between man and man.

There was never a point in all those discussions when the Indian delegates recommended that the Indian Act be repealed. 308

All institutions, if they are in existence long enough, develop a corporate memory. Policies may change over time, but as Manuel pointed out, practices — the mix of training and inherited ways of doing things that govern how employees work — do not change nearly so quickly. Government institutions are not simply neutral bodies carrying out policies in a balanced fashion on behalf of the public; they have interests of their own. We have seen how lands and resources management agencies have tended to limit Aboriginal participation. The observation is even more applicable to the department of Indian affairs, which can claim legitimately to be the oldest federal department, tracing its origins to Sir William Johnson’s northern Indian superintendency in the 1750s. But the department’s real corporate memory dates from the century after Confederation, when it held virtually total sway over the lives of Aboriginal people.

Government employees are also members of the general public. As we learned during our hearings, many people have deeply held beliefs about property rights and resources that often conflict with those of Aboriginal people. At least some of this conflict stems from the negative ways Canadians have been conditioned to see Aboriginal people, particularly during the past century. These conditioning factors need to be understood if there is ever to be a new relationship.

Assimilation policies

In a speech to the House of Commons in 1950, the minister responsible for Indian affairs, Walter Harris, summarized the long-time aims of Indian affairs policy:

The underlying principles of Indian legislation through the years have been protection and advancement of the Indian population. In the earlier period the main emphasis was on protection. But as the Indians become more self-reliant and capable of successfully adapting themselves to modern conditions, more emphasis is being laid on greater participation and responsibility by Indians in the conduct of their own affairs. Indeed, it may be said that ever since Confederation the underlying purpose of Indian administration has been to prepare the Indians for full citizenship with the same rights and responsibilities as enjoyed and accepted by other members of the community ... .

The ultimate goal of our Indian policy is the integration of the Indians into the general life and economy of the country. It is recognized, however, that during a temporary
transition period of varying length, depending upon the circumstances and stage of development of different bands, special treatment and legislation are necessary.\textsuperscript{309}

These goals would remain basically unchanged — though constantly challenged — until the 1969 white paper on Indian policy.\textsuperscript{310} The policy of assimilation had its roots in the nineteenth century, when governments in Canada and the United States — motivated by both philanthropic ideals and notions of European cultural and racial superiority — tried, through civilization and enfranchisement legislation, to eliminate distinct Indian status and to blend Indian lands into the general system. Thus, imprinted on the corporate memory of the Indian affairs department well into this century was the attitude that Indian people required protection because they were inferior — although with proper education and religious instruction, they could be turned into productive members of society.

Such views became deeply rooted in Canadian society as a whole. As the Penner committee on Indian self-government observed in its 1983 report to Parliament, it is only since the mid-1970s that public perceptions about Aboriginal problems have started to shift.\textsuperscript{311} Even today, many Canadians subscribe to the goals elaborated by Walter Harris; they do not understand why one sector of Canadian society should have treaties with another. They continue to believe that the solution to land claims and other issues lies in Aboriginal peoples’ integration and assimilation into mainstream society.\textsuperscript{312} Such views are being rejected explicitly, however, in emerging international legal principles, and assimilation policies have been criticized by major religious institutions.\textsuperscript{313}

Most Canadians are unaware that Indian people refused all along to accept assimilation (or enfranchisement, to use the words of the \textit{Indian Act}). Between 1857 and 1940, fewer than 500 people chose voluntarily — even under intense pressure from the department — to give up their Indian status in exchange for social and political rights. Unfortunately, this determined adherence to religion, language and customs, including traditional land-use practices, only reinforced the prevailing impression of Indian inferiority. To the department, it meant simply that Indian people would require the guiding hand of government — and a controlled reserve land base — for that much longer.

\textit{Federal policy on Aboriginal lands and resources}

The federal assimilation policy also explains, at least in part, the extraordinary pressures placed on Indian nations over the past century to surrender or sell their reserve lands and resources. If reserves were simply a temporary expedient — a way station en route to assimilation — then there was no particular reason to treat their natural assets with respect. At the same time, the departmental focus on reserves, even in a negative sense, had profound consequences for all Aboriginal peoples. First Nations have had every aspect of daily life regulated while Métis people and non-status Indians have been neglected completely.

The department of Indian affairs has continuously downplayed the Crown’s obligations under the historical treaties. Faced with provincial and territorial policies, which have
limited Aboriginal access to lands and resources off-reserve, Indian affairs officials — particularly those at the highest levels — generally did not champion Aboriginal people, as when they failed to defend harvesting rights explicitly spelled out in treaties.

This aspect of the department’s behaviour also had links to the policy of assimilation. Most galling to federal officials were the many individuals who learned English or French, became Christians, found jobs in the mainstream economy, and still refused to surrender their identity. At least in Ottawa, department personnel were unfamiliar with the kinship ties and customary laws that characterized traditional harvesting, and this easily led to the conclusion that, if someone had secured employment, he or she was no longer Indian. Provincial and territorial wildlife officials also subscribed to this view, and it continues to be held by some Canadians.

In and of itself, as we have seen throughout this chapter, the department’s behaviour has contributed greatly to the backlog of Aboriginal grievances. From Confederation until the early 1960s, Indian affairs officials refused to take land claims seriously and tried to prevent Aboriginal people from bringing them to the attention of Parliament and the public. Even today, despite the exponential growth over the past 20 years of policies and programs to deal with land claims and claims-related issues, the tradition that Indian people do not have land or resource rights outside their reserves is a strong component of the corporate memory of the department of Indian affairs. It is reflected in the department’s preference for extinguishment as a valid option in comprehensive claims settlements. It is reinforced by interpretations of Aboriginal and treaty rights that continue to be advanced by lawyers working in the departments of justice and Indian affairs. And it is reflected in the way the department classifies claims — downgrading matters of treaty interpretation and consistently limiting the discussion of Aboriginal grievances to matters connected with the past treatment of reserve lands and assets.

Adversarial attitudes are hindering the creation of policy measures that can genuinely fulfil the federal government’s fiduciary duty to Aboriginal peoples. In his report on extinguishment, for example, A.C. Hamilton expresses dissatisfaction with a background paper prepared for his inquiry by officials of the departments of Indian affairs and justice. That paper outlined the present requirements of federal comprehensive claims policy and put forward seven alternative models for discussion. Mr. Hamilton found the paper, and all but two of the models, distinctly unhelpful. He characterized the fears expressed in the paper about the continuation of “undefined Aboriginal rights” as a defence of existing policy:

The statement appears to reflect the extent to which current departmental thinking is influenced by the existing policy, even though the paper purports to advance alternatives to it. I believe this statement represents a belief by some departmental officials that the present policy and its wordings are quite appropriate and are merely misunderstood. If so, that attitude fails to appreciate the strength of the Aboriginal opposition to giving up, surrendering or exchanging Aboriginal rights, even for the limited purpose the present practice requires.
We, too, have been struck by the resistance of the department of Indian affairs in maintaining its claims policies and practices in the face of cogent and well-documented criticism over a period of nearly two decades. We have noted, however, that without formal changes in these policies, the department has created a large number of exceptions and has dealt with similar matters in inconsistent ways. Many justiciable rights have been excluded, as have some Aboriginal groups. For substantive change to occur, we have recommended that the department of Indian affairs be disbanded and replaced by two new departments (see Chapter 3).

5.5 Conclusion: The Need for Structural Change

Since the early 1970s, a virtual claims industry has developed; federal claims policies continue to perpetuate procedures that are dilatory, adversarial and unsatisfactory to all concerned. Claims negotiations have managed to take on a life of their own, leading to settlements that do not address the original grievance or vindicate the original assertions. Federal policies have consistently ignored what should be the fundamental goal of a just settlement of Aboriginal claims, a goal expressed by Indian claims commissioner Lloyd Barber in 1973:

In the final analysis it must be realized that the process of ... claims settlement involves not just the resolution of a simple contractual dispute, but rather the very lives and being of the people involved. Desire for settlement does not concern only the righting of past wrongs but as well the establishment of a reasonable basis for the future of a people ...

After all, much of our current difficulty stems from the rigidity and inflexibility of positions established ages ago.317

The current situation cannot endure. Fundamental change is urgent. But change requires mutual respect and reconciliation between Aboriginal peoples and other Canadians, not a return to failed policies of assimilation based on the surrender or extinguishment of Aboriginal title. In the next section, we develop the outline of a new deal for Aboriginal nations, one that will structure all claims issues within the context of the treaty relationship. Our proposal also includes the creation of a federal tribunal, one that would assist treaty processes and have binding decision-making powers over an enlarged category of specific claims. That such a tribunal was first proposed well over 30 years ago is in itself sad testimony to the continuing need for change.

6. A New Deal for Aboriginal Nations

6.1 Redressing the Consequences of Territorial Dispossession

As we learned from the song of Dene Th’a prophet Nógha, land is at the core of Aboriginal identity, a source of profound spiritual and moral values. Dene Th’a and other Aboriginal peoples require greater physical space than non-Aboriginal people to maintain their cultures and to protect their quiet and symbolic places — places of autonomy where they can reassert authority over their economic, social and political futures. For the same reason, Aboriginal peoples also require a greater share in decision making about activities
occurring on the parts of their traditional territories currently treated as ordinary Crown land.

A rapidly growing population is straining the resources of reserves and Aboriginal communities. In almost all cases, reserves are too small even to support existing numbers. In addition, most Aboriginal peoples in Canada have neither effective control over their existing lands nor sufficient access to lands and resources outside their reserves or communities.

Aboriginal peoples have tried for more than a century to maintain their own land base and derive a decent living from the natural resources and revenues of their traditional territories but these aspirations have been frustrated. Reserves and community lands have shrunk drastically in size over the past century and have been stripped of their most valuable resources. Moreover, as governments allocated resources and economic opportunities on traditional territories, Aboriginal peoples found themselves either excluded or positioned at the back of the line.

It is not difficult to identify the solution. Aboriginal nations need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.

This is as true for nations that have yet to enter into treaty with the Crown as it is for those that are party to historical treaties. There must be a presumption that Aboriginal signatories did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by agreeing to a treaty relationship. Where the text of an historical treaty makes reference to a blanket or wholesale cession of lands, the treaty relationship mandates sharing of both the territory and the right to govern and manage it, as opposed to a cession of the territory to the Crown.

Despite difficulties with current claims policies, especially the continuing requirement for some form of extinguishment of Aboriginal title, the Commission does not want to suggest that the consequences of these policies have been uniformly negative. Recent agreements are proof that more territory and jurisdictional authority will have a dramatic effect on Aboriginal nations’ ability to achieve economic, cultural and political self-sufficiency. In Appendix 4A, we outline the land provisions of the modern treaties and comprehensive agreements and, in Appendix 4B, the provisions of land and environment regimes established under these agreements. For Inuvialuit of the western Arctic, for example, fee simple or community lands amount to about 30 per cent of territory covered by the land claims settlement. In addition, Inuvialuit have achieved a share in the management of resources on Crown lands throughout the entire settlement region. Other
recent agreements in the North have similar provisions. As a result of the Yukon final agreement, the First Nations there will have an expanded base of exclusive Aboriginal lands (in their case, some eight per cent of the settlement area) and a share in the management of additional lands and resources. Through their agreement, Inuit of the eastern Arctic will have both extensive community lands and access to resources. Through the new government of Nunavut, they will also have significant authority over all Crown lands and resources.

Inuit of northern Quebec have an agreement with Quebec and Canada; the neighbouring Inuit of Labrador do not. While there have been complaints relating to the implementation of the James Bay and Northern Quebec Agreement, there can be no question that Quebec Inuit are more self-sufficient than their neighbours. Labrador Inuit have no formally recognized lands of their own, no guaranteed rights to resources outside their communities and no share in the governance of their traditional land-use areas.

The same conclusion can be drawn if we compare the Crees of eastern James Bay, who signed the 1975 James Bay and Northern Quebec Agreement, with the Cree of western James Bay in Ontario, who took part in Treaty 9. By any measurable standard, the eastern Crees are in a better situation, with more economic tools at their disposal to improve the lot of their communities. They have more land, more rights to resources and more capital than their neighbours (although they have continuing disputes with the government of Quebec about resources development and the respective powers of the parties on the various land categories described in their agreement.) Ontario does not acknowledge that the western Cree have rights to Crown land outside their reserves other than limited hunting, fishing and trapping rights. Inhabitants of Peawanuck (Winisk) on the western James Bay coast, which is located within a provincial park, require a work permit from an Ontario ministry of natural resources office several hundred kilometres away if they want to cut down trees to build a trapper’s cabin on their traditional lands. Through their agreement, the eastern Crees negotiated an income security program for traditional harvesters that is the envy of harvesters throughout northern Canada. The Mushkegowuk Tribal Council, which represents First Nations on western James Bay, has tried to negotiate a similar program for its member communities, thus far without success.

The problem and the solution are easy to identify, but providing Aboriginal nations with enough territory to facilitate economic, cultural and political self-sufficiency will be difficult. Nonetheless, the Commission believes that the law of Aboriginal title provides guidance. After more than a century of relative legal inaction on the rights of Aboriginal peoples to lands and resources, the law is finally beginning to recognize that they have a strong moral case for redress; they also have enforceable rights to an expanded base of lands and resources and to a share in jurisdiction over traditional territories that now fall within the category of Crown or public lands. The law of Aboriginal title, outlined in the next section, imposes extensive obligations on the Crown to protect Aboriginal lands and resources.
However, courts alone cannot provide everything required to achieve economic and cultural self-reliance and political autonomy. We propose that Parliament and the provinces introduce a range of reforms to facilitate negotiated solutions concerning the recognition and protection of Aboriginal rights to lands and resources. We also propose the establishment of an Aboriginal Lands and Treaties Tribunal to assist in redressing the consequences of territorial dispossession. As well, we propose a number of interim measures to protect Aboriginal title pending introduction of these institutional reforms and to improve Aboriginal access to lands and resources.

6.2 The Contemporary Law of Aboriginal Title as a Basis for Action

Aboriginal peoples’ experience with the law of Aboriginal title has been one of promise and frustration. The law of Aboriginal rights, including rights associated with Aboriginal title, provides a bridge between Aboriginal nations and the broader Canadian community. It draws on the practices and conceptions of all parties to the relationship, as these were modified and adapted in the course of contact (see Chapter 3). Canadian law recognizes and affirms Aboriginal relationships with the land and its resources. Indeed, recognition of Aboriginal title fundamentally structured the relationship between Aboriginal and non-Aboriginal people during much of the history of non-Aboriginal settlement and colonization of eastern and central North America. Recognition formed the basis of a pattern of contact that held real value for Aboriginal and non-Aboriginal people alike. Beginning in the second half of the nineteenth century, however, Aboriginal peoples encountered more and more difficulty securing recognition of their rights, despite persistent efforts.

The courts have begun to develop the law of Aboriginal title along its original path of respect and coexistence. In a landmark 1973 decision, the Supreme Court of Canada affirmed that Canadian law recognizes Aboriginal title as encompassing a range of rights of enjoyment and use of ancestral land that stem not from any legal enactment, such as the Royal Proclamation, but from the fact of Aboriginal occupancy. The court has also held that the Crown owes a fiduciary duty to Aboriginal peoples in its dealings with Aboriginal lands and resources.

In another case, the court ruled that treaties between the Crown and Aboriginal nations ought to be construed in light of their historical character, “not according to the technical meaning of [their] words but in the sense that they would naturally be understood by the Indians”. In 1990, in light of constitutional recognition and affirmation of existing Aboriginal and treaty rights by section 35(1) of the Constitution Act, 1982, the court ruled that “[t]he relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship”.

Courts have been careful to acknowledge that “[c]laims to aboriginal title are woven with history, legend, politics and moral obligations”. They emphasize the unique nature of Aboriginal title and tend not to subsume it under traditional common or civil law.
categories, referring to Aboriginal title as protecting an “Indian interest in land [that] is truly sui generis”. 328

With respect to claims of Aboriginal title to unceded ancestral lands advanced in the courts, claimants typically are required to prove that they and their ancestors have been members of an organized society that has occupied the territory in question since the assertion of British sovereignty. 329 Earlier intimations that some Aboriginal peoples were “so low in the scale of social organization” as to warrant no recognition of their title have since been roundly rejected by the judiciary as disreputable and discriminatory. 330

With respect to claims of Aboriginal rights to engage in particular practices and activities associated with lands and resources, the courts have noted that such rights are collective and protect integral aspects of Aboriginal identity. 331 Like the communities in which they are exercised, Aboriginal rights are not frozen in time, but instead evolve with the changing needs, customs and lifestyles of Aboriginal peoples. 332

The law of Aboriginal title thus acknowledges that societies and cultures evolve and transform over time and that legal recognition of Aboriginal rights is premised on continuity, not conformity, with the past. Given the dramatic transformations that accompanied contact, settlement and colonization, this acknowledgement is especially critical if the law of Aboriginal title is to reflect respect for Aboriginal relationships with lands and resources. In response to a host of complex factors, including historical patterns of non-Aboriginal settlement, economic development, intercolonial conflict and the intermingling of cultures, new Aboriginal collectivities, such as the Métis Nation, have emerged in North America. They have incorporated aspects of non-Aboriginal life into their cultures to produce unique new forms of Aboriginal identity, but they are self-governing, distinct societies that retain powerful relations with the land based on principles of stewardship and responsibility. 333

This judicial reawakening holds real promise for the future. In particular, the law of Aboriginal title provides a strong foundation for contemporary protection of Aboriginal lands and resources. The law recognizes that Aboriginal peoples have collective rights to occupy and use ancestral lands “according to their own discretion,” 334 and it protects practices — traditional and modern — that are integral to Aboriginal identity. 335 The law also seeks to restrict non-Aboriginal settlement on Aboriginal territory until a treaty has been reached with the Crown. 336 As well, it imposes strict fiduciary obligations on the Crown with respect to Aboriginal lands and resources. 337

These ways of regulating relations between Aboriginal and non-Aboriginal people have existed since contact but have begun to be reconstructed by the courts only recently, after years of neglect. Constitutional recognition and affirmation of existing Aboriginal and treaty rights in section 35(1) of the Constitution Act, 1982 have provided additional support in reconstructing rights associated with Aboriginal lands and resources. In the words of the Supreme Court, “By giving aboriginal rights constitutional status and priority, Parliament and the Provinces have sanctioned challenges to social and economic
policy objectives embodied in legislation to the extent that aboriginal rights are affected”.

Although true to the original purposes of the law of Aboriginal title, current jurisprudence cannot and does not accomplish all that is required to protect Aboriginal lands and resources. When an Aboriginal community asserts a particular right associated with its title to engage in a relatively discrete course of action, such as fishing, a ruling that defines the respective rights of the parties might be an effective means of resolving the issue. However, when an Aboriginal nation asserts a wide range of rights with respect to lands and resources associated with its title, the courtroom is not always the most effective forum to settle the dispute. Available remedies are often too blunt and reactive to reflect the detailed and complex political, economic, jurisdictional, and remedial determinations necessary to resolve the claim to the satisfaction of all interested parties.

The courts can be only one part of a larger political process of negotiation and reconciliation. As noted in a recent report by a task force of the Canadian Bar Association, “While the courts may be useful to decide some native issues or to bring pressure on the parties to settle by some other means, it appears clear that judicial adjudication will not provide all of the answers to the issues surrounding native claims”. Similarly, Chief Edward John of the First Nations Summit of British Columbia stated at our hearings:

It has never been the role of the Courts to define the detailed terms of the accommodation between the Crown and the First Nations. We have gone to the Courts in our own defence. We view them as a source of guidance for government, as to the rights of Aboriginal peoples and the resulting duties of government.

Chief Edward John
First Nations Summit of British Columbia
Prince George, British Columbia, 1 June 1993

Negotiations are clearly preferable to court-imposed solutions. Litigation is expensive and time-consuming. Negotiation permits parties to address each other’s real needs and make complex and mutually agreeable trade-offs. A negotiated agreement is more likely to achieve legitimacy than a court-ordered solution, if only because the parties participate more directly and constructively in its creation. Negotiation also mirrors the nation-to-nation relationship that underpins the law of Aboriginal title and structures relations between Aboriginal nations and the Crown.

Thus, the law of Aboriginal title serves as a backdrop to complex nation-to-nation negotiations concerning ownership, jurisdiction and co-management. By recognizing Aboriginal title, the law serves as an instrument for the enforcement of Aboriginal rights and provides Aboriginal nations with a measure of bargaining power during negotiations. The Canadian Bar Association has noted that to have courts decide basic legal issues and then to rely on negotiations in the “shadow of the court” to resolve complex details is a promising development with respect to the protection of Aboriginal lands and resources.
Governments must assist in achieving lasting reconciliation with Aboriginal nations concerning lands and resources. Indeed, the law requires the Crown to take active steps to protect Aboriginal lands and resources. The failure of current federal claims policy forces Aboriginal nations to seek redress through the courts, which, understandably, are reluctant to provide the continuing supervision necessary to enforce decisions concerning lands and resources. Aboriginal peoples face formidable hurdles in obtaining even interim relief pending final resolution of their claims. In light of the Crown’s historical duty of protection, Parliament should enact legislation providing for substantial protection of Aboriginal lands and resources. In addition to creating opportunities for lasting agreements, the policy should seek to ease the remedial burden on the courts by providing an alternative and more flexible and effective form of interim relief tailored to the particular needs and interests of all parties.

Next we describe current law governing interim relief. Then we explain why the law of Aboriginal title imposes on the Crown a positive obligation to protect Aboriginal lands and resources. Finally, we propose ways for Parliament to begin to fulfil the Crown’s historical duty of protection and achieve reconciliation with Aboriginal peoples concerning lands and resources.

**Interim relief**

When an Aboriginal nation seeks to assert its title in a court of law, usually it seeks to prevent activity adverse to its interests from occurring on the disputed territory pending final resolution. Generally speaking, the law offers two types of interim relief in such circumstances. The first is to file a notice of pending litigation or of right less than ownership (a caveat, *lis pendens*, or caution) against the land in question in the appropriate land titles office, indicating the existence of an outstanding claim. Available in the four western provinces, the territories, and parts of Ontario, this type of notice works as a temporary measure, designed to “freeze the title situation on the register until a claimant of an interest in land could take legal steps to protect the claim”.

Aboriginal parties have encountered difficulty securing this form of protection. A notice of *lis pendens* is permitted only after a claimant has begun an action to secure the claim. Caveats can be challenged immediately in court. As a result, this protection is available only when an Aboriginal nation is ready to begin or defend a legal action. Moreover, and partly as a result of differences in statutory wording, the right to register a caveat or *lis pendens* varies from jurisdiction to jurisdiction. In 1977, the Supreme Court held that a caveat could be registered in the Northwest Territories by an Aboriginal nation only on lands for which a certificate of title had been issued, not on unpatented Crown land. Accordingly, a caveat could be registered only on lands already in the hands of third parties. Other decisions provide that Aboriginal title and treaty rights do not constitute interests in land sufficient to support the registration of a caveat or certificate of *lis pendens*. Perhaps most important, the caveat and *lis pendens* are blunt forms of interim relief, in that they tend to prevent a wide range of activity on lands to which they apply, and they do not allow for tailored relief. Their blunt nature can contribute to judicial reluctance to see Aboriginal and treaty rights as registrable interests. As a result of all of
these factors, caveats and lis pendens are of limited use to an Aboriginal nation seeking protection of its title pending the outcome of litigation.

A second type of relief is the interlocutory injunction.\textsuperscript{349} Available in all jurisdictions, an interlocutory injunction is an order restraining certain persons from engaging in certain activity pending trial or other disposition of an action. The court typically will examine a number of factors to determine whether an interlocutory injunction is appropriate in the circumstances, including the strength of the plaintiff’s case, whether the plaintiff or defendant would suffer irreparable harm, the balance of convenience, and the effect of an interlocutory injunction on the status quo.\textsuperscript{350} The interlocutory injunction is much more flexible than a caveat or \textit{lis pendens}, as the courts are better able to tailor relief to the particular facts of the case.

The interlocutory injunction, therefore, is a more promising means of obtaining interim relief in cases involving claims of Aboriginal title.\textsuperscript{351} In 1973, for example, the James Bay Crees obtained from the Quebec Superior Court an interlocutory injunction stopping the James Bay I hydroelectric development. Although the injunction was suspended a week later by the court of appeal pending a full appeal, the action did bring parties to the bargaining table.\textsuperscript{352} However, it is not the ideal form of interim relief in all cases. Aboriginal nations have had greater success obtaining an interlocutory injunction where the territory at issue is a relatively small tract of land and where there are significant and special cultural and spiritual values at stake.\textsuperscript{353} Moreover, as a condition of obtaining this injunction, the plaintiff generally must give an undertaking to pay to the defendant any damages that the defendant sustains by reason of the injunction, should the plaintiff fail in the final result.\textsuperscript{354} This requirement, if insisted on by the courts, would make the interlocutory injunction an illusory form of interim relief for many Aboriginal nations seeking to uphold their title.

The availability of interim relief is closely related to the broader process of nation-to-nation negotiation. Interim relief against Crown and third-party activity on disputed territory is bound to serve as an incentive for the Crown to reach an agreement concerning lands and resources. Because negotiation is preferable to litigation as a means of resolving disputes between the Crown and Aboriginal nations, “courts should design their remedies to facilitate negotiations between First Nations, governments and other affected interests”\textsuperscript{355} Aboriginal peoples will secure substantive gains in negotiations only if courts order remedies that give Aboriginal parties more bargaining power than they have under Canadian law at present.

Judicial caution in this area is fuelled in no small measure by the same factors that make negotiation preferable to litigation. Although interlocutory injunctions are flexible interim measures, the courts are not the most appropriate institutions to rule on the complex political, economic, jurisdictional and remedial issues raised by cases involving Aboriginal title. Interim relief may adversely affect existing third-party interests and severely disrupt resource-based communities in the area, as well as introduce significant uncertainty about the future. We urge the courts to make creative use of the interlocutory injunction as a means of facilitating negotiations, but we recognize the difficulties
associated with interim relief in the absence of a fair and effective claims policy. For this reason, we believe that reform should provide a quick and reliable means of obtaining interim relief to protect Aboriginal lands and resources from further encroachment during negotiations. We propose that the parties reach interim relief agreements before final agreement. Pending these developments, however, Aboriginal parties require remedies from the courts that both increase their bargaining power and facilitate negotiations with the Crown. The institutional constraints on the courts do not outweigh the pressing need to protect rights associated with Aboriginal title from further erosion.

A duty to protect Aboriginal lands and resources

The law of Aboriginal title requires governments to take active steps to protect Aboriginal lands and resources. This positive dimension of the law emerges from the text, structure and jurisprudence of section 35 of the Constitution Act, 1982, which together suggest that government action, in the form of negotiations, is central to the constitutional recognition and affirmation of Aboriginal and treaty rights. It is reflected also in case law addressing the Crown’s fiduciary relationship with Aboriginal peoples, which “emphasize[s] the responsibility of government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation”. It is supported as well by emerging international legal norms, which impose extensive positive obligations on governments to recognize and protect a wide array of rights with respect to lands and resources.

With respect to the Constitution Act, 1982, section 35 recognizes and affirms existing Aboriginal rights and requires the courts to assess the constitutional validity of laws that impair existing Aboriginal rights. As we have seen, effective recognition of Aboriginal rights is the product of negotiation at least as much as judicial fiat. Indeed, section 35(3) of the Constitution Act, 1982 reflects this unique mix of negotiation and adjudication by recognizing and affirming “rights that now exist by way of land claims agreements or may be so acquired”. Equally, section 35.1 commits the federal and provincial governments to inviting Aboriginal participation in discussions of proposed constitutional amendments affecting Aboriginal rights. These aspects of section 35 underscore the fact that government as well as Aboriginal action — in the form of nation-to-nation negotiations — is central to the constitutional recognition and affirmation of Aboriginal rights. As stated by the Supreme Court, section 35 “provides a solid constitutional base upon which subsequent negotiations can take place”.

The Crown’s fiduciary relationship with Aboriginal peoples also reflects its historical obligation to protect Aboriginal lands and resources. Duties with respect to Aboriginal peoples have been recognized in at least three different contexts. First, it is well settled that the federal Crown is under fiduciary obligation to act in the interests of an Indian band when the band surrenders land to the Crown for third-party use. Second, in some contexts at least, the provincial Crown may owe fiduciary obligations to Aboriginal peoples upon the unilateral extinguishment of Aboriginal rights with respect to land. Third, jurisprudence under section 35(1) of the Constitution Act, 1982 suggests that government action that interferes with the exercise of Aboriginal rights recognized and
affirmed by section 35(1) creates fiduciary duties on the government responsible for the interference in question. More generally, the Supreme Court of Canada stated in Sparrow that

[T]he sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, Guerin, together with R. v. Taylor and Williams (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

The fact that the relationship between the government and Aboriginal peoples is trust-like, rather than adversarial has important implications for the role of government with respect to Aboriginal lands and resources. It requires institutional arrangements to protect them, and it requires government not to rely simply on the ‘public interest’ as justification for limiting the exercise of Aboriginal rights with respect to them. Moreover, it requires government to act in the interests of Aboriginal peoples when negotiating arrangements concerning their lands and resources. In the words of Justice Dubé of the Federal Court of Canada,

it is ... the duty of the federal government to negotiate with Indians in an attempt to settle ... rights ... . The government’s task is to determine, define, recognize and affirm whatever aboriginal rights existed.

Emerging international legal principles also specify that governments are under extensive obligations to protect Aboriginal lands and resources. The Draft Declaration on the Rights of Indigenous Peoples, prepared by a sub-commission of the United Nations Commission on Human Rights, proposes to recognize that “indigenous peoples have the right to self-determination” and that “[b]y virtue of that right they freely determine their political status and freely pursue their economic social and cultural development”. Accordingly, the draft declaration proposes to recognize, among others, indigenous rights of autonomy and self-government, the right to record, practise and teach spiritual and religious traditions, rights of territory, education, language and cultural property, and the right to maintain and develop indigenous economic and social systems.

The terms of the draft declaration support the view that government ought to provide for a fair and effective claims process, one that imposes positive obligations on government to reach agreements protecting Aboriginal rights with respect to lands and resources. Indeed, article 37 of the draft declaration provides that states shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.
Article 26 provides:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

James Anaya describes the draft declaration as “an authoritative statement of norms concerning Indigenous peoples on the basis of generally applicable human rights principles”, and notes that it also “manifests a corresponding consensus on the subject among relevant actors”. 363

In addition, convention 107 of the International Labour Organisation, adopted in 1957, while advocating the “integration” of indigenous populations into national communities, also calls upon governments to develop co-ordinated and systematic action to protect indigenous populations and to promote their social, economic and cultural development. 366 The International Labour Organisation revised convention 107 in its convention 169 of 1989. 367 It recognizes “the aspirations of these indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live”. It then lists a wide array of rights that attach to Indigenous peoples and numerous responsibilities that attach to governments, including obligations to protect indigenous lands and resources. 368 Canada is not yet a party to the convention, but, again according to James Anaya, the convention “represents a core of expectations that are widely shared internationally and, accordingly, it reflects emergent customary international law generally binding upon the constituent units of international community”. 369

We agree that both the draft declaration and convention 169 are authoritative statements of norms concerning Indigenous peoples, and we urge the government of Canada to protect Aboriginal lands and resources in accordance with those norms.

Summary

The law of Aboriginal title provides a firm foundation for contemporary protection of Aboriginal lands and resources. It imposes extensive obligations on the Crown to protect them. These duties of the Crown oblige Parliament to enact fair and effective institutional processes to facilitate negotiated solutions. The law requires government not to rely simply on the public interest as justification for limiting the exercise of Aboriginal rights but to act in the interests of Aboriginal peoples when negotiating arrangements concerning their lands and resources. Moreover, because the courts cannot easily make the detailed judgements necessary to address all the concerns of all the parties in a
dispute involving Aboriginal title, any new claims processes should provide for effective means of obtaining interim relief.

6.3 A New Approach to Lands and Resources

The many criticisms of existing land claims policies are cogent. Government’s failure to heed the volume and quality of criticism has fostered the perception that existing policies serve the needs of the broader public at the expense of Aboriginal peoples’ rights. Courts alone cannot provide the detailed and complex determinations necessary to provide lasting solutions to all interested stakeholders. A new approach is urgently needed. Federal and provincial governments must take seriously their legal and constitutional obligations. They must accept that the Crown is under a positive obligation to protect Aboriginal lands and resources. They must enact and participate in institutional processes that result in the definition, recognition and protection of the rights of Aboriginal peoples to lands and resources. They must give Aboriginal nations much greater control over and access to their traditional territories. The treaty making and treaty implementation and renewal processes described earlier in this volume (see Chapter 2), together with related reforms, can accomplish these objectives.

New terms and new processes

The term ‘land claims policy’ suggests that the burden of proof regarding lands and resources lies with Aboriginal parties. Long-held and totally misconceived ideas about the doctrines of discovery and terra nullius underpin the concept that Aboriginal title is a mere cloud or burden upon the Crown’s underlying title (see Volume 1, Chapter 2). The rights of Aboriginal peoples to lands and resources are perceived as somewhat nebulous claims against the real rights of the Crown. The purpose of a land claims agreement has been to dispose of the claim by extinguishing Aboriginal title and perfecting the ‘real’ Crown title in exchange for a set of contractual rights and benefits. By contrast, Aboriginal groups say that it is government that should bear the burden of establishing the validity of its claim to the unfettered administration and control of Aboriginal lands, and that the Crown, as a fiduciary obliged to protect the interests of Aboriginal people, should act with propriety.

Moreover, under current policies, claims based on non-fulfilment of a treaty promise or other legal obligation are seen as claims against the dominant system of vested rights and the orderly conduct of business and, therefore, as annoyances that must be put to an end. This fosters the view that Aboriginal claims should be settled, if at all, on the basis of a cash payment in exchange for a release, often accompanied by a purported extinguishment of land rights. In addition, existing categories of specific, comprehensive, and other claims are defined arbitrarily, containing limitations not in keeping with the Crown’s fiduciary obligations and too often plagued by conflicts of interest on the part of government.

Finally, as policy, land claims determination is subject to government control of substance and procedure. Land claims policies define what types of claims governments
will recognize and those to which they will respond. These policies are created unilaterally by government, interpreted unilaterally by government, and amended unilaterally by government, with a minimum of outside scrutiny. They are not entrenched in law or subject to judicial review.

These assumptions gravely misrepresent the nature of Aboriginal rights and make federal policy part of the problem instead of part of the solution. First, Aboriginal claims are not entreaties against the Crown’s superior underlying title. Aboriginal claims are assertions of Aboriginal rights — rights that inhere in Aboriginal nations because of time-honoured relationships with the land, which predate European contact. Aboriginal rights do not exist by virtue of Crown title; they exist notwithstanding Crown title. They are recognized by section 35(1) of the Constitution Act, 1982, and they protect matters integral to Aboriginal identity and culture, including systems of government, territory and access to resources. Any remaining authority the Crown may enjoy is constrained by the fact that it is required by law to act in the interests of Aboriginal peoples. Instead of readily invoking the public interest to oppose Aboriginal interests, the Crown should uphold Aboriginal interests.

Second, the extinguishment of Aboriginal title in exchange for a cash payment is at odds with constitutional recognition and affirmation of Aboriginal rights. Extinguishment is also out of step with the Crown’s fiduciary relationship with Aboriginal peoples. A fiduciary should not attempt to destroy what it is required to protect. The Crown should not seek the extinguishment of Aboriginal title; it should seek the recognition of Aboriginal title. Treaties should serve as solemn acts of mutual recognition of Aboriginal and Canadian ways of structuring relationships with the land. They should enable the coexistence of otherwise competing systems of land tenure and governance.

Third, the rights of Aboriginal peoples to lands and resources should not be subject to the shifting sands of policy initiatives developed unilaterally by governments. The protection and enforcement of Aboriginal rights require independent, legislated processes that allow for extensive Aboriginal participation and nation-to-nation negotiations. These new processes must address the fact that Aboriginal territories have been reduced by settlement, dislocation and development to such an extent that the very identities of Aboriginal nations are seriously threatened. Federal, provincial, territorial and Aboriginal governments must work together to establish processes that enable a significant expansion of Aboriginal territories. These processes should not interfere with third-party interests, but they must provide Aboriginal nations with sufficient lands and resources to reverse the devastating effects of dispossession and allow for the possibility of Aboriginal self-sufficiency.

Under the approach we propose, instead of being guided by a policy developed unilaterally by federal authorities, which establishes preconditions for negotiations and constrains possible outcomes based on the preferences of the Crown, disputes over lands and resources should be resolved through legitimate processes of consultation and negotiation enshrined in legislation. Negotiation is the best and most appropriate way to address these issues, and land claims policies should be replaced by treaty processes,
Integrating treaty processes with lands and resources

Current federal policy categorizes Aboriginal claims as comprehensive claims, specific claims, or claims of a third kind. We have struggled to find a more appropriate vocabulary to describe the range of unresolved lands and resources issues — one that embodies the four principles of the new relationship: mutual recognition, mutual respect, sharing and mutual responsibility (see Volume 1, Chapter 16). We have found it in the language of relationships, rights and reconciliation. As we have emphasized throughout our report, the relationship between Aboriginal peoples and other Canadians must be renewed in an honourable way. Aboriginal and treaty rights to lands and resources, along with other Aboriginal rights, must be taken seriously. They must be acknowledged, protected and given effect by institutions of government. And the rights of other Canadians must be reconciled with them.

When seen in this light, the separate categories of claims simply vanish. They become part of a broader process of reconciliation based on real and enforceable rights. Treaty-making processes will supersede the comprehensive claims process of the recent past. They will enable Aboriginal nations to enter new treaty relationships to define their rights to lands and resources, governance and many other matters. Treaty-making processes must be open to all Aboriginal groups that can meet the criteria set out in the proposed recognition act (see Chapter 3).

Treaty implementation and renewal processes will address the spirit, intent and legal effect of existing treaties, including those pre-Confederation and numbered treaties that the Crown has interpreted as treaties of extinguishment. As a result, many specific claims and claims of a third kind will become particular items for discussion in broader implementation and renewal negotiations. There must be a presumption in such negotiations that Aboriginal signatories did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by agreeing to a treaty relationship. Where the text of an historical treaty makes reference to a blanket or wholesale cession of lands, the treaty relationship mandates the sharing of both the territory and the right to govern and manage it, as opposed to a cession of the territory to the Crown. Implementation and renewal processes thus will attempt to determine the true spirit and intent of existing treaty relationships and bring them up to date with renewed vigour and relevance.

In time, treaty processes will make specific claims policy obsolete. Future treaties and their associated implementation agreements will contain dispute-resolution mechanisms to address past breaches of the Crown’s duty as well as new disputes that arise from time to time. Likewise, existing treaties will be supplemented by agreements to address past and future breaches of duty and other disputes that arise within the treaty relationship. Most disputes currently understood as specific claims will be settled through broader treaty implementation and renewal processes. As a result, the relationship between
Aboriginal peoples and other Canadians will be renewed in an honourable way. Aboriginal and treaty rights to lands and resources, along with other Aboriginal rights, will be taken seriously, and they will be reconciled with the rights of other Canadians.

However, Aboriginal people should not have to wait for resolution of a specific claim through this broader treaty implementation and renewal process. They should be free to seek its speedy resolution through negotiations outside the broader process in ways that do not replicate defects in current policy. When all other means of reconciliation fail, they should be able to place particular issues concerning the legal rights of parties to an existing treaty before an independent tribunal for binding decisions and appropriate relief. We propose that the Aboriginal Lands and Treaties Tribunal be authorized to hear and make binding decisions concerning specific claims in such circumstances. In addition, we propose that the tribunal’s jurisdiction be sufficiently flexible to permit it to resolve claims of a third kind, as well as other claims that do not fit within the categories of current policy.

The treaty-making and treaty implementation and renewal processes will share important structural similarities. Both processes will ensure that government negotiates in good faith and with Aboriginal interests in mind. Both processes will be predicated on the existence of Aboriginal rights concerning lands and resources. Both will aim to facilitate the negotiation of agreements that recognize those rights and reconcile them with the rights of other Canadians. Finally, both will ensure that Aboriginal nations are provided with enough territory to foster economic self-reliance and cultural and political autonomy. Together, these processes will foster a new relationship between Aboriginal nations and the Crown — a relationship based on recognition, respect, sharing and responsibility.

**Principles to guide federal policy and treaty processes**

We have proposed the preparation of a royal proclamation to set out the fundamental principles of the bilateral nation-to-nation relationship and the treaty-making and treaty implementation and renewal processes. We have proposed that the government of Canada introduce companion legislation to accomplish a number of objectives, among them the establishment of institutions to fulfil treaty processes, including an Aboriginal Lands and Treaties Tribunal. In addition, we recommend the development of a Canada-wide framework agreement, entered into by the federal, provincial and territorial governments and Aboriginal nations, to establish the scope of treaty making and treaty implementation and renewal negotiations and a fiscal formula for the financing of the Aboriginal order of government.

Several key principles relating to lands and resources must inform federal policy both before and during negotiations. In our special report, *Treaty Making in the Spirit of Co-existence*, which addressed federal policy as it relates to Aboriginal nations that have yet to enter into treaty with the Crown, we presented some of these principles as recommendations for reform of federal treaty-making policy. However, these principles must inform both treaty making and treaty implementation and renewal. The federal
government should seek to ensure that these principles find expression in a Canada-wide framework agreement. However, the government should not wait for consensus on the framework agreement to amend its current claims policies, because some Aboriginal nations may be ready to enter into negotiations before consensus is reached.

**Recommendation**

The Commission recommends that

2.4.1

Federal policy and all treaty-related processes (treaty making, implementation and renewal) conform to these general principles:

(a) Aboriginal title is a real interest in land that contemplates a range of rights with respect to lands and resources.

(b) Aboriginal title is recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.

(c) The Crown has a special fiduciary obligation to protect the interests of Aboriginal people, including Aboriginal title.

(d) The Crown has an obligation to protect rights concerning lands and resources that underlie Aboriginal economies and the cultural and spiritual life of Aboriginal peoples.

(e) The Crown has an obligation to reconcile the interests of the public with Aboriginal title.

(f) Lands and resources issues will be included in negotiations for self-government.

(g) Aboriginal rights, including rights of self-government, recognized by an agreement are ‘treaty rights’ within the meaning of section 35(1) of the *Constitution Act, 1982*.

(h) Negotiations between the parties are premised on reaching agreements that recognize an inherent right of self-government.

(i) Blanket extinguishment of Aboriginal land rights will not be sought in exchange for other rights or benefits contained in an agreement.

(j) Partial extinguishment of Aboriginal land rights will not be a precondition for negotiations and will be agreed to by the parties only after a careful and exhaustive analysis of other options and the existence of clear, unpressured consent by the Aboriginal party.

(k) Agreements will be subject to periodic review and renewal.
(l) Agreements will contain dispute resolution mechanisms tailored to the circumstances of the parties.

(m) Agreements will provide for intergovernmental agreements to harmonize the powers of federal, provincial, territorial and Aboriginal governments without unduly limiting any.

Federal policy and treaty processes must conform to a number of specific principles relating to lands and resources: Aboriginal nations must be provided with sufficient territory to foster economic self-reliance and cultural and political autonomy; traditional Aboriginal territories should be defined as falling into one of several categories of jurisdiction to foster mutual coexistence; third-party interests must receive protection in negotiations; and parties must reach interim relief agreements that protect Aboriginal lands and resources during negotiations.

Providing sufficient territory to foster economic self-reliance and cultural and political autonomy

A major objective of treaty making and treaty implementation and renewal is to facilitate Aboriginal economic self-reliance, cultural autonomy and self-government. To accomplish this, Aboriginal nations must have more territory and rights of access to resources than they do now under Canadian law. Without adequate lands and resources, Aboriginal nations will be pushed to the edge of economic, cultural and political extinction. This is as true for nations that have yet to enter into treaty with the Crown as it is for those that are party to historical treaties.

**Recommendations**

The Commission recommends that

2.4.2

Federal, provincial and territorial governments, through negotiation, provide Aboriginal nations with lands that are sufficient in size and quality to foster Aboriginal economic self-reliance and cultural and political autonomy.

2.4.3

The goal of negotiations be to ensure that Aboriginal nations, within their traditional territories, have

(a) exclusive or preferential access to certain renewable and non-renewable resources, including water, or to a guaranteed share of them;

(b) a guaranteed share of the revenues flowing from resources development; and
(c) specified preferential guarantees or priorities to the economic benefits and opportunities flowing from development projects (for example, negotiated community benefits packages and rights of first refusal).

2.4.4

Aboriginal nations, through negotiation, receive, in addition to land, financial transfers, calculated on the basis of two criteria:

(a) *developmental needs* (capital to help the nation meet its future needs, especially relating to community and economic development); and

(b) *compensation* (partial restitution for past and present exploitation of the nation’s traditional territory, including removal of resources as well as disruption of Aboriginal livelihood).

An Aboriginal nation engaged in treaty making or treaty renewal with the Crown will see the provision of more territory and access to resources as critical components of the negotiation process. The amount of land necessary to meet present and future economic and cultural needs will occasion extensive discussions. Some of the historical treaties established the amount of reserve land by a predetermined formula (for example, in the western half of the province of Canada, it was 640 acres per family of five). The *Manitoba Act, 1870* provides for the appropriation of ungranted Crown lands, “to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents”.  

370 There have also been more recent attempts to define specific amounts. In the spring of 1995, for example, the government of British Columbia proposed that the amount of settlement land (including existing reserves) to be set apart as a result of the British Columbia Treaty Commission process be less than five per cent of the province’s total land base.

371 If parties to negotiations wish to establish a per capita formula or a ceiling as part of a framework agreement, that is certainly their prerogative. Governments should not impose such a formula or ceiling as a precondition for negotiations. This is unnecessary, because the amount of land available for selection will vary by region and local circumstances. Where the territory is extensively populated, for example, it may be appropriate for the Crown to provide a limited amount of land plus sufficient funds to enable the Aboriginal party to purchase additional land from willing third parties.

**Recommendation**

The Commission recommends that

2.4.5

Negotiations on the amount and quality of additional lands, and access to resources, be guided by the
(a) size of the territory that the Aboriginal nation traditionally occupied, controlled, enjoyed, and used;

(b) nature and type of renewable and non-renewable resources, including water, that the Aboriginal nation traditionally had access to and used;

(c) current and projected Aboriginal population;

(d) current and projected economic needs of that population;

(e) current and projected cultural needs of that population;

(f) amount of reserve or settlement land now held by the Aboriginal nation;

(g) productivity and value of the lands and resources and the likely level of return from exploitation for a given purpose;

(h) amount of Crown land available in the treaty area; and

(i) nature and extent of third-party interests.

Aboriginal nations require not only more territory, but also territory of value. In the past, governments often tried to limit the lands available for reserve selection to those that were of least value to other interested parties.

**Recommendation**

The Commission recommends that

**2.4.6**

In land selection negotiations, federal, provincial and territorial governments follow these principles:

(a) No unnecessary or arbitrary limits should be placed on lands for selection, such as

(i) the exclusion of coastlines, shorelines, beds of water (including marine areas), potential hydroelectric power sites, or resource-rich areas;

(ii) arbitrary limits on size, shape or contiguity of lands; or

(iii) arbitrary limits on the ability of the Aboriginal nation to purchase land in order to expand its territory.

(b) Additional lands to be provided from existing Crown lands within the territory in question.
(c) Where parties are seeking to renew an historical treaty, land selection not be limited by existing treaty boundaries (for example, the metes and bounds descriptions contained in the post-Confederation numbered treaties).

(d) Provincial or territorial borders not constrain selection negotiations unduly.

(e) Where Crown lands are not available in sufficient quantity, financial resources be provided to enable land to be purchased from willing third parties.

In relation to points (c) and (d), for example, Dene Th’a, whose existing reserve lands are located in northern Alberta, are party to Treaty 8, but their traditional territory also covers portions of British Columbia and the Northwest Territories (see Figure 4.4). Treaty 5, which covers well over half of Manitoba, as well as small portions of Ontario and Saskatchewan, provides another example. The Cree, Oji-Cree, Ojibwa and Dene nations of Treaty 5 may seek to enter into the treaty renewal process together, although they would probably choose to negotiate separately under that umbrella and negotiate the selection of lands based on their traditional territories.

The Commission believes that the principles outlined in recommendations 2.4.1 to 2.4.6 must be given a status that gives all parties the expectation of stability, continuity and accountability. We are acutely aware that negotiating appropriate reallocation of lands and resources and land-sharing agreements will be the work of a generation. If the required trust is to be generated and sustained over this process, stability and accountability are essential.

Guiding principles for negotiations with respect to lands and resources must move from the realm of policy, where they can be altered any time a minister persuades cabinet that change is opportune, to the more stable realm of legislation. Equally, officials charged with implementing policy need the firmer discipline of being accountable to legislative requirements rather than policy guidelines. Where negotiations are involved, flexibility is important, but the promise of stability and legal accountability is even more crucial if trust is to be established and maintained.

It would be advisable for the federal government to legislate these principles with full consultation between provincial governments and representatives of Aboriginal peoples. The principles should be adopted immediately by the federal government as policy guiding negotiations with Aboriginal nations, but they should also be the subject of full discussion during the development of the Canada-wide framework agreement and revised appropriately as a result. Only then should the federal government move to incorporate the revised principles into legislation.

**Recommendation**

The Commission therefore recommends that

2.4.7
The government of Canada adopt the principles outlined in recommendations 2.4.1 to 2.4.6 as policy to guide its interaction with Aboriginal peoples on matters of lands and resources allocation with respect to current and future negotiations and litigation.

2.4.8

The government of Canada propose these principles for adoption by provincial and territorial governments as well as national Aboriginal organizations during the development of the Canada-wide framework agreement.

2.4.9

Following such consultations, the government of Canada propose to Parliament that these principles, appropriately revised as a result of the consultations, be incorporated in an amendment to the legislation establishing the treaty processes.

Categorizing traditional territories to foster coexistence

We propose that negotiations aim to categorize traditional territories in three ways to identify, as exhaustively and precisely as possible, the rights of each party with respect to lands, resources and governance.

On lands in a first category (Category I lands), full rights of ownership and primary jurisdiction over lands and renewable and non-renewable resources, including water, would belong to the Aboriginal nation in accordance with the traditions of land tenure and governance of the nation in question. Category I lands would comprise any reserve and settlement lands currently held by the nation and, selected in accordance with the factors listed in recommendation 2.4.5, any additional lands necessary to foster economic self-reliance and cultural and political autonomy. On such lands, Aboriginal relationships with the land could be recognized and systems of land tenure and governance implemented more or less in their entirety. For example, Aboriginal people commonly regard their lands and resources as a collective heritage or property. Tenure can be on the basis of an extended family, community or nation, and there might be customary limits and controls on the use, transfer, and alienation of lands and resources. An Aboriginal nation would be free to structure its relationship with Category I lands in accordance with its world view, perhaps by building in legal obligations to serve as stewards for future generations. It could opt for provisions enabling it to grant future interests to third parties in the form of conventional resource leases or permits.372

On lands in a second category (Category II lands), a number of Aboriginal and Crown rights concerning lands and resources would be recognized by the agreement, and governance and jurisdiction would be shared among the parties. Category II lands would form a portion of the traditional territory of the Aboriginal nation, determined by the degree to which Category I lands fostered self-reliance.
For example, if lands allocated in Category I were insufficient to provide the means for substantial self-reliance for the Aboriginal nation and its citizens, that nation would obtain a larger share of the revenues generated by taxation or royalties from economic activity on Category II lands. Co-jurisdictional and co-management bodies could be empowered to manage the lands and direct and control development and land use. Rights to traplines and fishing sites could be recognized in accordance with Aboriginal tenure systems and could coexist with Crown rights of mineral exploration, in accordance with provincial or territorial law. Co-jurisdiction refers to an institutional arrangement that allows for representation on a nation-to-nation basis, whereas co-management refers to an institutional arrangement that is more local in nature, allowing for representation of local Aboriginal and non-Aboriginal communities. Both types of regime should be based on the principle of parity of representation among parties to the treaty. Mutual recognition would allow for revenue sharing based on identified benefits flowing from Aboriginal and Crown rights recognized and affirmed by the agreement. In terms of existing uses, Category II lands are already shared lands. Agreements negotiated according to the principles proposed here would give legal force and effect to these uses, in a way that reflects the fundamental rights — and not necessarily the economic and demographic power — of each party.

On lands in a third category (Category III lands), a complete set of Crown rights with respect to lands and governance would be recognized by the agreement, subject to residual Aboriginal rights of access to historical and sacred sites and hunting, fishing and trapping grounds, Aboriginal participation in national and civic ceremonies and events, and symbolic representation in certain institutions. These lands would likely constitute the largest of the three categories and consist of the majority of Crown lands in the area covered by the treaty, all municipal lands, and most other organized local jurisdictions such as townships or local improvement districts (especially where these consist of settled agricultural or industrial lands). Even on lands in this category, however, some Aboriginal rights could be recognized to acknowledge Aboriginal peoples’ historical and spiritual relationships with such lands. For example, Aboriginal people, as a matter of protocol, could serve as diplomatic hosts at significant events of a civic, national or international nature that take place on their territory.

Category I lands will provide the maximum degree of autonomy for Aboriginal people. They will provide for coexistence rather than sharing and minimize the need for harmonization and co-operation. Category II lands will require shared jurisdiction and management. As a general rule, both the expansion of the Aboriginal land base through Category I selections, and security of access to resources on public lands and joint management of these resources on Category II lands, will be necessary to achieve self-reliance and self-government. Although the appropriate mix in any particular situation should be determined by the parties, selection negotiations should seek to maximize the amount of Category I lands available to the Aboriginal nation, and the amount selected should result in a significant increase of territory under Aboriginal control.

As can be seen in Appendix 4A, versions of this categorization scheme already exist in the land provisions of the comprehensive claims agreements negotiated since 1975.
Quebec’s offer to the Attikamek-Montagnais people, also described in Appendix 4A, relies on a version of this scheme. This tripartite classification is in marked contrast to the post-Confederation treaty model, whereby the written text provided that Aboriginal peoples were to receive very small allocations of reserve land, with their rights to resources off-reserve generally confined to limited harvesting (hunting, fishing and trapping) privileges.

This tripartite categorization of land should not be insisted on at the expense of reaching agreement on ownership, use, and access rights concerning features of the environment and common resources not separable by land categories, (for example, flowing waters, fish, some migratory species, and animals with large ranges, such as caribou). In respect of these, the appropriate approach would be to negotiate institutional mechanisms to allow for resource sharing, regardless of location. Concerning fish specifically, an arrangement respecting shared allocation and governance should be negotiated, independent of riparian, coastline, or water bed ownership. Major fisheries, such as the salmon fisheries on the Fraser and Skeena rivers in British Columbia, would be shared and co-managed as a whole, without regard to land categories. Existing caribou management boards (see Appendix 4B) provide a model of how this might be done. Similarly, some water rights might be allocated through a co-management regime that includes all categories of land.

This tripartite categorization of lands should be employed in a manner consistent with the models of governance discussed in Chapter 3. In particular, and along the lines suggested by the nation-based model of government, we propose that an Aboriginal nation exercise primary and paramount legislative authority on Category I lands, shared legislative authority on Category II lands, and limited, negotiated authority on Category III lands.

**Recommendations**

The Commission recommends that

**2.4.10**

Negotiations aim to describe the territory in question in terms of three categories of land. Using these three categories will help to identify, as thoroughly and precisely as possible, the rights of each of the parties with respect to lands, resources and governance.

**2.4.11**

With respect to Category I lands,

(a) The Aboriginal nation has full rights of ownership and primary jurisdiction in relation to lands and renewable and non-renewable resources, including water, in accordance with the traditions of land tenure and governance of the nation in question.
(b) Category I lands comprise any existing reserve and settlement lands currently held by the Aboriginal nation, as well as additional lands necessary to foster economic and cultural self-reliance and political autonomy selected in accordance with the factors listed in recommendation 2.4.5.

2.4.12

With respect to Category II lands,

(a) Category II lands would form a portion of the traditional territory of the Aboriginal nation, that portion being determined by the degree to which Category I lands foster Aboriginal self-reliance.

(b) A number of Aboriginal and Crown rights with respect to lands and resources would be recognized by the agreement, and rights of governance and jurisdiction could be shared among the parties.

2.4.13

With respect to Category III lands, a complete set of Crown rights with respect to lands and governance would be recognized by the agreement, subject to residual Aboriginal rights of access to historical and sacred sites and hunting, fishing and trapping grounds, participation in national and civic ceremonies and events, and symbolic representation in certain institutions.

2.4.14

Aboriginal nations exercise legislative authority as follows:

(a) primary and paramount legislative authority on Category I lands;

(b) shared legislative authority on Category II lands; and

(c) limited, negotiated authority exercisable in respect of citizens of the nation living on Category III lands and elsewhere and in respect of access to historical and sacred sites, participation in national and civic ceremonies and events, and symbolic representation in certain institutions.

Protecting third-party rights and interests

The objective of providing adequate territory to facilitate self-sufficiency and self-government must be balanced with the need to protect third-party rights and interests. In common law, these would include rights of fee simple and lesser legal interests, as well as general rights to use Crown lands. In Quebec these would include the right of ownership, dismemberments of ownership (real rights of enjoyment), and personal rights of enjoyment in connection with land, as well as general rights to use Crown lands.
Accordingly, the Commission believes that parties to treaty processes should adhere to certain principles when negotiating the selection and categorization of territory.

Common law fee simple interests and civil law rights of ownership

The need to provide land and access to resources should not be met at the expense of the rights and interests of those who currently own property in fee simple at common law or who are titularies of a right of ownership in civil law. Except where there are willing sellers, or in exceptional circumstances outlined below, agreements should not modify, limit or extinguish common law fee simple interests or civil law rights of ownership. However, parties to the treaty process should be free to include land held at common law in fee simple or land owned in Quebec within Category II lands. The inclusion of such lands in Category II lands would not change the legal nature of the common law right of fee simple or the civil law right of ownership, but would subject activity occurring on such land to the regulatory authority of co-jurisdictional and co-management bodies empowered to manage Category II lands and direct and control development and land use. An example of this arrangement is the Wendaban Stewardship Authority, which has exercised jurisdiction over roughly 400 square kilometres of land northwest of Temagami, Ontario, within the traditional territory of the Teme-Augama Anishinabai. The stewardship authority is responsible for monitoring, regulating and planning all uses and activities ranging from recreation and tourism, fish and other wildlife to land development and cultural heritage, including such uses and activities on private land within the territory in question (see Appendix 4B). In Category III lands, common law fee simple interests and civil law rights of ownership would continue to be subject to federal, provincial or territorial laws.

Recommendations

The Commission recommends that

2.4.15

As a general principle, lands currently held at common law in fee simple or that in Quebec are owned not be converted into Category I lands, unless purchased from willing sellers.

2.4.16

In exceptional cases where the Aboriginal nation’s interests clearly outweigh the third party’s rights and interests in a specific parcel, the Crown expropriate the land at fair market value on behalf of the Aboriginal party to convert it into Category I lands. This would be justified, for example, where
(a) a successful claim for the land might have been made under the existing specific claims policy based on the fact that reserve lands were unlawfully or fraudulently surrendered in the past; or

(b) the land is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site or a place of substantial cultural significance).

2.4.17

Lands that at common law are held in fee simple or that in Quebec are owned can be included within Category II lands.

Lesser interests on Crown lands

At common law, in addition to fee-simple interests, lesser interests can be grouped into two basic categories:

• exclusive tenures, such as cottage or other recreational property leases, which are akin to fee simple interests, in that the holders can exclude access, use or occupation by another party, but apply for only a limited period; and

• non-exclusive tenures, such as forest licences. These provide defined rights of use and benefit, but do not necessarily exclude other interests. Several such tenures, such as a mining claim, forest licence or grazing licence, can apply simultaneously to the same piece of land.

Under the civil law, in addition to the right of ownership, other real rights of enjoyment can be claimed in land, and other personal rights of enjoyment can be claimed in respect of land. For present purposes, these rights can be considered to be of two main types:

• Rights of exclusive enjoyment. These include major dismemberments of ownership, such as the right of emphyteusis or usufruct, which are akin to ownership in that the titulary can exclude access, use or occupation by another party, but exist for only a limited period. Also of this kind are certain personal rights, such as those under a lease, which provide for exclusive rights of enjoyment of an immoveable but are also of limited duration.

• Non-exclusive rights of enjoyment. These include rights such as those granted under forest permits, which may be either lesser dismemberments of ownership or personal rights of enjoyment, but do not necessarily preclude the existence of other similar rights. Several lesser dismemberments and personal rights of enjoyment, such as a mining claim, a forest permit or a grazing permit, can apply simultaneously to the same piece of land.

Parties must be able to select lands subject at common law to third-party interests less than fee simple, or under the civil law to third-party rights of enjoyment other than ownership, for conversion into Category I lands, but if such lands are selected, the treaty
should provide that the Aboriginal nation respect the original terms of all common law tenures and the original terms by which all dismemberments of ownership and personal rights of enjoyment in the civil law were created. Thus, at common law, there would be a change of landlord, in that the Aboriginal nation would replace the Crown as the beneficial owner and receive rentals or other revenues. The existing lease, however, would continue to structure relations between the new lessor and lessee. Under the civil law, there would also be a change of owner, and the Aboriginal nation would replace the Crown as the owner entitled to receive rents or other revenues. The existing contractual agreement, however, would continue to structure relations between the new owner and the titulary of the dismemberment of ownership or the personal right of enjoyment.

As in the case of common law fee-simple interests or civil law rights of ownership, we propose that in exceptional circumstances, where Aboriginal interests significantly outweigh third-party rights and interests, the Crown should revoke the common law tenure or the civil law dismemberment of ownership or personal right of enjoyment, at fair market value, on behalf of the Aboriginal party to convert it into Category I lands. This would occur where the land in question might otherwise have been the subject of a successful claim under the existing specific claims policy (such as reserve lands unlawfully or fraudulently surrendered in the past), or where the land is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site or a place of substantial cultural significance).

In addition, parties must be free to include within Category II lands lands that are held in less than fee simple at common law and lands held by virtue of a dismemberment of ownership or a personal right of enjoyment under the civil law. If lands held under such lesser common law interests or by virtue of such civil law rights are included in Category II lands, they would fall under the authority of the co-jurisdictional and co-management bodies empowered to manage the lands and direct and control development and use. In Category III lands, common law interests less than fee simple and civil law rights of enjoyment other than ownership would continue to be subject to federal, provincial or territorial laws.

Recommendations

The Commission recommends that

Lands affected at common law by third-party interests less than fee simple or under the civil law by third-party rights of enjoyment other than ownership may be selected as Category I lands. If such lands are selected, the Aboriginal nation is to respect the original terms of all common law tenures and all civil law dismemberments of ownership and personal rights of enjoyment.

2.4.19

In exceptional circumstances, where Aboriginal interests significantly outweigh third-party rights and interests, the Crown revoke the common law tenure or the civil law
dismemberment of ownership or personal right of enjoyment at fair market value on behalf of the Aboriginal party to convert it into Category I lands. Examples of when this would be justified are where

(a) a successful claim for the land might have been made under the existing specific claims policy (such as reserve lands unlawfully or fraudulently surrendered in the past); or

(b) the land is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site or a place of substantial cultural significance.

2.4.20

Lands affected at common law by interests less than fee simple or under the civil law by rights of enjoyment other than ownership can be selected as Category II lands.

Parks and protected areas

There are many parks and protected areas within the traditional territories of Aboriginal nations. For example, Canada has recently returned to the Keeseekoowenin Ojibway Nation in Manitoba a small portion of Riding Mountain National Park that was wrongfully taken from them in the 1930s. In the Yukon and Nunavut agreements, several new national parks have been created with the full consent, and indeed at the insistence, of the Aboriginal parties. These new parks will be subject to shared management. Moreover, some Aboriginal nations might wish to establish their own tribal parks — as the Haida people of British Columbia did with Gwaii Haanas (South Moresby) — and most will want to share in the management of existing and future parks and protected areas. Nonetheless, existing parks and protected areas should be interfered with as little as possible in the land selection process.

Recommendations

The Commission recommends that

2.4.21

Existing parks and protected areas not be selected as Category I lands, except in exceptional cases where the Aboriginal nation’s interests clearly outweigh the Crown’s interests in a specific parcel. Examples of when this would be justified are where

(a) a successful claim for all or part of the park or protected area might have been made under the existing specific claims policy (such as reserve lands unlawfully or fraudulently surrendered in the past);

(b) all or part of the park or protected area is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site); or
(c) a park occupies a substantial portion of a nation’s territory.

2.4.22

Existing parks and protected areas, as well as lands being considered for protected area or park status, may be selected as Category II lands.

Public interests on Crown land

Members of the public use Crown lands and waters for a variety of purposes, including recreation, and hunting and fishing. Parties to the treaty process must be free to categorize Crown lands to which the public has access as Category I or II lands. Some Crown lands used for these purposes undoubtedly will be selected in the course of treaty negotiations and converted into Category I lands. Aboriginal governments may choose to allow continued public access to these lands, but they will have legislative authority to regulate such activities subject to any terms in the agreement to the contrary. In many cases, such activities will be of economic benefit to Aboriginal communities. In the case of sacred sites or places of traditional significance, however, Aboriginal governments may wish to exclude members of the general society. If parties categorize such lands as Category II lands, public rights of access will be determined by the co-jurisdictional and co-management bodies empowered to manage the lands and direct and control development and use. In Category III lands, rights of access will continue to be determined by the federal, provincial, territorial or municipal government with jurisdiction over the lands in question.

Recommendation

The Commission recommends that

2.4.23

Crown lands to which the public has access be available for selection as Category I or II lands.

Interim relief agreements

Treaty negotiations based on mutual recognition, mutual respect, sharing and mutual responsibility will take time. In the past, it has taken a decade or more to conclude a comprehensive claims agreement. We have every reason to think that the time involved may be reduced by the greater and more formal government commitment in the proposed royal proclamation as well as the clearer direction and greater consensus on the purposes of treaty negotiations. Nonetheless, time will be required to complete large-scale negotiations on a new relationship, whether it is the making of a new treaty or the renewal and implementation of an historical one. For this reason, the Commission considers it vital that realistic and effective interim relief be agreed upon as a first step in treaty negotiations to protect Aboriginal rights concerning lands and resources. Forms of
relief should be contained in interim agreements between federal, provincial, territorial and Aboriginal governments. These should provide an effective means of interim protection from development and the creation of new legal third-party interests by subjecting them to a set of controls and exclusions. Relief should apply for a specified period until agreement on a formal treaty is reached or until joint management structures are put in place after the ratification of a treaty.

As the brief from the Labrador Inuit Association points out, the existence of interim relief agreements can have powerful implications for the process of claim negotiations:

• they increase the pressure on non-Aboriginal governments to negotiate in good faith and expeditiously;

• they help equalize the bargaining power of the Aboriginal claimant group;

• they give the Aboriginal group a say in managing lands and resources in their traditional territory during negotiations; and

• they free up time and resources, which the Aboriginal group might otherwise have devoted to dealing with resource developments on their lands. 373

As other presenters pointed out, the chief problem in the absence of an agreement on interim relief is that as the negotiations proceed, new third-party rights and interests are granted and even promoted by one party to the negotiations, to the detriment of the negotiating position, and indeed the substance of the interest, of the other party. 374 Moreover, as we have seen, the courts are reluctant to order interim relief to protect Aboriginal title pending final judgement.

We propose that federal policy and the Canada-wide framework agreement recognize, as a matter of principle, that nation-to-nation negotiations must begin with efforts to reach an agreement that includes interim relief of the following nature:

• Interim relief agreements should provide for land withdrawals to halt the further disposition of rights on specified lands for the duration of the agreement. Land withdrawals should apply to those areas most likely to be selected by the Aboriginal party and that might affect the disposition of all or a significant portion of existing or future rights concerning lands and resources.

• Aboriginal participation and consent should be required for the creation of new third-party interests or Crown development of lands or resources on withdrawn lands. An interim relief agreement should also guarantee Aboriginal participation in the joint management of lands and resources in the traditional territory, for the duration of the agreement. This involvement could take various forms, ranging from consultation to consent to all surface and subsurface rights issuance.
• Interim relief agreements should provide that revenue to governments, such as taxes and royalties from any new resources development on the traditional territory, should be held in trust pending final resolution of the claim. While such revenues would be payable by the developer, governments would not receive them pending expiry of the interim relief agreement.

Given that one of the purposes of an interim relief agreement is to protect the rights of Aboriginal peoples to lands and resources, undue delay in negotiating such an agreement could be highly detrimental. Companion legislation to a royal proclamation should state that the parties to negotiation have a duty to bargain in good faith and make reasonable efforts to reach an agreement. We propose that the Aboriginal Lands and Treaties Tribunal be given jurisdiction over the negotiation, implementation and conclusion of interim relief agreements to ensure good faith negotiations, and in the event of failure, be empowered to impose an agreement in order to prevent the erosion of Aboriginal title. These recommendations require provincial participation in negotiations and in the design of the tribunal and its mandate.

Recommendations

The Commission recommends that

2.4.24

Federal and provincial governments recognize, in the Canada-wide framework agreement, the critical role of interim relief agreements and agree on principles and procedures to govern these agreements, providing for

(a) the partial withdrawal of lands that are the subject of claims in a specific claims treaty process;

(b) Aboriginal participation and consent in the use or development of withdrawn lands; and

(c) revenues from royalties or taxation of resource developments on the withdrawn lands to be held in trust pending the outcome of the negotiation.

2.4.25

In relation to treaties, the companion legislation to the proposed royal proclamation state that the parties have a duty to make reasonable efforts to reach an interim relief agreement.

Rights concerning lands and resources and the role of provincial governments

Although Parliament has exclusive legislative authority to enact laws in relation to “Indians, and Lands reserved for the Indians”, provincial interests in lands and resources
figure prominently in our proposals. Undoubtedly, provincial Crown lands and resources will be a matter of discussion in any negotiations. Many specific claims about the loss of land guaranteed to an Aboriginal nation by treaty implicate provincial interests, for the land in question is often provincial Crown land. Many times the federal government offers only cash in compensation for land claims, while the lands remain with the province. There must be a presumption in respect of historical treaties that Aboriginal signatories did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by agreeing to a treaty relationship. It must be presumed also that where the text of an historical treaty makes reference to a blanket or wholesale cession of lands, the treaty relationship mandates a sharing of both the territory and the right to govern and manage it, as opposed to a cession of the territory to the Crown.

It is critical that provincial governments establish policies parallel to the processes and reforms that we are proposing, and that provincial governments participate fully in negotiations on interim relief agreements and in the treaty-making and treaty implementation and renewal processes. In addition, to provide Aboriginal nations with sufficient land to foster economic self-reliance and cultural and political autonomy, provincial governments must make Crown land available to an Aboriginal nation in cases where traditional territory has become provincial Crown land as the result of a breach of Crown duty. The provision of land in such circumstances is a matter of simple justice and likely is required by principles of fiduciary law. Where traditional territory has become private land as a result of Crown conduct (such as the improper sale or surrender of reserve land), the federal government can be called upon to compensate the province for the market value of Crown lands provided to Aboriginal nations in substitution, but such issues should be resolved between the governments and should not delay the resolution of claims.

In the wake of extensive litigation between Canada and provincial governments between the 1880s and the early 1920s, various federal-provincial statutory agreements were entered into that had the effect of giving provincial governments a measure of control over reserve lands and certain resources revenues from such lands. In the short term, these arrangements must be renegotiated by the federal and provincial governments to restore the control and benefits of reserve lands to Aboriginal nations. In the longer term, they should be repealed and replaced with appropriate statutory agreements that formalize the obligations of the federal and provincial governments in the fulfilment of treaty provisions.

**Recommendations**

The Commission recommends that

2.4.26

Provincial governments establish policies parallel to the processes and reforms proposed in recommendations 2.4.1 to 2.4.22.
2.4.27

Provincial governments participate fully in the treaty-making and treaty implementation and renewal processes and in negotiations on interim relief agreements.

2.4.28

In addition to provisions made available under recommendations 2.4.2 to 2.4.5, provincial governments make Crown land available to an Aboriginal nation where traditional Aboriginal territory became provincial Crown land as the result of a breach of Crown duty.

6.4 An Aboriginal Lands and Treaties Tribunal

Our principles for a renewed relationship between Aboriginal and non-Aboriginal peoples are not self-implementing. If these principles are to retain their credibility and vitality, they must be translated expeditiously into solid achievements. To prevent the erosion of confidence in the foundations of the new relationship, and to build their own legitimacy, institutional arrangements must satisfy four principles.

First, the tasks must be appropriate for the body to which they are assigned. This is the principle of institutional competence. It means, for example, that multi-dimensional and complex public policy decisions of wide-ranging importance should be made through a political process by persons accountable to those they represent, not by an adjudicative body independent of the parties. On the other hand, the resolution of disputes with less sweeping ramifications, depending more on judgements about the specifics of particular issues, can appropriately be entrusted to a body that is, and is seen to be, informed, open, impartial and independent.

Second, before the body is established, its design, jurisdiction, procedures and powers must have been the subject of wide consultation and broad agreement. Its composition must be representative of those most affected by the issues to be decided. This is the principle of inclusiveness.

Third, the powers and procedures of the body must be compatible with a process that is participatory, informal and inexpensive. This is the principle of accessibility. An adversarial model dominated by lawyers, in which the decision-making body plays an essentially passive role, is unlikely to meet these objectives. For these reasons, the body must have the capacity to deal comprehensively with the issues before it, and its decisions should be final, subject only to limited rights of reconsideration and judicial review.

Fourth, any body entrusted with responsibilities related to implementing the Commission’s recommendations for a renewed relationship between Aboriginal and non-Aboriginal people must have available the ingredients for fully informed, thoughtful and wise decisions. These can be supplied through representations made at public hearings,
the expertise and knowledge of its members, staff and consultants, and the results of research. This is the principle of responsive deliberation.

With these principles in mind, we propose that federal companion legislation to the royal proclamation provide for the establishment of an independent administrative tribunal, the Aboriginal Lands and Treaties Tribunal. One of its principal roles will be to ensure a just resolution of existing specific claims, relating mostly, but not exclusively, to lands and resources. The tribunal will have responsibility not only for monitoring the fairness of the bargaining process by which most specific claims should be settled, but also, where no agreement is reached, for adjudicating outstanding substantive issues and making final and binding decisions on the merits of these claims.

In addition, the tribunal may be of assistance in treaty-making, implementation and renewal processes. However, because of the highly political nature of these negotiations, the tribunal’s role will be much more modest and confined almost exclusively to process issues and matters pertaining to interim relief. The tribunal would also be assigned responsibility for the creation and supervision of recognition panels to advise the government on the eligibility of an Aboriginal nation’s application for recognition (outlined in Chapter 3).

**Recommendation**

The Commission recommends that

**2.4.29**

Federal companion legislation to the royal proclamation provide for the establishment of an independent administrative tribunal, to be called the Aboriginal Lands and Treaties Tribunal.

**Rationale for a tribunal**

Experience clearly indicates that without an enforcement mechanism, it is all too likely that disputes will continue to be protracted as a result of the reluctance of the federal or provincial governments to come to the bargaining table or, when there, to attempt in good faith to reach a speedy and just resolution of the issues. It seems equally clear that a body with the power only to make recommendations is of limited value in effecting settlements.

While Aboriginal people have undoubtedly achieved some important victories in the recognition of Aboriginal title and other rights through the courts, litigation is a very slow and expensive process for resolving the large number of outstanding claims, let alone the disputes that may arise from implementation of the Commission’s recommendations. Although satisfying the criterion of independence, judges lack the necessary expertise in these areas. In addition, the adversarial and formal procedures of courts of law are all too likely to be damaging to the relationship of the parties, and their domination by lawyers
tends to exclude the active participation of the parties themselves. Moreover, court procedures and rules of evidence can often be quite inappropriate for achieving a just and fully informed resolution of the issues.

Independent administrative agencies are perhaps the most characteristic public institutions of the late twentieth century. They have several features in common: procedural openness, specialization of functions, and a degree of independence from the executive branch of government. In other respects, they are notable for the variety of their structures, powers, procedures and composition. It is, of course, this very flexibility that has made them so attractive in many different government contexts: within broad parameters, the institutional design and legal powers of these agencies can be tailored to the exigencies of the task at hand.

Thus, the composition of a tribunal is not limited to lawyers but can include persons with a range of experience, knowledge and skills. Specialization ensures that, in addition to their previous knowledge, its members will acquire new expertise and understanding as a result of repeated exposure to related issues. It is also possible to ensure that tribunal members and staff are representative of those they serve.

Tribunals do not have to use formal, adversarial procedures. For example, many tribunals have a research capacity independent of the parties that enables them to play an active role in defining and resolving the issues. They are not restricted by technical rules of evidence either. At the same time, the openness and independence inherent in administrative tribunals provide essential supports for the legitimacy that is crucial for successful decision making in sensitive and complex areas of public policy.

These features make an independent administrative tribunal the most suitable institutional form through which to exercise whatever coercive powers of a broadly judicial type are needed to implement the Commission’s recommendations.

**Jurisdiction of the tribunal**

Our proposals for the tribunal’s jurisdiction should be considered with three points in mind. First, since constitutional competence for “Indians, and Lands reserved for the Indians” is vested in Parliament, the tribunal should be established by federal legislation. The jurisdiction proposed for the tribunal with respect to specific claims can be conferred by federal legislation. Whether they arise from a treaty, the common law of Aboriginal title or some other liability of the federal Crown, specific claims can be settled by a body operating under federal statute.

Nonetheless, provinces will be directly interested in the resolution of many of these claims, especially when they relate to land to which underlying title is held by the Crown in right of a province. It is highly desirable, therefore, that provinces become involved in the design of the tribunal. In addition, it would enhance the tribunal’s constitutional ability to deal effectively with issues relating to land and self-governance if provincial legislatures were to delegate to the tribunal jurisdiction over matters that relate essentially
to property and civil rights in the province. The constitutional dimensions of the tribunal’s jurisdiction are discussed in more detail below.

Second, at this stage it is neither realistic nor desirable to provide more than a tentative sketch of the institutional design and operation of the tribunal. If the tribunal is to be broadly accepted and effective, Aboriginal people and federal and provincial governments must be actively involved in its design. Moreover, given the complexity and variety of the issues that are likely to arise, it would be unwise to attempt to settle the details of the tribunal’s operations so precisely as to preclude the possibility of readily making adjustments in the light of experience.

Third, negotiation is the best way for Aboriginal nations and the other two orders of government to resolve their differences. This will be especially true concerning the treaty-making, implementation and renewal processes as they relate to claims for lands and resources and the right of self-governance. However, it is hoped that conferring jurisdiction on the tribunal to adjudicate specific claims will provide an important incentive for the parties to negotiate. Despite its adjudicative powers over specific claims, the tribunal’s roles are best regarded an aid, not a substitute, for negotiation.

Recommendations

The Commission recommends that

2.4.30

Parliament, and provincial legislatures when they are ready, confer on the tribunal the necessary authority to enable it to discharge its statutory mandate pertaining to both federal and provincial spheres of jurisdiction.

2.4.31

Even without provincial delegation of powers to the tribunal, Parliament confer on the tribunal jurisdiction to the full extent of federal constitutional competence in respect of “Indians, and Lands reserved for the Indians”, including the power to issue orders binding provincial governments and others, when they relate essentially to this head of federal competence.

Specific claims

The creation of an administrative body with binding decision-making powers over specific claims was first proposed by the federal government more than three decades ago but never implemented. The subsequent failure of the federal government to settle specific land claims, partly because of the lack of an independent body, resulted in Aboriginal people feeling a sense of grievous injustice.
In defining the jurisdiction of the tribunal we have adopted an understanding of specific claims considerably broader than that currently accepted by government policy. For one thing, the jurisdiction proposed for the tribunal extends to specific claims made by any of the Aboriginal peoples covered by section 91(24) of the Constitution Act, 1867: Indian, Inuit or Métis. This is consistent with the position taken by the Commission that section 91(24) includes Métis people and their lands (see Volume 4, Chapter 5).

Specific claims relating to land may arise from several legal sources. Some claims will be based on allegations of failure by the Crown to honour an existing treaty obligation. Others might involve disputes about lands reserved by the Crown; for example, part of the reserve might have been improperly expropriated, or there might be disagreement about the precise boundaries of the reserve. Still others might depend on unextinguished Aboriginal title to particular land or the Crown’s breach of the Indian Act or a fiduciary duty. An example of a Métis specific claim is the allegation by the western Métis Nation that the Crown is in breach of its fiduciary duty in failing to prevent the perpetration of fraud and other forms of dishonesty by third parties and government officials with respect to land title.

Specific claims might pertain also to natural resources, such as mineral rights and hunting, fishing and trapping rights on particular land. Nor should the specific claims within the tribunal’s jurisdiction be limited to lands and resources — they might also include specific provisions in a treaty relating to the payment of an annuity by the Crown, education, health or taxation, for example.

Current federal policy on specific claims adopts a much narrower definition of a specific claim than that just indicated. Nonetheless, even narrowly understood, more than 500 of the specific claims already submitted remain unresolved and are being settled at the rate of a mere five or six each year. Moreover, the process now in place gives the appearance of injustice. In particular, since claims are currently referred to the Indian Claims Commission only after they have been screened by officials in the department of justice, and since the claims commission has the power to make recommendations but not final decisions, the federal government appears to be in the position of both judge and adversary.

We attach utmost importance to the just and expeditious settlement of specific claims, more broadly conceived, and we see some of the tribunal’s most important functions being in this area. We recommend that the tribunal replace the claims commission, although the experience gained by members of the commission concerning specific claims should be made available to the tribunal by, for example, the appointment to the tribunal of former members of the commission.

The tribunal and the negotiating process

Regardless of their particular subject matter, negotiations are likely to produce timely, just and durable agreements only if the negotiating process is not allowed to stall and is regarded by the participants as fair. Complaints about the unwillingness of governments
to bargain in good faith and the disparity of resources available to the parties are longstanding.

We proposed the creation of treaty commissions to facilitate negotiations including mediation when required. Most of the commissions’ efforts will focus on the bilateral process for negotiating new or renewed treaties, which may include claims arising from existing treaties, comprehensive land claims and self-governance.

It will be an important function of the Aboriginal Lands and Treaties Tribunal to ensure that any negotiations on specific claims outside bilateral treaty processes are conducted in good faith and without undue delay and that the integrity of the process is otherwise maintained. Rather like a labour relations board, the tribunal will police the bargaining process, and, unlike the treaties commissions, it will have the power to make binding orders on those in breach.

In addition, when it proves impossible through good faith negotiations with the federal government for Aboriginal people to secure adequate funding to enable them to participate effectively in the process for resolving a particular claim, it should be within the jurisdiction of the tribunal to review the adequacy of the amount of funding provided by the federal government.

There is, of course, a danger that disappointment with funding decisions, even if made by members who do not participate in subsequent proceedings arising from the same negotiations, may undermine the credibility and perceived impartiality of the tribunal to determine the other issues. Indeed, we invited a person who was independent of our Commission to chair the Intervener Participation Program through which funds were distributed to Aboriginal groups to enable them to participate in the Commission’s work by preparing research papers, briefs and oral presentations.

On the other hand, the joint boards established under land use, municipal and environmental legislation, to which Ontario’s Intervenor Funding Project Act applies, seem not to have been impaired by their power to award funding before hearings commence. Some of the criteria contained in the Ontario statute to guide the boards’ discretionary award of funding might be relevant to decisions the tribunal will make in exercising its funding review powers.

Perhaps the most salutary warning to emerge from Ontario’s experience with intervener funding is the propensity of lawyers to turn the hearings process into something resembling complex, multi-party litigation in the courts. However, the active role recommended for the tribunal in the exercise of its adjudicative powers should provide an effective countervail.

Substantive questions

Here we sketch the tribunal’s decision-making powers in respect of specific claims that the parties have been unable to resolve in negotiations outside the treaty processes, even
with the benefit of mediation and other assistance provided by treaty commissions. We anticipate that most claims will be settled informally by negotiation. Indeed, the existence of the tribunal, as a last resort when good-faith attempts to resolve differences have failed, will tend to encourage the parties to reach an agreement.

Given the relatively limited scope of most specific claims arising from the failure of the Crown to implement the rights and obligations in existing treaties, or derogations of reserved land, for example, it would be appropriate for Parliament to confer on the tribunal jurisdiction to adjudicate disputes that the parties cannot resolve by negotiation. The tribunal may be asked to adjudicate the claim as a whole, or any part of it. In addition, the statute should confer wide remedial powers on the tribunal, making it clear that the transfer of land, as opposed to compensation, is the preferred remedy.

Because these claims are based on breaches of obligation by the federal Crown, it is within Parliament’s constitutional competence for “Indians, and Lands reserved for the Indians” to confer on the tribunal statutory jurisdiction to determine whether a breach has occurred and, if so, to provide an appropriate remedy. Federal law creating the tribunal might authorize the making of an order, even though it affects the proprietary rights of the Crown in right of a province, if the law in question relates in pith and substance to “Indians, and Lands reserved for the Indians”. However, legitimate provincial interests will have to be recognized. After the tribunal has been created and principles for the selection of land determined, parallel negotiations are likely to take place between the province affected and the federal government on issues such as the selection of the land to be transferred and the compensation to be paid for the transfer.

Aboriginal nations should not have to wait for resolution of these pressing specific claims by the treaty renewal processes. It is a widespread and strongly held view among Aboriginal people that, as a matter of the most elementary justice, the Crown’s non-fulfilment of existing treaty and other obligations with respect to specific claims should be remedied without further delay. The tribunal’s decision on any specific claim will be final. However, an Aboriginal nation, or other claimants, should be free to refer a specific claim instead to the longer and broader treaty-making or renewal processes.

Because there is no bright conceptual line dividing specific claims from comprehensive claims, legislation will need to define with care the term ‘specific claim’. This definition should include all disputes categorized by current federal policy as either specific claims or claims of a third kind. In general, the definition should embrace claims relating to treaty rights and obligations, as well as claims based on breach of statutory, fiduciary or other legal obligations of the Crown. It should seek to be inclusive, not exclusive, of the range of disputes that typically arise between the Crown and Aboriginal parties to treaties. In any event, the definition of a specific claim should certainly include any issue relating to treaties that is currently justiciable in the courts. It will be for the tribunal to decide, subject to the possibility of judicial review, whether a claim referred to it falls within its jurisdiction as defined in its enabling statute.
The enabling legislation must also provide that, when deciding specific claims derived from treaties or issues relating to treaty making or implementation, the tribunal should adopt a broad and progressive interpretation of the treaties and not limit itself to technical rules of evidence (including the parol evidence rule) by which the courts are bound. In particular, the enabling legislation must ensure that when interpreting disputed terms and fashioning appropriate relief for breach, the tribunal takes into account the fiduciary obligations of the Crown, Aboriginal customary law and perspectives, and the relevant history of the parties’ conduct and relations. Moreover, the statute should remind the tribunal of the importance of rendering its decisions promptly. Aboriginal peoples have good reason already to appreciate the truth of the maxim that justice delayed is justice denied.

Clearing the current substantial backlog of specific claims referred to the tribunal will require a time limit. In contrast, the longer-term processes of treaty making and renewal, tackling the more deep-seated problems, will be of indefinite duration. Given its role in the longer-term treaty processes, the tribunal will remain in existence for that time.

An important policy question is whether claims should be made to the tribunal solely at the instance of the Aboriginal claimants, or whether the consent of the Crown should be required, including the Crown in right of the province, when the dispute involves land to which it has the underlying title. On balance, we recommend that the Crown not be given the power to veto the right of claimants to refer such questions to binding decisions by the tribunal. To make the tribunal’s jurisdiction contingent on the consent of all parties would provide a major disincentive for government to settle these claims, many of which have been outstanding for a very long time.

When claimants refer a claim to the tribunal for settlement, the tribunal could grant standing to any third party whose interests are directly affected by the decision. We have in mind those on whom the claim, if successful, would have a direct impact: local landowners, including municipalities, and local fishers, for example.

Finally, when a specific claim arises under a treaty that contains its own mechanism for resolving disputes about non-implementation, the claim should be handled through the agreed process. However, if a claim raises issues of general significance, extending beyond the immediate dispute, the Aboriginal nation should be able to ask the tribunal to resolve it. If the non-Aboriginal party objects to the tribunal’s jurisdiction over a claim, on the ground that it should have been referred to the treaty mechanism, the tribunal will have to decide whether, given the circumstances, there is good reason for bypassing the primary forum. Conversely, those responsible under the treaty for resolving disputes may, in exceptional circumstances, decide that the claim is better taken to the tribunal. Once either the tribunal or the decision-making body created by the treaty has decided to deal with the claim, the other should defer to it and refuse to entertain the claim.

The general thrust of the legislative scheme we propose for the tribunal is to expand the choices available to Aboriginal people for achieving justice. Potential inconsistencies
between specific dispute resolution mechanisms in particular treaties and the tribunal’s design are a price worth paying to maintain this principle.

Treaty-making, implementation and renewal processes

In describing the jurisdiction that should be conferred on the tribunal with respect to comprehensive claims, we deal separately with land claims and self-governance, although often the issues will be inextricably linked.

Land claims

The tribunal should not exercise a significant role on non-process issues that might arise in the course of treaty-making and treaty implementation and renewal negotiations between the Crown and Aboriginal nations, including Métis people and Inuit. For the most part, issues arising out of these processes will be unsuitable for adjudication. They will usually involve the reallocation of lands, resources and jurisdictional authority and can be addressed satisfactorily only as an integral part of the whole relationship established (or to be established) by the treaty.

The tribunal would be available to review the adequacy of funding made available by government to Aboriginal parties. It would also ensure that negotiations were conducted in good faith. However, in the absence of provincial legislation delegating powers to the tribunal in respect of matters that relate essentially to property and civil rights, it is unlikely that the tribunal could rely on jurisdiction conferred solely by federal legislation to order a province to the bargaining table. The courts might conclude that Parliament’s constitutional competence with regard to Indian peoples and their lands does not extend to aspects of the bilateral treaty process involving land to which a province has underlying title and on which there may be no existing Aboriginal title. However, it might concur with our view, set out in Chapter 2, that the assumed extinguishment of Aboriginal title as a result of the historical treaties may not in fact have occurred and that Aboriginal title can continue to exist alongside provincial Crown title.

In addition, the parties mutually should be able to refer to the tribunal any issue on which they cannot agree. Arbitration might enable them to obtain a ruling on an issue that is impeding resolution of the central questions they are negotiating. Party autonomy should be the governing principle: that is, generally they are in the best position to know when the assistance of the tribunal on a matter that is not just one of process would be beneficial. The tribunal should have the power to make a final adjudication and to issue orders that are legally binding on the parties.

However, the tribunal should have discretion not to exercise its jurisdiction as well. For example, if it regards a question referred to it as one better resolved by the parties themselves, it could send it back for further negotiation, perhaps with some suggestions for a way forward. It might regard a question as premature, and again might send it back to the parties, with or without suggestions.
Finally, in some circumstances the parties might leave a question of principle about the interpretation of existing treaty rights or unextinguished Aboriginal title unresolved, while they negotiate other issues. In these situations, which we anticipate will be few, we propose that if the government refuses to submit a particular matter to the tribunal for arbitration, the Aboriginal party should be able to refer it for binding adjudication on its own initiative. We want to emphasize that this jurisdiction would extend only to issues of Aboriginal rights or treaty that would be justiciable in a court of law, if the claimants had chosen that route.

Implementing the right of self-government

It is unlikely that substantive issues surrounding negotiations on the implementation of self-governance will be suitable for adjudication by the tribunal. Negotiating the recognition of constitutional powers among the federal, provincial and Aboriginal orders of government, together with the transfer of a land and resource base sufficient to sustain Aboriginal self-governance, involves political questions of the highest order. However, subject to any constitutional limits when a province has not delegated powers to the tribunal, its jurisdiction to monitor the negotiating process should be applicable here, as should its authority to arbitrate an issue referred to it by the parties.

Nonetheless, in addition to its roles as monitor of the negotiation process and consensual arbitrator, the tribunal appropriately can assume jurisdiction for resolving disputes about whether an Aboriginal group should be recognized as an Aboriginal nation possessing the right of self-government. The Commission has recommended that criteria of recognition, including culture and language, be included in the legislation. Panels organized by the tribunal specifically for this purpose should be empowered to recommend whether a group claiming nationhood status should be recognized as such by the federal government. In the event that a panel’s recommendation for recognition is rejected by the federal government on the grounds that a particular group’s inherent right of self-government had been extinguished or had never existed, the Aboriginal party could refer the matter to the tribunal proper for adjudication.

Compliance

Parties to a new treaty or agreement could empower the tribunal to resolve disputes about compliance in an area within the tribunal’s jurisdiction. Parties to existing treaties may also decide to include a similar provision in respect of disputes not already covered by the tribunal’s general statutory jurisdiction. Accordingly, a party alleging that an agreement is not being implemented in accordance with its intent should be able to invoke the tribunal’s assistance. The tribunal would be given the statutory powers necessary to investigate a complaint of non-compliance, adjudicate the dispute and award an appropriate remedy.

Parties to a new treaty would be able to devise their own dispute resolution mechanism; however, the existence of the tribunal, with a developed structure, expertise and statutory powers, may provide an attractive and convenient alternative.
Interim relief

To maintain the fairness and efficacy of the processes for resolving disputes concerning lands and resources, it is crucial to ensure that their subject matter is not lost or irretrievably diminished before negotiations are complete or disputes resolved by adjudication. We proposed that parties be under an obligation to bargain in good faith and make every reasonable effort to reach interim relief agreements to halt or regulate the development of lands and resources and to provide for their continuing management. The tribunal should have jurisdiction to supervise the negotiation, implementation and conclusion of interim relief agreements to ensure good faith treaty-making and treaty implementation and renewal negotiations; also, it should be empowered to impose an interim relief agreement in the event of a breach of the duty to bargain, as well as to order other forms of interim relief where necessary.

The tribunal would be a suitable body to make orders granting interim relief with respect to lands and resources that are the subject of negotiation, once it was satisfied that the claimants had demonstrated an arguable claim. The availability of effective relief of this nature should remove a powerful incentive for governments to procrastinate in the conduct of negotiations and delay the just settlement of claims.

However, to bind the provinces to an interim relief order, it is likely that the tribunal will require provincial legislatures to delegate powers to supplement its own. This is because, when the relief proposed by the tribunal concerns land owned by the Crown in right of the province that is not necessarily subject to existing Aboriginal title, the essence of the order may well be regarded by the courts as pertaining to property and civil rights within the province rather than to Aboriginal peoples and their lands.

Because of the generally circumscribed scope of specific land claims, there will be fewer occasions on which it will be appropriate for the tribunal to exercise its power to order interim relief. However, when the nature of the claim is such that its substratum may disappear, the tribunal should be empowered to award interim relief here as well.

Recommendations

The Commission recommends that

2.4.32

The tribunal be established by federal statute operative in two areas:

(a) settlement of specific claims, including those removed by the Aboriginal party from the broader treaty-making, implementation and renewal processes; and

(b) treaty-making, implementation and renewal processes.
2.4.33

In respect of specific claims, the tribunal’s jurisdiction include

(a) reviewing the adequacy of federal funding provided to claimants;

(b) monitoring the good faith of the bargaining process and making binding orders on those in breach; and

(c) adjudicating claims, or parts of claims, referred to it by Aboriginal claimants and providing an appropriate remedy where called for.

2.4.34

In respect of the longer-term treaty-making, implementation and renewal processes, the tribunal’s jurisdiction include

(a) reviewing the adequacy of federal funding to Aboriginal parties;

(b) supervising the negotiation, implementation, and conclusion of interim relief agreements, imposing interim relief agreements in the event of a breach of the duty to bargain in good faith, and granting interim relief pending successful negotiations of a new or renewed treaty, with respect to federal lands and on provincial lands where provincial powers have been so delegated;

(c) arbitrating any issues referred to it by the parties by mutual consent;

(d) monitoring the good faith of the bargaining process;

(e) adjudicating, on request of an Aboriginal party, questions of any Aboriginal or treaty rights that are related to the negotiations and justiciable in a court of law;

(f) investigating a complaint of non-compliance with a treaty undertaking, adjudicating the dispute and awarding an appropriate remedy when so empowered by the treaty parties; and

(g) recommending to the federal government, through panels established for the purpose, whether a group asserting the right of self-governance should be recognized as an Aboriginal nation.

2.4.35

The enabling legislation direct the tribunal to adopt a broad and progressive interpretation of the treaties, not limiting itself to technical rules of evidence, and to take into account the fiduciary obligations of the Crown, Aboriginal customary and property law, and the relevant history of the parties’ relations.
2.4.36

Constitutional foundations

A tribunal that is to make binding determinations of rights and duties and issue orders backed by the authority of the state requires statutory authority. In a federal system, it is important to establish which order of government has the constitutional authority to give the tribunal a legislative mandate.

The Commission’s strong preference is that the provinces co-operate actively with the federal government and Aboriginal people in working to ensure the success of the tribunal as an instrument of justice. In particular, we would hope that the provinces are willing to delegate to the tribunal the powers necessary to enable it to grant interim relief and monitor negotiations effectively. However, the legislative powers of Parliament are sufficient to enable the tribunal to deal effectively with one important part of its mandate, the resolution of specific claims, especially those relating to land.

A federal tribunal with additional powers delegated by the provinces

The tribunal’s principal work will be in connection with the settlement of specific claims based on existing treaties that have not been honoured or on other legal sources, such as the Crown’s reserve of land for Aboriginal people. We regard specific claims against the Crown, whatever their origin, as falling squarely within the exclusive federal legislative competence for “Indians, and Lands reserved for the Indians”, even when they relate to land to which a province holds the underlying title. In view of the constitutional authority vested in Parliament, it is appropriate that, after extensive consultations with Aboriginal people and the provinces, the tribunal should be established by federal statute. This would have the advantage of minimizing the risk of a successful challenge to the tribunal under section 96 of the Constitution Act, 1867.

It is clear, however, that the provinces will have a direct interest in the settlement of many of the issues outstanding between Aboriginal people and the Crown. The successful conclusion of the larger treaty-making, renewal and implementation processes is likely to require the provinces to delegate the necessary powers to the tribunal to enable it to support negotiations and grant interim relief.

In addition, provinces must confirm the legislative powers needed by the third order of government to implement Aboriginal self-governance. Even when provincial cooperation in the resolution of a dispute is not required as a matter of constitutional law (as in the settlement of specific land claims, for example), the outcome may be of concern to a province. In short, the provinces are crucially important actors in the process of renewing the relationship between Aboriginal peoples and Canada.

Active participation by the provinces in implementing the Commission’s recommendations would recognize their stake in the success of the enterprise. A constructive step in this direction would be for the provinces to delegate to the tribunal
the power to deal with any matters within its mandate that fall outside exclusive federal legislative competence. This would maximize the tribunal’s capacity to deal with issues comprehensively and conclusively. That the constitution permits the inter-delegation of power by the legislature of one order of government to an administrative agency created by the other order of government has been made clear by the Supreme Court in *P.E.I. Potato Marketing Board v. Willis.*

Once the tribunal has been created by Parliament, provinces could ‘sign on’ individually and at different times by enacting legislation to delegate to the tribunal the power it would need to perform its functions effectively. Provinces that signed on would become active participants in the process of renewing the relationship between Aboriginal people and other residents within their boundaries. For example, they would be included in consultations about the development and operation of the tribunal and would be invited to nominate members to the tribunal.

A federal tribunal with exclusively federal powers

It is clearly preferable for the tribunal to operate with the benefit of co-operation between governments. However, Parliament has the constitutional capacity to confer on the tribunal the statutory authority necessary to enable it to discharge the most important parts of the mandate we have recommended be entrusted to it. In this section, we indicate the breadth of Parliament’s authority to legislate in this area.

The authority conferred by section 91(24) of the *Constitution Act, 1867* enables Parliament to enact legislation establishing a tribunal with jurisdiction over a range of issues arising from Aboriginal treaties, land claims and self-governance. A tribunal could be given statutory decision-making powers on any matters falling within section 91(24). In addition, the law relating to the liability of the Crown in right of Canada is federal, whether or not it has been put into statutory form, as is the common law relating to Aboriginal title.

Section 101 of the *Constitution Act, 1867* provides another possible source of authority. It authorizes Parliament to establish “additional courts for the better administration of the laws of Canada”. Under this provision, Parliament can create a court to decide disputes governed by federal legislation, as well as by federal common law relating to Aboriginal title and the liability of the federal Crown.

Despite Parliament’s broad powers under these provisions, the Crown in right of the provinces holds the underlying title to much of the land that is subject to claims of unextinguished Aboriginal title and to specific claims under existing treaties. Three provisions of the *Constitution Act, 1867* give provincial legislatures exclusive authority to legislate with respect to such land. Section 92(5) confers legislative competence over the sale and management of public lands belonging to the province, while section 92(13) assigns to provincial jurisdiction property and civil rights within the province. A third important source of provincial authority is section 92A of the *Constitution Act, 1867,*
which gives provinces exclusive legislative authority over non-renewable resources, forestry resources and electrical energy.

A tribunal with powers conferred solely by federal law could not exercise jurisdiction in matters that, in pith and substance, fall within one of these provincial heads of power rather than within the federal sphere of “Indians, and Lands reserved for the Indians”. When the first provinces entered Confederation, however, the land that passed to them then was “subject to any Trusts existing in respect thereof, and to any interest other than that of the province in the same”. Similar provisions apply to provinces admitted to Confederation later.

Despite the limitations on federal legislative competence that preclude Parliament from conferring plenary powers on the tribunal in every aspect of its statutory mandate, it is equally important to note the substantial scope of the jurisdiction that federal statute can confer. By virtue of the paramountcy doctrine, federal legislation relating in pith and substance to “Indians, and Lands reserved for the Indians” prevails over any inconsistent provincial statutes or common law. In addition, a federal law that in other respects falls within the constitutional authority of Parliament can be made to apply to the Crown in right of the provinces, if clearly it so provides. Canada’s constitutional law contains no general doctrine of intergovernmental immunity.

Thus, the extent to which a federal tribunal could be empowered by federal legislation to make decisions binding on the Crown in right of a province depends entirely on the reach that the courts are prepared to give to the federal law of Aboriginal title, the fiduciary duties of the Crown, and Parliament’s legislative authority under section 91(24). Despite the uncertainties that inevitably surround the courts’ future interpretations of the constitution, we note that in the past the courts have generally taken a broad view of the scope of section 91(24). We regard the following observation made by Peter Hogg as eminently plausible:

It seems likely, therefore, that the courts would uphold laws which could be rationally related to intelligible Indian policies, even if the laws would ordinarily be outside federal competence.\(^{78}\)

A federal tribunal and the constitutionally guaranteed jurisdiction of provincial superior courts

A problem of a somewhat different kind is posed by the judicature provisions of the Constitution Act, 1867, sections 96 to 100. These provide for the federal appointment of judges to the superior, district and county courts of the provinces; specify that the judges are to be selected from members of the bar of the province in which they sit; and underpin judges’ independence by guaranteeing security of tenure until the prescribed age of retirement and the provision by law of salaries, allowances and pensions.

These sections have been held to prevent legislatures (both federal and provincial) from conferring on provincially created tribunals powers of a judicial nature that are identical
or analogous to a jurisdiction historically exercised exclusively by superior, district or county courts. In addition, since it is an inherent part of the jurisdiction of a section 96 court to determine whether inferior tribunals have acted in breach of the duty of fairness or otherwise exceeded their legal authority, provincial legislation cannot remove the power of the superior courts of the provinces to exercise jurisdictional control over them.  

For the following reasons, these provisions do not present a serious constitutional impediment to the creation of an Aboriginal Lands and Treaties Tribunal. First, whether or not its jurisdiction is supplied in part by provincial legislation, the tribunal will be established by federal statute, and the orthodox view is that Parliament’s power to create administrative tribunals in the federal sphere is not subject to the same limitations as those restricting provincial competence. Sections 96-100 seem directed at the appointment and terms of office of judges of the superior courts in the provinces.

Second, even if the judicature sections of the Constitution Act, 1867 were held to apply to federally created tribunals, a challenge to the constitutionality of the legislation would succeed only if it were established that the Aboriginal Lands and Treaties Tribunal had been given jurisdiction over matters that were at least analogous to those exclusively within the jurisdiction historically exercised by superior, district or county courts. While determinations of rights by reference to the federal common law of Aboriginal title or the Crown’s fiduciary duties to Aboriginal peoples, for example, might be regarded as such a matter, many others would not.

For example, the superior courts historically have not had exclusive jurisdiction over the determination of questions of constitutional law: lower courts can be required to determine the constitutionality of the conduct of a police officer, and administrative tribunals may be empowered to decide constitutional challenges to the validity of their enabling legislation. Thus, there could be no objection to the tribunal’s jurisdiction to interpret section 35 of the Constitution Act, 1982 or the scope of Parliament’s legislative authority under section 91(24) of the Constitution Act, 1867 in the course of deciding a dispute. Since there is no aspect of the superior courts’ jurisdiction that is analogous to the role proposed for the tribunal as monitor of the bargaining process between Aboriginal peoples and the Crown, section 96 could not be used to impugn this aspect of the tribunal’s jurisdiction.

Third, the Supreme Court has upheld legislation conferring powers on provincial tribunals that were, considered in isolation, analogous to those of section 96 court judges but, when viewed in their wider context, formed part of an administrative scheme. To the extent that the proposed tribunal is seen as an integral and ancillary part of the non-judicial process of resolving multi-faceted disputes by negotiation, it is likely to come within this exception. This view is strengthened by the importance to the tribunal of having non-lawyer and Aboriginal members, an independent research capacity and informal procedures.
Fourth, Parliament could resort to section 101 of the *Constitution Act, 1867* to create a federal tribunal. This expressly empowers Parliament to create additional courts for the better administration of the laws of Canada, “notwithstanding any other provision in this Act”. It is a requirement of this section, however, that the rights and obligations determined by this court must be based on federal law, which includes the law that the tribunal is most likely to administer — federal legislation, Aboriginal title, and the liability of the Crown in right of Canada. Because the tribunal’s success depends on the diversity of background, perspectives and expertise of its members and the flexibility of its procedures, we do not recommend the creation of a body that is likely to be regarded as a court for purposes of section 101.

It is clear, however, that constitutional law imposes at least two limitations on the jurisdiction of the tribunal. First, on application for judicial review, a court could set aside a decision of the tribunal on the ground that Parliament lacked the constitutional authority to establish it.

Second, by express word or implication, legislatures can authorize tribunals to determine questions of constitutional law that arise in the course of their proceedings. However, when conferred, this jurisdiction cannot exclude the superior courts’ inherent authority to determine the constitutionality of federal or provincial legislation on either division of powers or Charter grounds, or under section 35 of the *Constitution Act, 1982*. Nonetheless, it is within the discretion of the superior courts to decide in any given case whether to exercise their jurisdiction over constitutional challenges to the validity of legislation. The existence of an independent, specialized administrative agency with the capacity to decide questions of constitutional law, along with other matters that are squarely within its expertise, might satisfy a court that it should not make a ruling until the tribunal has rendered its decision.

If Parliament can entrust a tribunal with jurisdiction to decide a matter, it can make that jurisdiction exclusive of the superior courts of the provinces, except on questions of constitutional law. It would be tidy to sweep into the tribunal, the body designed specifically for resolving disputes of this kind, exclusive jurisdiction over matters within its statutory mandate. It would ensure that decisions made by the tribunal were informed by its expertise and would minimize inconsistencies and avoid ‘forum shopping’.

Nonetheless, we propose that where a claim is justiciable, Aboriginal claimants should remain free to pursue it through the courts, rather than be forced to take it to the tribunal. It would be inappropriate to recommend legislation to remove an avenue of legal redress that Aboriginal peoples have sometimes found valuable. Moreover, to the extent that these claims fall within section 35 of the *Constitution Act, 1982*, the jurisdiction of the superior courts of the provinces cannot be removed. However, if the tribunal operates as we anticipate, claimants should find it at least as satisfactory a forum as the courts.

**Recommendation**

The Commission recommends that
2.4.37

The tribunal’s jurisdiction to determine specific claims be concurrent with the jurisdiction of the superior courts of the provinces.

Structure

The range of issues that could be assigned to the tribunal is large, geographically diverse, and of fundamental importance to a large number of Aboriginal nations and groups with distinctive histories, traditions and cultures. Some aspects of the tribunal’s jurisdiction are likely to be needed for a finite period of time, while others may endure indefinitely. The composition of the tribunal will need to reflect the knowledge required for the resolution of particular issues. The procedures it adopts might need to vary according to the nature of the dispute before it. Also, its structure should reflect fully the very significant interest of the provinces in aspects of its operation.

In light of this diversity, should there be a single tribunal to exercise jurisdiction over all issues, regardless of where they arise or the Aboriginal peoples they involve? Or should there be several tribunals, perhaps based on geography, subject matter (self-governance or specific claims, for example), or the degree to which the dispute involves lands or resources to which the Crown in right of a province holds the underlying title?

The selected structure should seek to combine the organizational advantages of a centralized agency with the responsiveness that could be achieved through a series of more specialized tribunals. Perhaps this balance can be struck through a tribunal that is established on a Canada-wide basis but operates through panels appointed in connection with particular matters. A single tribunal, with internal devolution, has the great virtue of avoiding uncertainties and wrangles about which tribunal has jurisdiction over any given matter. It is also important that Aboriginal peoples not have to divide up their grievances to fit different institutional mechanisms but instead have them considered as a whole.

The tribunal could also provide a registry, with offices located across the country, for filing documents and performing other related functions for matters referred to the tribunal. The tribunal could maintain a library containing, among other things, a record of the research conducted for the panels, together with their decisions. Although not legally binding, the results of research and reasoned decisions in other cases would provide invaluable assistance to subsequent claimants and panels and introduce into the process a welcome level of consistency, expertise and efficiency.

Senior permanent members of the tribunal would constitute its executive, which would have regional representatives. The role of the executive would include overseeing, coordinating and being publicly accountable for the tribunal’s operations and budget. It might be efficient as well for the tribunal to provide central legal services and a small research staff, on which panels could call as required.
Apart from the permanent full-time members of the tribunal with executive responsibilities, others would be appointed on a provincial or regional basis. They would be assigned to particular disputes on the basis of their knowledge and experience with the issues. Members of a panel could be selected by the claimants and the federal and provincial governments, with a mutually agreed chair. If the parties could not agree on a chair, the selection could be made by the tribunal.

It can sometimes be difficult to know when the local and specialized knowledge that is desirable in tribunal members threatens the appearance of impartiality and independence. This issue is important in the context of the Supreme Court’s recent decision in *Canadian Pacific Ltd. v. Matsqui Indian Band*. Some members of the court expressed the view that the tax appeal committee established by the band council was not sufficiently independent of the council to provide an adequate alternative to judicial review. However, as experience with tripartite labour arbitration boards indicates, courts are liable to take a contextual approach to standards of independence and impartiality when the composition of an agency is designed to reflect the general perspectives of each of the parties. Nonetheless, attention will need to be given to avoiding potential conflicts of interest when panel members are selected.

As the *Matsqui Indian Band* decision reminds us, the terms of appointment of members of a tribunal have an important bearing on the independence of the tribunal and the degree of public confidence that it attracts. We propose that for the duration of their appointments, members be dismissable only for cause. Other aspects of appointment that should be considered from this perspective include duration, reappointment, remuneration, and disciplinary authority and process.

To ensure that members are widely representative of Aboriginal peoples and have a broad range of knowledge, most tribunal members would serve part-time, as is commonly the case with members of human rights tribunals and labour arbitrators, for example.

**The appointment of members**

The credibility and legitimacy of the tribunal will depend on its composition and the process for appointing members. Three points of principle stand out.

First, Aboriginal nominees, both men and women, must be fully represented at all levels of the tribunal. Half the members of decision-making panels should be Aboriginal members of the tribunal, or as close to half as may be permitted by an uneven number. The tribunal should also have Aboriginal and non-Aboriginal nominees as co-chairs. This principle can be implemented by giving Aboriginal groups the right to nominate candidates for half the positions on the tribunal, including one of the co-chairs, and by providing that half the members appointed to the tribunal at all levels by the federal government be nominated by Aboriginal groups.

Second, the membership of the tribunal should be representative of all regions of Canada, and provinces that delegate legislative power to the tribunal should have the right to
nominate full-time members, as well as half the non-Aboriginal part-time members who will decide disputes that arise within their boundaries.

Third, the process of appointing members must meet growing public demands for openness, equity and accountability. For example, all nominations for membership should be subject to approval by a screening committee that is broadly representative of the principal stakeholders. The government, on the joint recommendation of the minister of justice and the proposed minister of Aboriginal relations, could appoint from among nominees approved by the committee.

Recommendations

The Commission recommends that

2.4.38

The membership and staff of the tribunal

(a) reflect parity between Aboriginal and non-Aboriginal nominees and staff at every level, including the co-chairs of the tribunal; and

(b) be representative of the provinces and regions.

2.4.39

The process for appointing full-time and part-time members to the tribunal be as follows:

(a) the appointment process be open;

(b) nomination be by Aboriginal people, nations, or organizations, the federal government, and provinces that delegate powers to the tribunal;

(c) nominees approved by a screening committee be qualified and fit to serve on the tribunal;

(d) members be appointed by the federal government on the joint recommendation of the minister of justice and the proposed minister of Aboriginal relations; and

(e) the terms of appointment of the co-chairs and members provide that, during their period of office, they be dismissable only for cause.

Procedure

It would not be useful at this stage to prescribe codes of procedure for the tribunal and its panels. There ought to be room for experimentation and variation, based on the type of
claim and proceeding being heard and the preferences of the parties. Whatever procedures are adopted should help, not hinder, the ability of the panel to reach timely and fully informed decisions; they should provide an adequate opportunity for the parties to participate in the decision-making process in a constructive manner and minimize the need for professional representation; they should respect oral traditions of Aboriginal peoples; and they should be the product of prior consultation, Aboriginal world views, values and experience.

It will be important to free the panels’ proceedings from undue constraints imposed by rules of evidence developed in the very different context of adversarial courts. There should be little place for the parol evidence rule, for example, which restricts the introduction of evidence other than the written text of an agreement in order to determine its terms. Aided by researchers, panel members should assume an active role in identifying the issues, the research agenda and methodology, and potential witnesses and evidence. The procedure should more closely resemble an inquiry than the adversarial model.

**Recommendation**

The Commission recommends that

**2.4.40**

The tribunal operate as follows:

(a) emphasize informal procedures, respect the oral and cultural traditions of Aboriginal nations, and encourage direct participation by the parties;

(b) take an active role in ensuring the just and prompt resolution of disputes;

(c) maintain a small central research and legal staff and provide a registry for disputes; and

(d) hold hearings as close as is convenient to the site of the dispute, with panels comprising members from the region or province in question.

**Judicial review**

Should tribunal decisions be subject to review by the courts? As a federally created agency, it might not be subject to the rule established in *Crevier v. Attorney General of Quebec*, where the Supreme Court held that the constitution makes provincially created tribunals subject to review by the superior courts for jurisdictional error.

Nevertheless, it is clear that the decisions of all tribunals are subject to review on questions of constitutional law. In addition, legislation cannot oust the jurisdiction of superior courts to determine at first instance the extent of a person’s constitutionally
entrenched rights and whether they have been breached by statute or otherwise; however, given the existence of a more appropriate forum, a court may resolve in its discretion not to decide the issue until the completion of the tribunal proceedings in which the issue has arisen or is likely to arise. Even if Crevier were held not to apply to federal tribunals, a legislative attempt to insulate the tribunal from judicial review on non-constitutional issues would be liable to attract to the legislation, and to the tribunal in particular, unhelpful and unnecessary controversy.

On the other hand, to afford unrestricted access to the courts would increase the cost of reconciliation and delay its progress. An appropriate balance would be to subject the tribunal, like other major federal administrative agencies, to review in the Federal Court of Appeal. However, given the importance of avoiding delays in resolving questions before the tribunal, minimizing the cost of judicial review, and respecting the expertise of the tribunal and its representative composition, the grounds for review should be restricted to questions of constitutional law, jurisdiction and procedural fairness. Similar restrictions, and for some of the same reasons, already attach to the review of decisions by administrative agencies operating in the area of labour law, including the Canada Labour Relations Board.

**Recommendation**

The Commission recommends that

**2.4.41**

Decisions of the tribunal be final and binding and not subject to review by the courts, except on constitutional grounds and for jurisdictional error or breach of the duty of fairness under paragraphs 18.1(4)(a) and (b) of the Federal Court Act.

**6.5 The Need for Public Education**

We have emphasized the need for public education about the role treaties played in the creation of Canada and about the rights and obligations they conferred on all peoples who share this land. The treaty processes and other measures recommended in this chapter will require not only the energetic participation of government but also, to be successful, understanding and acceptance by the general public and Aboriginal people. This may not be easy to achieve. Public opinion polls in the past few years have consistently shown broad sympathy for Aboriginal issues and concerns, but that support is not very deep. More recent events have brought about a hardening of attitudes toward Aboriginal issues in many parts of the country. This is true especially in rural areas, the northern parts of some provinces and urban areas that border some of the large southern reserves. This growing hostility can be traced in large part to recent negative publicity over land claims, Aboriginal hunting and fishing rights, and issues of taxation.

The current economic situation has also had an impact on public attitudes. Greater competition for government program funds has meant that moneys earmarked for land
claims settlements or other measures to increase the Aboriginal land and resource base are seen increasingly in zero-sum terms — as Aboriginal people win, the general society loses. The range of such opinions and the force with which they are expressed were evident in our hearings and in submissions made to us.

In response to such concerns, non-Aboriginal governments have been devoting more attention to consultations with the public on Aboriginal issues. In the case of the B.C. treaty process, for example, the parties have established a series of ‘side tables’ for municipalities and advocacy groups, which insist that their interests or those of the broader citizenry are not being represented. Government negotiators believe that active public involvement will speed resolution of the particular land claim or other issue by promoting the crucial ‘buy-in’ from the non-Aboriginal population. Commissioners certainly agree that for the long-term success of such initiatives, personal and community-level co-operation is essential. Mayor Barrie Conkin of North Battleford, Saskatchewan, expressed the frustration of many participants in our hearings when he noted that, with respect to land claims settlements and other Aboriginal issues, “federal and provincial governments have made promises the ordinary citizen at the grassroots level does not understand and does not feel part of”. As we will see, similar complaints are being made by members of Aboriginal communities.

Public consultation, then, is an absolute necessity for the success of the measures we recommend in this section. Such consultation needs to be carried out very carefully, however. In fact, unless it is coupled with a serious program of public education, it may actually slow down the resolution of Aboriginal grievances. Moreover, it could worsen, rather than improve, relations between Aboriginal and non-Aboriginal people. As we have seen throughout this chapter, a significant minority of Canadians — including many government officials — do not accept even the basic premises of current negotiations. On many issues, it is clear from the hearings and submissions that Aboriginal people and the general public do not share even common definitions — of conservation, for example. Moreover, it is apparent that many Canadians still subscribe to the views set out in the federal government’s 1969 white paper on Indian policy, which recommended the termination of treaties and the elimination of distinct legal status for Aboriginal peoples.

Throughout our report, we have rejected the premises on which the white paper was based and recommended a new relationship with Aboriginal peoples based on principles of mutual recognition, respect, sharing and responsibility. Nevertheless, these attitudes must be discussed openly as part of a public education process dealing with lands and resources issues. In particular, that discussion must highlight the fundamental relationship that Aboriginal people maintain with the land. We note, for example, that in light of recent confrontations in Ontario and British Columbia, the member of Parliament for Churchill, Elijah Harper, has convened a circle of Aboriginal and non-Aboriginal spiritual leaders to seek new ways of healing disputes over matters of lands and resources. It is our view that this kind of intercultural initiative helps restore an important spiritual dimension to a dialogue that, if it has existed at all, has been overly materialistic.

**The role of non-Aboriginal governments**
In general, non-Aboriginal governments have an obligation to develop and support policies of public education and discussion in connection with the treaty processes. Not only do Aboriginal governments currently lack the resources to do so, they would argue that federal, provincial and territorial governments bear full responsibility for the fact that so many citizens do not understand Aboriginal issues. However, provinces can argue that the federal government — given its constitutional responsibilities — should bear the cost of public education programs connected with land claims or other such negotiations. There is no reason that these programs should be treated differently from other public consultation exercises currently under way across the country. They are funded, depending on circumstance, by either or both orders of government.

Governments have a particular responsibility to educate their own employees about Aboriginal lands and resources issues. It should not be limited to explaining the implications for provincial or federal legislation of court decisions on Aboriginal rights. In many jurisdictions, police officers, court workers and other officials who deal regularly with Aboriginal people already receive cross-cultural awareness training. The same has not been true for government employees involved in areas of public lands and resources management — forestry, parks, fisheries and wildlife — where they interact regularly with Aboriginal people, often in an enforcement role.

Cross-cultural education and training is also important to the success of claims settlements or analogous agreements. It is one thing for government negotiators or other senior officials to bring back agreements for implementation. Government personnel responsible for implementing the provisions of the agreement also need to understand the concepts behind the agreements and to buy in to the resulting process. If not, shared management schemes that rely on such officials for technical and other support will fail.

**Aboriginal governments**

The issue of buy-in is also a concern for Aboriginal governments. In many instances, there has been a lack of awareness among community members with respect to the overall intent and provisions of lands and resources agreements negotiated with non-Aboriginal governments — something that on occasion has promoted community backlash. This makes the agreements themselves vulnerable at the ratification stage. The Dene-Métis land claims agreement, for example, was rejected in 1990 by Dene and Métis general assemblies. The first two agreements negotiated by the Council for Yukon Indians met the same fate. In southwestern Ontario, at the Chippewa Thames reserve, ballot boxes were stolen and destroyed to annul a vote on a specific land claims settlement. In northeastern Ontario, in 1994, the Temagami First Nation — an Indian Act band — rejected an agreement in principle with the provincial government that had been negotiated by the Teme-Augama Anishinabai, which represents status and non-status people.

This issue has also arisen during the development and negotiation stages of agreements. For instance, tribal councils and other political organizations involved in negotiations on community-based self-government, land claims and other matters have often found that,
despite their best efforts, community understanding is largely absent. The result, in some cases at least, is that individual First Nations have withdrawn from involvement. The basic problem is that the negotiators sometimes get ahead of the community and there is slippage, resulting in further delays, ambivalence or schism. At the level of the nation, general awareness and co-ordination may be lacking in terms of concrete action or the ability to deliver. As we concluded in Chapter 3, Aboriginal governments require the opportunity and capacity to educate their citizens and renew their institutions.

The issue of community acceptance or buy-in applies to both sides of the treaty negotiation process. Whether treaties are to be made, implemented or renewed, there must be mutual respect for the terms of the agreement. Negotiators need to pay equal attention to the internal renewal that must take place within and among Aboriginal communities as well as to accountability and public education.

The language of agreements

One immediate and concrete step that can be taken toward public education is to improve the language of treaty documents and other such agreements. As we saw earlier in this chapter, treaty documents are overly legalistic, filled with minutiae and virtually incomprehensible to the lay reader — not to mention inaccessible to the many Aboriginal people whose principal language of communication is an Aboriginal one. We endorse the statement of Alvin C. Hamilton in his recent fact finder’s report to the minister of Indian affairs: “Future treaties must be able to provide certainty for the parties, and for those affected by them, and to do so they must be understandable”. We encourage the drafters of agreements to think of their eventual audience and to bring in professional writers, if necessary, to aid in the production of clear, comprehensible documents.

Aboriginal outreach

While Aboriginal people individually are not responsible for public misunderstanding of lands and resources issues, they can still play a role in educating their neighbours. This involvement can take many forms. Already a number of Aboriginal organizations have outreach activities aimed at reaching local and regional communities, particularly in British Columbia, Quebec and other provinces. Many Aboriginal organizations provide speakers on Aboriginal issues to schools, service clubs, chambers of commerce and other community organizations.

Across the country, schools, libraries and local historical societies are searching for materials on Aboriginal history and culture. What they find is most often too general or largely inaccurate. What they want is material that relates to Aboriginal people in their own area. Many Canadians do not know whether where they live is covered by treaty, or if they do, they have no real idea of the treaty’s contents or why it was made.

Many First Nations, tribal councils, and provincial and national Aboriginal organizations have reports and other material, much of it unpublished, bearing on tribal and local history and culture. A great deal of it is the product of land claims research over the past
20 years. While sensitive information could be protected, an outreach program to disseminate this information, particularly in local and regional schools and libraries, could have a long-term impact on public opinion.

If nothing else, this material would help dispel the misconception in many parts of Canada that land claims are a new phenomenon, and it would provide a partial rejoinder to the argument that historical wrongs are not the responsibility of present generations. Non-Aboriginal people should know that, in many cases, it was their own parents and grandparents — not distant government officials — who benefited directly from the wrongful alienation of Aboriginal lands and resources.

**Government accountability**

Public education is not a top-down exercise. If the constitutional talks of the 1980s proved nothing else, they proved that Canadians are increasingly suspicious of their governments. This view was stated emphatically at our hearings. Indeed, far from regarding government negotiators as their representatives, many residents of rural and northern Canada see government — along with environmentalists and other ‘outsiders’ — as a disruptive influence on their long-standing relations with local Aboriginal people. Aboriginal people do not share wholeheartedly in this rosy view of a common past, but they can find themselves the victims of a government’s urge to do the right thing. Long after the negotiators have left, it is they who must continue to live with their non-Aboriginal neighbours.

If public education is to be an important part of treaty processes, there are advantages to having that function performed by someone other than the immediate parties to negotiations. This need not jeopardize the principle of government-to-government negotiations. Outside facilitators have been employed already in a number of claims negotiations, and local communities include many respected individuals capable of playing a similar role. Such people could be responsible for disseminating information about the specific issues involved in negotiations — including any research — and for generating discussion of the broader principles of treaty and Aboriginal rights.

It is important that public information be shared and that it be perceived as coming from a neutral source. Ironically, government-commissioned research is often treated with suspicion by Aboriginal and non-Aboriginal people alike. For example, the ad hoc committee for the defence of Algonquin Park, which is opposing current negotiations with the Algonquin of Golden Lake, has been refused access to provincial and some federal research reports on the claim and related matters. As a result, the committee has been carrying out its own research and publicizing the results in a series of newsletters.

For genuine healing and reconciliation between Aboriginal and non-Aboriginal people, therefore, treaty processes must encourage dialogue, and the contents of negotiations must be explained comprehensively and clearly.

**Recommendation**
The Commission recommends that

2.4.42

Public education be a major part of treaty processes and of the mandates of the treaty commissions and Aboriginal Lands and Treaties Tribunal, in keeping with the following principles:

(a) federal and provincial governments keep the public fully informed about the nature and scope of negotiations with Aboriginal peoples and not unduly restrict the release of internal reports and other research material;

(b) Aboriginal parties participate in educating the general public and ensure that their members fully understand the nature and scope of their negotiations with provincial and federal governments;

(c) the federal government ensure that negotiation processes have sufficient funding for public education; and

(d) treaties and similar documents be written in clear and understandable language.

7. Securing an Adequate Land and Resource Base for Aboriginal Nations

Only substantive change, represented by the new treaty processes and the Aboriginal Lands and Treaties Tribunal, can fully resolve outstanding issues and provide the land and resource base that Aboriginal nations require for self-government and self-reliance. At the same time, we recognize the difference between long-term and short-term solutions. Some of the measures we have recommended, especially those requiring new or amended legislation, will take time. In the interim, there are many things that non-Aboriginal governments can do — and are already beginning to do — within the existing legal and policy framework that would provide a better situation for Aboriginal people. In this section, we outline a number of such transitional measures, with recommendations on their implementation.

First, we discuss broad questions of land reform, principally for First Nations. We begin with the urgent need for an interim specific claims protocol, which will last until the Aboriginal Lands and Treaties Tribunal is established. Next, we suggest improvements to several of the existing related processes by which First Nations can add to their land base. Because of the division of constitutional powers, the federal government will have primary responsibility in this area, although it will necessarily involve negotiations with provincial, territorial and, in some cases, municipal governments where their interests are involved.

Second, we cover general issues of improved access to natural resources on public lands for all Aboriginal peoples, as well as tenure arrangements that would allow more space
for Aboriginal title and jurisdiction on-reserve (in the case of First Nations) and on Crown lands.

Third, we examine co-jurisdiction and co-management arrangements, in the overall context of provincial land and resource management policies. While all questions involving natural resources will require the consent and active involvement of provincial and territorial governments, we recommend a much greater level of active participation on the part of the federal government.

The word ‘interim’, as we use it throughout this section, does not always mean temporary. Some of the measures we recommend, such as an interim specific claims protocol, are clearly transitional, and many short-term changes to provincial land and resource management policies and regulations will undoubtedly be embodied in future agreements with Aboriginal nations. However, other measures, particularly those touching on questions of natural resource allocation, are immediate and can be implemented regardless of whether they eventually form part of the negotiation process for new or renewed treaties.

We have been critical of past action (or in some cases, inaction) on the part of all levels of government. But we also wish to recognize instances where there has been significant progress, whether in Aboriginal access to resources, in self-regulation or in co-management ventures. Much of this movement has come from the provinces and territories, often with little or no co-operation from the federal government and at times in the face of vigorous opposition. Such achievements reinforce our hope and expectation of energetic involvement on the part of all governments.

7.1 Interim Steps: Expanding the First Nations Land Base

The linked processes of treaty making and treaty implementation and renewal provide the best route to securing an adequate land base for all Aboriginal peoples. For First Nations people, however, there are already several means by which they can add to their existing land base. These include the settlement of specific claims or past grievances and unfulfilled land entitlement under previous treaties or agreements; compensatory land provisions (such as the Manitoba Northern Flood Agreement); and the purchase of land on the open market. Other measures would also assist in providing more land for Aboriginal people, such as the return of unsold surrendered lands and of lands expropriated previously.

These are all practical means of providing an expanded land base for First Nations communities. Moreover, they can all be implemented without prejudice to future treaty negotiations. The needs are immediate, and Commissioners believe that they deserve to be pursued. However, in each case, practical problems make it difficult to reach or implement agreements. These problems are set out below.

An interim specific-claims protocol
Only an independent body with a legislative basis, such as the Aboriginal Lands and Treaties Tribunal, can remove the current conflict of interest created when the federal government serves as funding agent, defence counsel, judge and jury in matters involving its own past conduct. Until the tribunal has been established, however, the current specific claims policy must be amended to introduce more fairness in its operations and to speed up claims resolution. Our discussion follows the lines suggested by the proceedings of the joint AFN-federal government working group on claims and the neutral draft of recommendations.384

With respect to criteria, the current specific claims policy states that the federal government will consider claims based on non-fulfilment of treaty terms. In practice, however, the government does not accept grievances relating to the interpretation of treaties. Harvesting rights are a prominent example — as in the government’s recent refusal to consider claims of the Athabasca Denesuline to Aboriginal or treaty harvesting rights north of the 60th parallel.385 We believe that the current policy must be open to treaty-based claims.

With respect to compensation, we draw two conclusions. We observed that the guidelines that federal negotiators apply in settling claims are inconsistent, arbitrary and not in keeping with the fiduciary principles set out in Guerin and other Supreme Court decisions. The main purpose of these guidelines is apparently to limit the financial obligations of the federal government. In effect, claimants are being offered compensation far less than the courts would likely award, with the result that the policy is no longer a viable alternative to litigation. The specific claims policy itself does not need to be revised to eliminate this inequity; but the compensation guidelines should be amended or interpreted to permit the application of fiduciary principles of legal obligation and compensation.

In almost all instances, the federal government also offers only cash compensation to settle claims. For the reasons set out in this chapter, we believe the primary purpose of claims resolution should be to provide Aboriginal nations with greater access to and control over their traditional territories. Cash compensation should be paid only if full restitution is impossible or impracticable or not desired by the nation in question.

The federal government should respond promptly to the recommendations of the Indian Claims Commission, which currently serves as a forum for bringing forward rejected claims. We agree with the claims commission that government delays and inaction are unconscionable; they are slowing the process of claims resolution and undermining the commission’s effectiveness.386 We also believe that the federal government should improve access to the claims commission and to the expertise the commission has developed in cross-cultural mediation and negotiation.

**Recommendation**

The Commission recommends that
The federal government enter into an interim specific claims protocol with the Assembly of First Nations embodying, at a minimum, the following changes to current policy:

(a) the scope of the specific claims policy be expanded to include treaty-based claims;

(b) the definition of ‘lawful obligation’ and the compensation guidelines contained in the policy embody fiduciary principles, in keeping with Supreme Court decisions on government’s obligations to Aboriginal peoples;

(c) where a claim involves the loss of land, the government of Canada use all efforts to provide equivalent land in compensation; only if restitution is impossible, or not desired by the First Nation, should claims be settled in cash;

(d) to expedite claims, the government of Canada provide significant additional resources for funding, negotiation and resolution of claims;

(e) the government of Canada improve access to the Indian Claims Commission and other dispute resolution mechanisms as a means of addressing interpretations of the specific claims policy, including submission to mediation and arbitration if requested by claimants; and

(f) the government of Canada respond to recommendations of the Indian Claims Commission within 90 days of receipt, and where it disagrees with such a recommendation, give specific written reasons.

**Fulfilment of treaty land entitlements**

The general question of unfulfilled entitlement to reserve lands will most properly be dealt with under the new treaty implementation and renewal process, with the Aboriginal Lands and Treaties Tribunal serving as the forum for unresolved issues. But many First Nations (as in Saskatchewan) are already involved in processes dealing with treaty land entitlement. The parties may wish to continue with those processes while the Commission’s general recommendations are being implemented.

Many treaties negotiated with Aboriginal people provided for the selection of reserve lands. Until Confederation, these lands were simply exempted from the general description of lands covered by treaty; later, they were set apart for Aboriginal beneficiaries out of the totality of lands covered by the treaties.

The post-Confederation numbered treaties — covering much of western and northwestern Canada (see Figure 4.8) — provided specific formulae for calculating the quantum of reserve lands. Depending on the treaty, the signatory tribes or bands were to choose reserve lands of between 160 and 640 acres per family of five.
As several of the treaty case studies conducted for the Commission showed, not all of the contemplated reserves were actually created. Of those that were created, many First Nations communities argue that the population of signatory bands was calculated incorrectly, so that the reserves were not the proper size. These issues currently form the subject of specific land claims in various parts of northern and western Canada.

Parallel to the specific claims process, and in most instances tied directly to it, there have been various attempts to resolve questions of outstanding treaty land entitlement. After a failed attempt, in the 1970s, to resolve outstanding issues of entitlement in Saskatchewan, a treaty commission was established in 1989 to advise the department of Indian affairs and the Saskatchewan Indian Federation on outstanding treaty issues. The commission turned its attention to the entitlement issue and issued a report in 1990. In 1982, the government of Manitoba had created its own treaty land entitlement commission to address — from a provincial perspective — the claims of 27 Indian bands that signed various of the numbered treaties.

The findings of the two commissions were quite similar, dealing with the interests of third parties, loss of municipal tax assessment, and the categories of land that should be available for selection. Although subsequent negotiations have encountered many difficulties, some agreements have now been reached in Saskatchewan (though not in Manitoba, where negotiations were inconclusive) that will see money handed over to Aboriginal people for the purchase of land on the open market. That process will be under way for many years.

One general problem affecting all unfulfilled land entitlement discussions is the issue of the appropriate amount of acreage to be set aside on a per capita basis for First Nations people under treaty terms. The written texts of the numbered treaties are silent regarding the date at which the base population is to be enumerated for the purposes of determining reserve land quantum. Canada has generally interpreted the ambiguity to mean that lands were to be selected based on total membership at the time of treaty, or at the time of survey following reserve selection.

For their part, First Nations people disagree passionately with the specific land quantum set out in the treaty texts, insisting that this was not their understanding of the treaty negotiations. Reserves, they say, were intended to provide a basis for their self-sufficiency in the future. As a result, they have consistently argued that modern land entitlement should be calculated on the basis of current population figures. The so-called ‘Saskatchewan formula’, which was to have applied in both Saskatchewan and Manitoba, represented a compromise between these two positions. Land quantums were to be divided up according to treaty band populations as of 31 December 1976. Canada has since backed away from this formula (as has Manitoba), arguing once again that its ‘lawful obligation’ is confined to population at the date of first survey. To do otherwise, say federal officials, would be unfair to bands that received their entitlements long ago.
Federal policy on land entitlement has never been consistent. New reserves have been set apart on many occasions since the 1930s with, in several instances, the quantum of reserve land being calculated on the basis of contemporary population figures, not those at the time of the treaty or first survey. This makes it difficult for Canada to argue that the strict wording of the treaty texts prevents the same being done again.

First Nations and their political organizations point to the rate of natural increase in on-reserve population as a significant reason for using modern population figures in calculating quantums. They also argue that Bill C-31 registrants have enlarged many band populations since the 1976 formula was established. We believe the Aboriginal position makes good sense. It acknowledges the current needs of First Nations communities and avoids the expense and associated delay that results from arguing over historical population figures.

It is extremely difficult to establish historical population figures. Except in rare cases, there are no accurate government census records for communities in the period before treaty, and the registers of Indian missions, while informative, are based on religious affiliation, not group identity. Moreover, the penetration of Christianity among northern and western First Nations was far from comprehensive before the early twentieth century.

The department of Indian affairs bases its calculations for entitlement purposes on treaty pay lists. But those pay lists, particularly in the early years after treaty, are difficult to interpret. Because most Indian agents did not speak the languages of their clients, they had trouble rendering Aboriginal names into English. Especially in northern regions, some treaty beneficiaries either refused to take payment or did not show up for annuities until many years later. Agents also complained of what they saw as frequent inter-band movement, with members of the same family showing up on different pay lists in the same or subsequent years. In fact, what this showed was that treaty pay lists did not necessarily represent actual group identity.\footnote{388}

Federal calculations also ignore the impact of the \textit{Indian Act} on band membership lists. It is well known that the act excluded women who married non-Indians, along with their descendants. In addition, if the date of first survey, rather than of treaty signing, is used, band numbers in some instances show a decline. Numbers could also drop because of the effects of epidemic diseases such as measles and influenza before 1920.

There are also broader issues involved in any discussion of treaty land entitlement. The case studies conducted for the Commission demonstrated that the treaty texts are open to interpretation on more than just the issue of the date at which land quantums were to be calculated. For example, while the reserves on Lake Huron and Lake Superior under the Robinson treaties of 1850 are defined in terms of miles, the Ojibwa participants believed that they were reserving lands on the basis of French leagues (one league equals approximately 2.5 miles), the only European unit of measure with which they were familiar.\footnote{389}
It should not be assumed, therefore, that those who participated in later agreements, such as the northern Cree and Dene who took part in Treaty 10, even understood the meaning of units of measure such as an acre or a square mile. Indeed, in most of the northern treaties, reserves were not surveyed and set apart until many years after the agreements were signed, if at all. Many of the Treaty 8 reserves in northern Saskatchewan, Alberta and British Columbia, for example, were not created until the 1950s and ‘60s, more than half a century after the treaty was signed.

However, the Aboriginal position on treaty entitlement leaves one important issue unaddressed. As the Federation of Saskatchewan Municipalities points out, almost two-thirds of Saskatchewan First Nations people, including long-time band members and Bill C-31 registrants, now live in urban areas. Should urban band members be part of the calculation of treaty land entitlement, particularly when it is unlikely that they will ever return to live on-reserve? It could be argued that it may be more appropriate to use their numbers when calculating new treaty land entitlement in urban areas.

Canada, as well as some of the provinces, regards the entitlement process as a particular kind of specific claim that will provide a final solution to the treaty issue. But First Nations object that government is once again trying to impose its own agenda. They believe that treaty land entitlement is simply throwing money at a deeper problem. Unless the true spirit and intent of the treaties are recognized and implemented, it is clear that many of them will not accept the process as resolving the issue. This is an excellent example of why a long-term process of treaty implementation and renewal is preferable to any short-term solution on treaty land entitlement.

Nation building must occur before nations enter into the revised treaty process. Treaty entitlement will be an important part of that process, which should be as inclusive as possible.

**Recommendation**

The Commission recommends that

2.4.44

The treaty land entitlement process be conducted as follows:

(a) the amount of land owing under treaty be calculated on the basis of population figures as of the date new negotiations begin;

(b) those population figures include urban residents, Bill C-31 beneficiaries and non-status Indians; and

(c) the federal government negotiate agreements with the provinces stipulating that a full range of land (including lands of value) be available for treaty land entitlement selection.
Purchase of land

Many First Nations communities, particularly those in heavily populated regions of the country, have been attempting to increase their reserve land base by purchasing property on the open market. Since most Canadians broadly support private property rights, one would expect little opposition to such a practice. The Commission heard, for example, from Chief Gerald Beaucage of the Nipissing First Nation near North Bay, Ontario, that his community has been using a variety of revenue sources, including the proceeds of specific land claims settlements, to buy bush lots and farm land in the townships surrounding their reserve. These townships were originally part of their reserve, having been surrendered in the early part of this century.

In this particular case, there has been little or no controversy. Much of the land is of marginal value to the seller, and the properties are being acquired at fair market value. Thus, the principle of ‘willing seller, willing buyer’ can be seen to apply. Nevertheless, in many other localities, such purchases of private land have sparked protests.

In October 1993, the Township of Onondaga, which borders the large Six Nations reserve in southern Ontario, passed a resolution protesting any First Nation purchases of land outside reserve boundaries. While recognizing the right of all Canadians to buy and own land, the resolution opposes the right of Aboriginal people to purchase private property and have it become part of a reserve. The stated reason is the potential loss of municipal tax assessment and the effect of such loss on school funding and the provision of municipal services. The township resolution demands that the federal government compensate municipalities for the loss of tax base and directly fund the continued provision of services to the reserve. It petitions the government to defer all decisions regarding land claims and the addition of what it calls “non-native lands” to reserves until federal policy on such matters has been reviewed by all Canadians.

Having circulated the resolution to other municipalities in Ontario, the township attracted widespread support, particularly from municipalities affected by actual or potential land claims. The controversy could therefore have an impact on current land negotiations, not only with First Nations in Ontario, but elsewhere across Canada. According to a brief to the Commission from the union of Quebec municipalities, 80 municipalities in Quebec either border on or are close to an Aboriginal community. The number of municipalities potentially affected in provinces such as Saskatchewan and British Columbia is even larger.

Ironically, the apparent source of the Onondaga township grievance is not reserve status itself, but a section of the Ontario Assessment Act that exempts First Nations property from municipal taxes. The province of Ontario argues that the federal government should invoke the provisions of its 1991 Additions to Reserve policy whenever a First Nation purchases the land, not just when it first applies for reserve status.

According to that policy, Canada will not normally grant reserve status to lands within municipal boundaries until the First Nation and the affected municipality have reached a
formal agreement on areas of concern. These areas include loss of tax assessment; provision of and payment for municipal services; the application, enforcement or harmonization of by-laws; and land-use planning.393

We certainly favour negotiations between Aboriginal people and other interested parties. In their submission, the Federation of Canadian Municipalities recommended that joint committees be formed with representation from municipalities and neighbouring Aboriginal governments to deal with issues of common concern.394 This is an excellent suggestion, which we fully support.

While it is essential that municipal interests be considered in issues of reserve expansion, it was surely not the intent of the federal policy to give municipalities a veto over reserve creation. This would prevent a First Nation from obtaining reserve status for any newly acquired lands.

It is also important to point out that Aboriginal people have been purchasing land for purposes other than reserve land expansion. Inuvialuit, for example, have been using the money from their land claims settlement to buy property in urban areas as an investment. In that sense, they are no different from any other institutional investor. The additions to reserve policy has no relevance to this type of activity.

**Recommendation**

The Commission recommends that

**2.4.45**

Land purchases be conducted as follows:

(a) the federal government set up a land acquisition fund to enable all Aboriginal peoples (First Nations, Inuit and Métis) to purchase land on the open market;

(b) the basic principles of ‘willing seller, willing buyer’ apply to all land purchases;

(c) joint committees, with representatives from municipalities and neighbouring Aboriginal governments, be formed to deal with issues of common concern;

(d) the federal government do its utmost to encourage the creation of such committees;

(e) the federal government clarify the 1991 additions to reserves policy to ensure that the process of consultation with municipalities does not give them a veto over whether purchased lands are given reserve status; and

(f) the federal government compensate municipalities for the loss of tax assessment for a fixed sum or specific term (not an indefinite period), if the municipality can show that such loss would result from the transfer of the purchased lands to reserve status.
Unsold surrendered lands

Since the mid-nineteenth century, First Nations in many parts of Canada have surrendered lands conditionally to the federal Crown (often under protest) so that such lands could be sold for their benefit. A surprising quantity of those lands were never sold, and they continue to occupy a curious limbo in the federal land registry system. Though they are no longer reserve lands, they remain ‘Indian lands’ as defined in the Indian Act, and their disposal is handled by the department of Indian affairs. The department does not actively manage them, however. While they are not provincial Crown lands, local non-Aboriginal residents generally treat them as such — and have been known to raise objections when the issue of returning such lands to First Nations control is broached.

The map of present and past reserves on Lake Huron is a good illustration of unsold surrendered lands (see Figure 4.7). At Sault Ste. Marie, Garden River and Thessalon, for example, the original reserve area is outlined in grey around the much smaller contemporary reserves. Though these lands were surrendered long ago, half the grey area or more remains unsold to this day.

The return of such lands would be an excellent way to provide for community expansion, particularly since these lands have remained legally under federal jurisdiction and control. Considerable progress is now being made in some regions. Figure 4.7 shows a large area of surrendered land around the present reserve on Lake Nipissing. On 30 March 1995 the governments of Canada and Ontario signed an agreement with the Nipissing First Nation community to return 13,300 hectares of unsold land in Beaucage and Commanda townships (the residue of 22,840 hectares originally surrendered for sale in 1904 and 1907) to community control. The agreement maintains easements for transportation and utility purposes and protects the access rights of private landowners, as well as the continued public use of waterways that pass through the lands in question.395

Such protection for existing third-party interests is clearly an important consideration in the return of unsold surrendered lands. The terms of the Nipissing agreement conform to the general principles for the treatment of such interests. We note, however, that the Nipissing First Nation community first approached the federal government in 1973 about securing the return of these unsold surrendered reserve lands.396 Sadly, such delays have plagued the claims resolution process.

Recommendation

The Commission recommends that

2.4.46

Unsold surrendered lands be dealt with as follows:

(a) the Department of Indian Affairs and Northern Development compile an inventory of all remaining unsold surrendered lands in the departmental land registry;
(b) unsold surrendered lands be returned to the community that originally surrendered them;

(c) First Nations have the option of accepting alternative lands or financial compensation instead of the lands originally surrendered but not be compelled to accept either; and

(d) governments negotiate protection of third-party interests affected by the return of unsold surrendered lands, such as continued use of waterways and rights of access to private lands.

Return of expropriated lands

Portions of reserves have been surrendered for a variety of private or public purposes, including fur trade posts, Christian missions, police stations and utility operations. Reserves have also, like private lands, been subject to expropriation. During the railway boom of the past century, many reserves were bisected by railway rights-of-way, and the lands for these were expropriated by the Crown (despite protests from First Nations). Another example — one that attracted significant notice in 1995 — involved the expropriation in 1942, under the War Measures Act, of the Stoney Point reserve on Lake Huron for a military base and weapons range.397

In other instances, it was not reserve lands themselves, but lands that Aboriginal peoples occupied and used for traditional harvesting that were expropriated. Thus, in the early 1950s, an area of 11,630 square kilometres, straddling the Alberta-Saskatchewan border, was set apart by federal/provincial agreement as the Primrose Lake Air Weapons Range. First Nations and Métis people were forbidden to carry on traditional activities (such as hunting, fishing and trapping) within the range. Although some First Nations people did receive payment for loss of traplines, the Indian Claims Commission (ICC) recently concluded that payments were completely inadequate to compensate for the loss of livelihood. The ICC found that the most productive harvesting lands of the Canoe Lake and Cold Lake First Nation communities had been taken up by the Primrose Lake range, with devastating consequences for their traditional economy.398

There are obvious policy implications when the original purpose for which lands were taken no longer exists. For example, CP and CN rail have stated their intention to abandon considerable amounts of track in eastern Canada — some of which runs through reserves.

In principle, the Commission believes that Aboriginal people should benefit from any disposal of rights to such land. In the case of the Stoney Point weapons range, which is no longer in use, the departments of national defence and Indian affairs did reach a tentative agreement with the nearby Kettle Point First Nation community, which had absorbed the former Stoney Point band following the original expropriation. That agreement was subsequently rejected, in part because of the perceived inadequacy of the financial settlement (as well as the fact that it did not provide for return of the land) and
in part because descendants of the Stoney Point people argued that they alone should have been the beneficiaries of the agreement.

The difficulties surrounding the Stoney Point weapons range illustrate some of the problems with claims policy discussed earlier in this chapter. We believe that it is inappropriate for the owner — the federal Crown — unilaterally to establish the value of previously expropriated lands or the conditions of their return. At the very least, such matters should be resolved by negotiation. If the parties are unable to reach agreement, the Aboriginal Lands and Treaties Tribunal would be an ideal body to make such a determination.

There are other difficulties involved in the return of previously expropriated lands, such as clean-up and environmental monitoring and the associated costs. These should not be borne by the Aboriginal community affected. They can, however, represent an opportunity. In the case of a former weapons dump on the Sarcee reserve in Alberta, for example, Tsuut’ina Nation members have been trained in ordnance clean-up by retired defence department personnel, and they have been able to market this expertise elsewhere through a company, Wolf Floats, established for the purpose.

**Recommendation**

The Commission recommends that

2.4.47

If reserve or community lands were expropriated by or surrendered to the Crown for a public purpose and the original purpose no longer exists, the lands be dealt with as follows:

(a) the land revert to the First Nations communities in question;

(b) if the expropriation was for the benefit of a third party (for example, a railway), the First Nations communities have the right of first refusal on such lands;

(c) any costs of acquisition of these lands be negotiated between the Crown and the First Nation, depending on the compensation given the First Nation community when the land was first acquired;

(d) if the land was held by the Crown, the costs associated with clean-up and environmental monitoring be borne by the government department or agency that controlled the lands;

(e) if the land was held by a third party, the costs associated with clean-up and environmental monitoring be borne jointly by the Crown and the third party;
(f) if an Aboriginal community does not wish the return of expropriated lands because of environmental damage or other reasons, they receive other lands in compensation or financial compensation equivalent to fair market value; and

(g) the content of such compensation package be determined by negotiation or, failing that, by the Aboriginal Lands and Treaties Tribunal.

7.2 Interim Steps: Improving Access to Natural Resources

The ability of First Nations people to derive a living from natural resources on their reserves has been hampered by federal policies. Provincial and territorial laws and policies have made it difficult for First Nations and Métis (and, in some regions, Inuit) to secure allocations of natural resources outside their reserves or community lands. In numerous instances — such as the Ojibwa commercial sturgeon fishery on Lake of the Woods — resources once used by Aboriginal communities were in effect confiscated by government and awarded to non-Aboriginal people.

Increasing the Aboriginal share of natural resources will therefore require direct action by governments at all levels. Spelling out Aboriginal resource rights in the context of treaties will obviously provide the best long-term solution. But until that process is completed, governments should take interim steps to redress the balance. Some jurisdictions (such as British Columbia and Saskatchewan) are already improving First Nations’ access to natural resources, and their approach could provide a model for other regions of the country.

Commissioners believe that it is in the federal government’s interest to assist in the economic and cultural development of First Nations through opportunities in the natural resources sector. As a general principle, therefore, we encourage governments to rethink their overall allocation policies and licensing systems. As noted earlier, natural resource regulation regimes have historically favoured the maximization of production, which is a major reason that Aboriginal peoples were excluded from so many resource sectors. Even today, licensing systems continue to be based on economies of scale, on the assumption that the largest producers (whether in forestry, fisheries or other resource sectors) are the most efficient. But a new understanding of the concept of resource depletion, coupled with broad acceptance of the principles of sustainable development, means that old assumptions about efficiency may no longer be valid. The collapse of the Atlantic fishery is an excellent case in point. Changing the system of resource allocation to benefit Aboriginal harvesters (as well as other small producers in all regions of Canada) is not only a just solution, but also one that can make long-term environmental and economic sense.

We also believe that, as part of the law of fiduciary duty, Canada has an obligation to protect the exercise of traditional Aboriginal activities (hunting, fishing, trapping and gathering of medicinal and other plants) on Crown lands. There is a strong link, for example, between resource activities such as industrial forestry and negative effects on traditional activities. While some First Nations have treaties that guarantee certain
harvesting rights, many do not — and all First Nations have had difficulty securing recognition of their broader Aboriginal rights. As for Métis people, and Inuit in Labrador, there has been no recognition of their right to pursue traditional harvesting activities at all. Similar standards that apply across the country would remove such inequities as well as provide greater certainty for provincial and territorial governments until the new treaty processes have been implemented.

We therefore urge the federal government to seek the agreement of the provinces and territories in enacting a national code to permit traditional Aboriginal activities on Crown lands, which the provinces and territories would enact as part of their land and resource management law. Such a code and its contents could be an agenda item for an early meeting of federal and provincial ministers responsible for natural resources and public lands, following publication of this report.

Next, we examine other measures to increase Aboriginal access to and control over resources and help them gain a proper share in resource revenues. Future treaty negotiations will likely supplant or incorporate many of our recommendations. In some instances, however, we offer general observations to serve as a guide for negotiations.

**Recommendation**

The Commission recommends that

2.4.48

With respect to the general issue of improving Aboriginal access to natural resources on Crown land:

(a) the federal government seek the co-operation of provincial and territorial governments in drafting a national code of principles to recognize and affirm the continued exercise of traditional Aboriginal activities (hunting, fishing, trapping and gathering of medicinal and other plants) on Crown lands; and

(b) the provinces and territories amend relevant legislation to incorporate such a code.

**Forest resources**

In the mid-north, as well as in pockets of southern Canada, participation in the forest industry shows great potential for increasing Aboriginal self-sufficiency. Most reserves outside the prairie belt and the far north have at least some forest cover, and in the mid-north, reserves and settlements are surrounded by forested Crown land. But improving the Aboriginal share of forest resources will require better care of forests on reserves as well as changes in tenure systems for Crown forests.

Reserve forests
For much of the past century, the fate of renewable resources on reserve lands has been a dismal one. Most reserves in eastern Canada were stripped of their timber for the sake of short-term employment or a modest increase in band funds. Farsighted leaders such as Chief Dokis, of the French River area in Ontario, were subjected to continuous pressure from timber interests and government officials if they tried to slow down exploitation and conserve valuable resources on reserves.

Until quite recently, little forest management expertise was available to First Nations through the department of Indian affairs. There were few attempts at artificial regeneration and, on most reserves, natural regeneration has been only partially successful. Forested lands on reserves continue to require major restoration efforts. According to a 1994 federal report on reserve forests in Nova Scotia, woodlots are in poor condition in places where the stands are reasonably accessible.

Only in the past decade has there been any real change. A number of First Nations have participated in the Indian forest lands program, a component of federal/provincial forest resource development agreements (FRDA). Unfortunately, there have been no similar programs for Métis people. The program has provided for some forest inventories, management plans and reforestation of reserve forests, as well as limited training and practical work opportunities for First Nations workers in the forest industry. In Nova Scotia, about $200,000 was being provided annually to the Confederacy of Mainland Micmacs to encourage forest management on reserves owned by 12 Nova Scotia First Nations. Under the Indian forestry development program in northwestern Ontario, for example, 1050 hectares of reserve land had been planted and tended by 1990, 10 management plans prepared and almost 50 person-years of employment created for community members. The program was directed by representatives of three tribal councils in the area served by the Grand Council, Treaty 3.

Although there has been general satisfaction with the Indian forest lands program, some Aboriginal groups, notably the National Aboriginal Forestry Association in its submission to the Commission, have criticized the program’s focus on timber production. It should be modified, they state, to reflect and integrate the traditional ecological knowledge and resource values of Aboriginal communities.

In his November 1992 report to Parliament, Auditor General Denis Desautels noted that overall federal support, even with FRDA, has been inadequate to meet the reforestation requirements of Indian reserves or generally accepted standards of forest management. He also pointed out that the regulations governing forestry activities on Indian lands had not been changed in 50 years. Yet the need for proper forest management on reserves has never been greater. As provinces respond to public criticism of forest management practices by tightening up their legislation (as in Ontario’s new Crown Forest Sustainability Act), the overall supply of wood fibre from Crown lands is diminishing. Particularly in British Columbia and Ontario (where the laws are toughest), mills have been actively seeking alternative sources of wood from adjacent provinces and private lands. In Ontario alone, the price paid for wood from private land has quadrupled since the new act was passed and could go much higher.
To the forest industry, reserves are, in effect, private lands; they have therefore been subject to the same kinds of development pressure. In Alberta, in a well-publicized incident in the spring of 1995, the Nakoda (Stoney) First Nation at Morley sold much of its reserve timber to a mill in neighbouring British Columbia. Their chief was unapologetic. His people, he said, felt they had no alternative; the price was right, and the reserve had no other resources of value.

In early 1993, the federal government announced that as a cost-saving measure, it would no longer participate in federal/provincial forest resource development agreements. As those agreements expire — as the Canada-Nova Scotia agreement did on 31 March 1995 — they are not being renewed, which means that the Indian forest lands programs are disappearing along with them. Commissioners remind the department of Indian affairs and the department of natural resources that Canada has a fiduciary obligation to see that Indian lands are managed for the benefit of First Nations. That obligation includes stewardship of reserve forests.

Recommendation

The Commission recommends that

2.4.49

With respect to forest resources on reserves, the federal government take the following steps:

(a) immediately provide adequate funding to complete forest inventories, management plans and reforestation of Indian lands;

(b) ensure that adequate forest management expertise is available to First Nations;

(c) consult with Aboriginal governments to develop a joint policy statement delineating their respective responsibilities in relation to Indian reserve forests;

(d) develop an operating plan to implement its own responsibilities as defined through the joint policy development process;

(e) continue the Indian forest lands program, but modify its objectives to reflect and integrate traditional knowledge and the resource values of First Nations communities with objectives of timber production; and

(f) in keeping with the goal of Aboriginal nation building, provide for the delivery of the Indian forest lands program by First Nations organizations (as has been the case with the Treaty 3 region of northwestern Ontario).

7.2 Interim Steps: Improving Access to Natural Resources
The ability of First Nations people to derive a living from natural resources on their reserves has been hampered by federal policies. Provincial and territorial laws and policies have made it difficult for First Nations and Métis (and, in some regions, Inuit) to secure allocations of natural resources outside their reserves or community lands. In numerous instances — such as the Ojibwa commercial sturgeon fishery on Lake of the Woods — resources once used by Aboriginal communities were in effect confiscated by government and awarded to non-Aboriginal people.

Increasing the Aboriginal share of natural resources will therefore require direct action by governments at all levels. Spelling out Aboriginal resource rights in the context of treaties will obviously provide the best long-term solution. But until that process is completed, governments should take interim steps to redress the balance. Some jurisdictions (such as British Columbia and Saskatchewan) are already improving First Nations’ access to natural resources, and their approach could provide a model for other regions of the country.

Commissioners believe that it is in the federal government’s interest to assist in the economic and cultural development of First Nations through opportunities in the natural resources sector. As a general principle, therefore, we encourage governments to rethink their overall allocation policies and licensing systems. As noted earlier, natural resource regulation regimes have historically favoured the maximization of production, which is a major reason that Aboriginal peoples were excluded from so many resource sectors. Even today, licensing systems continue to be based on economies of scale, on the assumption that the largest producers (whether in forestry, fisheries or other resource sectors) are the most efficient. But a new understanding of the concept of resource depletion, coupled with broad acceptance of the principles of sustainable development, means that old assumptions about efficiency may no longer be valid. The collapse of the Atlantic fishery is an excellent case in point. Changing the system of resource allocation to benefit Aboriginal harvesters (as well as other small producers in all regions of Canada) is not only a just solution, but also one that can make long-term environmental and economic sense.

We also believe that, as part of the law of fiduciary duty, Canada has an obligation to protect the exercise of traditional Aboriginal activities (hunting, fishing, trapping and gathering of medicinal and other plants) on Crown lands. There is a strong link, for example, between resource activities such as industrial forestry and negative effects on traditional activities. While some First Nations have treaties that guarantee certain harvesting rights, many do not — and all First Nations have had difficulty securing recognition of their broader Aboriginal rights. As for Métis people, and Inuit in Labrador, there has been no recognition of their right to pursue traditional harvesting activities at all. Similar standards that apply across the country would remove such inequities as well as provide greater certainty for provincial and territorial governments until the new treaty processes have been implemented.

We therefore urge the federal government to seek the agreement of the provinces and territories in enacting a national code to permit traditional Aboriginal activities on Crown

608
lands, which the provinces and territories would enact as part of their land and resource management law. Such a code and its contents could be an agenda item for an early meeting of federal and provincial ministers responsible for natural resources and public lands, following publication of this report.

Next, we examine other measures to increase Aboriginal access to and control over resources and help them gain a proper share in resource revenues. Future treaty negotiations will likely supplant or incorporate many of our recommendations. In some instances, however, we offer general observations to serve as a guide for negotiations.

**Recommendation**

The Commission recommends that

2.4.48

With respect to the general issue of improving Aboriginal access to natural resources on Crown land:

(a) the federal government seek the co-operation of provincial and territorial governments in drafting a national code of principles to recognize and affirm the continued exercise of traditional Aboriginal activities (hunting, fishing, trapping and gathering of medicinal and other plants) on Crown lands; and

(b) the provinces and territories amend relevant legislation to incorporate such a code.

**Forest resources**

In the mid-north, as well as in pockets of southern Canada, participation in the forest industry shows great potential for increasing Aboriginal self-sufficiency. Most reserves outside the prairie belt and the far north have at least some forest cover, and in the mid-north, reserves and settlements are surrounded by forested Crown land. But improving the Aboriginal share of forest resources will require better care of forests on reserves as well as changes in tenure systems for Crown forests.

Reserve forests

For much of the past century, the fate of renewable resources on reserve lands has been a dismal one. Most reserves in eastern Canada were stripped of their timber for the sake of short-term employment or a modest increase in band funds. Farsighted leaders such as Chief Dokis, of the French River area in Ontario, were subjected to continuous pressure from timber interests and government officials if they tried to slow down exploitation and conserve valuable resources on reserves.

Until quite recently, little forest management expertise was available to First Nations through the department of Indian affairs. There were few attempts at artificial
regeneration and, on most reserves, natural regeneration has been only partially successful. Forested lands on reserves continue to require major restoration efforts. According to a 1994 federal report on reserve forests in Nova Scotia, woodlots are in poor condition in places where the stands are reasonably accessible.399

Only in the past decade has there been any real change. A number of First Nations have participated in the Indian forest lands program, a component of federal/provincial forest resource development agreements (FRDA). Unfortunately, there have been no similar programs for Métis people. The program has provided for some forest inventories, management plans and reforestation of reserve forests, as well as limited training and practical work opportunities for First Nations workers in the forest industry. In Nova Scotia, about $200,000 was being provided annually to the Confederacy of Mainland Micmacs to encourage forest management on reserves owned by 12 Nova Scotia First Nations.400 Under the Indian forestry development program in northwestern Ontario, for example, 1050 hectares of reserve land had been planted and tended by 1990, 10 management plans prepared and almost 50 person-years of employment created for community members. The program was directed by representatives of three tribal councils in the area served by the Grand Council, Treaty 3.401

Although there has been general satisfaction with the Indian forest lands program, some Aboriginal groups, notably the National Aboriginal Forestry Association in its submission to the Commission, have criticized the program’s focus on timber production. It should be modified, they state, to reflect and integrate the traditional ecological knowledge and resource values of Aboriginal communities.402

In his November 1992 report to Parliament, Auditor General Denis Desautels noted that overall federal support, even with FRDA, has been inadequate to meet the reforestation requirements of Indian reserves or generally accepted standards of forest management. He also pointed out that the regulations governing forestry activities on Indian lands had not been changed in 50 years.403 Yet the need for proper forest management on reserves has never been greater. As provinces respond to public criticism of forest management practices by tightening up their legislation (as in Ontario’s new Crown Forest Sustainability Act404), the overall supply of wood fibre from Crown lands is diminishing. Particularly in British Columbia and Ontario (where the laws are toughest), mills have been actively seeking alternative sources of wood from adjacent provinces and private lands. In Ontario alone, the price paid for wood from private land has quadrupled since the new act was passed and could go much higher.

To the forest industry, reserves are, in effect, private lands; they have therefore been subject to the same kinds of development pressure. In Alberta, in a well-publicized incident in the spring of 1995, the Nakoda (Stoney) First Nation at Morley sold much of its reserve timber to a mill in neighbouring British Columbia.405 Their chief was unapologetic. His people, he said, felt they had no alternative; the price was right, and the reserve had no other resources of value.
In early 1993, the federal government announced that as a cost-saving measure, it would no longer participate in federal/provincial forest resource development agreements. As those agreements expire — as the Canada-Nova Scotia agreement did on 31 March 1995 — they are not being renewed, which means that the Indian forest lands programs are disappearing along with them. Commissioners remind the department of Indian affairs and the department of natural resources that Canada has a fiduciary obligation to see that Indian lands are managed for the benefit of First Nations. That obligation includes stewardship of reserve forests.

**Recommendation**

The Commission recommends that

**2.4.49**

With respect to forest resources on reserves, the federal government take the following steps:

(a) immediately provide adequate funding to complete forest inventories, management plans and reforestation of Indian lands;

(b) ensure that adequate forest management expertise is available to First Nations;

(c) consult with Aboriginal governments to develop a joint policy statement delineating their respective responsibilities in relation to Indian reserve forests;

(d) develop an operating plan to implement its own responsibilities as defined through the joint policy development process;

(e) continue the Indian forest lands program, but modify its objectives to reflect and integrate traditional knowledge and the resource values of First Nations communities with objectives of timber production; and

(f) in keeping with the goal of Aboriginal nation building, provide for the delivery of the Indian forest lands program by First Nations organizations (as has been the case with the Treaty 3 region of northwestern Ontario).

**Crown forests**

Figures from the Canadian Council of Forest Ministers show that 80 per cent of all inventoried productive forests are on provincial Crown land, and 85 per cent of all forest harvesting occurs on provincial Crown land. Hence, any plan to increase Aboriginal access to forest resources will have to address the current system of provincial ownership and management.
In Canada, 42 major tenure systems are used to grant property rights to forestry companies, ranging from comprehensive freehold to non-exclusive common property rights. The three broad categories of tenure are forest management agreements, forest licences, and timber permits.

Forest management agreements called tree farm licences usually carry a 20-year term rolled over every five years and are area-based rather than volume-based. These agreements are the most significant form of tenure and are designed for companies that operate pulp and paper mills and/or major sawmills. Under these agreements, a wood processing facility is required because a major capital investment ensures that the company has both a vested interest in the licence area and enough capital to pay the costs of fulfilling the required forest management responsibilities; and the facility generates employment. In most cases, the company has exclusive harvesting rights within the area. Companies are required to submit annual harvesting plans and five-year management plans to the provincial forest ministry.

Until recently, these agreements focused almost exclusively on timber production, with the associated requirements that a company manage the forest for harvesting, silviculture, planting, road building and tending to the free-to-grow stage. In many jurisdictions now (such as Ontario and British Columbia) the scope of management is being broadened by requiring companies to manage the forest for other uses such as recreation and grazing. Nevertheless, timber production remains the primary economic focus. Most agreements stipulate that the company must consult with the public and other stakeholders. In some cases the provinces allocate third-party harvesting rights, while in others the company grants these rights.

Forest licences can be issued for periods of between ten and 20 years and are renewable for up to 20 years. Awarded through a competitive bidding process, licences tend to be restricted to operators of sawmills or manufacturing facilities where the company makes a smaller investment and has fewer property rights, while the province retains most of the forest management responsibilities.

Timber permits (called district cutting licences in some areas) are usually from one to five years in length, granting only site-specific property rights, while the province retains all management responsibility. The permits are designed to fulfil domestic and other small timber needs such as fuel wood, poles and building materials.

Historically, Aboriginal people have not participated in forest management agreements or forest licences. They have been confined to the much more limited category of timber permits or district cutting licences and even then have suffered discrimination compared to other resource users. In its 1994 decision on provincial timber management planning, the Ontario environmental assessment board noted that Aboriginal people frequently complained that the district cutting licences they were receiving from the ministry of natural resources were for areas where the best timber had already been removed. They also objected that allocations were far too small to support employment or income within their communities. In northwestern Ontario, for example, 30 loggers on the Eagle Lake
reserve were required to share 5,500 cords of wood, while a single non-Aboriginal contractor in nearby Dryden was given a quota of 15,000 cords.\textsuperscript{408}

The ninth priority of the 1992 national forestry strategy for Canada focuses on Aboriginal peoples in a framework for action designed “to increase the involvement of Aboriginal people in forest land management ... to ensure the recognition of Aboriginal and treaty rights in forest management ... and to increase forest-based economic opportunities for Aboriginal people”.\textsuperscript{409} Commissioners support these goals, but to reach them, a number of major barriers must be overcome. Fortunately, a great deal of progress is already being made in some regions.

One of the major impediments is that almost all of the most economically accessible forested lands are under long-term renewable licence or similar forms of tenure to large forest companies. The fact that such licences are renewable makes it difficult for provinces to provide timber allocations to Aboriginal firms. Related to this issue is the fact that forest management agreements in most provinces are tied to wood processing facilities. This acts as a barrier to Aboriginal people’s attempts to enter the forest industry. Recently, however, provinces such as British Columbia are showing flexibility by altering some of the conditions of their tree farm licences (for example, the requirement for a wood-processing facility). We encourage other provinces to follow this example.

Partnerships or joint ventures between Aboriginal forest operating companies and other firms that already own wood processing facilities — or have the finances to create one — are another promising model. In northern Quebec, Domtar and the Cree of Waswanipi plan to build a sawmill on that First Nation’s reserve, with the province agreeing to furnish an allocation of wood to the Cree-owned forest operating company, Nabakatuk.\textsuperscript{410} In Saskatchewan, the Meadow Lake Tribal Council is generating employment and income from a once-failing sawmill purchased in a joint venture, which included an existing forest management agreement.

There are additional steps provinces could take to improve Aboriginal access to forest resources. The National Aboriginal Forestry Association has recommended that provinces amend their legislation to establish a special forest tenure category for holistic resource management by Aboriginal communities in their traditional territories or land use areas. This recommendation, which we support, would do a great deal to rectify the historical inequity in timber allocations to Aboriginal people. British Columbia, for example, already makes specific legislative provision for access to smaller amounts of Crown timber by First Nations. The B.C. Forest Act provides for woodlot licences of up to 400 hectares of Crown land for terms of up to 15 years. Several First Nations and communities have already taken advantage of this provision, combining the forested portion of their reserves with the leased Crown land.\textsuperscript{411}

\textbf{Tanizul Timber Limited}

In 1981, the Tl’azť’en Nation (formerly known as the Stuart-Trembleur Band) in the
Fort St. James area of central British Columbia bid for and received a tree farm licence (tfl) from the British Columbia Ministry of Forests. The licence itself is held by six members of the nation in trust for the entire community.

To obtain its licence, the Tl’azt’en combined some 2,500 acres of its reserve lands with 49,000 hectares of provincial Crown lands. To complete that commitment, special federal regulations under the Indian Act were prepared to allow for management of the Indian reserve portion of the tree farm licence under the terms of the b.c. Forest Act and regulations. A second unusual characteristic of this tfl was that it excluded the operation of a wood-processing facility, because b.c. officials believed that there was already enough milling capacity in the region. As a consequence, Tanizul Timber has been selling its logs on the open market. However, Tanizul Timber is now completing a sawmill so that it can profit from value-added manufacturing.

The two principal logging contractors employed by Tanizul are owned by community members, and more than half the 80 jobs in logging, road construction and reforestation are filled by band members or other Aboriginal people.


The diminishing quantity of unallocated forest land in most jurisdictions makes it more difficult to be innovative. In Ontario, for example, much of the Crown land is already tied up under long-term licence. In Nova Scotia, there is little Crown forest at all — about 72 per cent of forested lands are under private tenure, compared with the Canadian average of 10 per cent. Nevertheless, there are still things that can be done. One is priority of allocation. Where unalienated Crown timber exists close to reserves or Aboriginal communities, provinces could award those timber licences to Aboriginal people. The Ontario environmental assessment board, as part of its April 1994 decision on Crown timber management, has ordered the ministry of natural resources to implement just such a practice.

However, it 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. In both the Tanizul Timber and NorSask ventures, local Aboriginal people, while appreciating the employment opportunities, have expressed concerns about the overall impact of forest operations. Tanizul Timber is obliged to operate according to British Columbia ministry of forest regulations that enshrine established industrial forestry practices — including clearcutting and extensive road construction. Some members of the community object that these practices emphasize timber production at the expense of their traditional activities and the holistic management philosophies of community elders. Moreover, logging roads have also made the area more accessible, increasing hunting competition from recreational hunters from outside the community.
NorSask Forest Products Limited

In 1988, the Meadow Lake Tribal Council, acting on behalf of nine First Nation communities in northern Saskatchewan, took advantage of the receivership of a local sawmill to join forces with the mill’s employees and purchase the mill. They also assumed the former company’s forest management licence agreement. The new company, NorSask Forest Products, which uses only softwoods in its sawmill, has joined forces with a pulp manufacturing firm interested in establishing a mill that would use hardwoods. In 1990, NorSask Forest Products and Millar Western Pulpmill Limited became partners. A new firm, Mistic Management Ltd., owned jointly by NorSask and Millar Western, with the Meadow Lake Chiefs District Investment Company and employees of the local sawmill as majority shareholders, was set up to operate the timber limits.

At present, Mistic Management relies on a non-Aboriginal forestry and technical staff, but already some 20 per cent of the logging is by the Meadow Lake Tribal Council Logging Company, and this proportion is expected to increase.


In Saskatchewan, there have been similar conflicts between the logging practices of Mistic Management — which are based on provincial management regulations and policies — and Métis and First Nations people concerned about maintaining traditional employment in hunting, trapping and fishing. Max Morin of the Metis Society of Saskatchewan raised this issue in his appearance before us. As a result of the protests, four forestry advisory boards have been set up with representation from the company, local First Nations communities and the provincial forestry administration to deal with problems between timber harvesting plans and trapping and hunting interests. The boards may place restrictions on forest management plans, although the province retains final decision-making power.  

Commissioners encourage the provinces to show greater flexibility in their timber management policies and guidelines. 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.

In May 1995, a scientific panel appointed by the British Columbia government — which included Aboriginal representatives — released its final report on forestry practices in the Clayoquot Sound area of Vancouver Island. This and the panel’s other reports are particularly critical of clearcutting, the dominant harvesting method in British Columbia and elsewhere in Canada. As currently practised, clearcutting “removes all trees in a given area in one cutting, after which an even-aged stand is established by planting or natural regeneration ... most of the opening is not shaded or sheltered by the surrounding
forest”. This lack of shelter has major consequences for the viability and diversity of forest life. The panel’s reports stress the need to maintain forest integrity, recommending that at least 15 per cent of trees be retained in all cutting areas and 70 per cent be kept where there are “significant values for resources other than timber”. The panel also recommends that forest structures and habitat elements such as large old trees, snags and downed wood — which are important for regeneration and as insect and wildlife habitat — be retained.416

The panel concluded that existing provincial planning procedures were inadequate for sustainable ecosystem management. Forest companies and the provincial forests ministry, it said, had failed to take adequate account of the physical and ecological connections among land-based, freshwater and marine ecosystems and had failed to incorporate First Nations’ values and perspectives:

Human activities must respect the land, the sea and all the life and life systems they support ... Long-term ecological and economic sustainability are essential to long-term harmony ... The cultural, spiritual, social and economic well-being of indigenous people is a necessary part of that harmony.417

We believe that the conclusions of the Clayoquot Sound panel — particularly those concerning Aboriginal peoples — are valid for all forested regions of Canada and should be incorporated in planning processes. We urge the provinces to allow Aboriginal people to review forest management and operating plans within their traditional land-use areas. This would be parallel to — but separate from — other public consultation processes regarding such plans. This is already happening in Ontario where, in 1990, the province agreed to give the Teme-Augama Anishinabai an advisory role in timber management planning within the ministry’s Temagami District (see Appendix 4B). More recently, under the terms of its April 1994 decision, the Ontario environmental assessment board ordered the ministry of natural resources to implement a special Aboriginal consultation process in all timber management planning throughout the province.418

Consultation is only part of the answer, however, because it leaves Aboriginal people in the position of responding to plans that have already been drafted. Far better to involve Aboriginal people in planning from the beginning. In Quebec, the Barriere Lake Trilateral Agreement, which was renewed in 1995 for another year, enables the local Algonquin community to participate in preparing a draft integrated management plan for renewable resources within the 10,000 square kilometre area of their traditional lands (see Appendix 4B). In keeping with the concept of sustainable development, environmental assessments are already part of the forest management planning process. In some jurisdictions, such as Ontario, proposed new timber management planning guidelines may also require heritage assessments. Given the importance of Aboriginal land use in so many areas of the country, such guidelines should address Aboriginal issues and concerns specifically. The Commission urges the provinces, therefore, to make Aboriginal land-use studies — developed in collaboration with Aboriginal peoples — a requirement of all forest management plans.
Finally, we turn to the question of federal involvement. We are encouraged by the fact that the federal department of natural resources has been actively promoting First Nations involvement in resource planning and research outside their reserve lands. In Saskatchewan, the Prince Albert model forest, partly funded by the federal forest service, recognizes Aboriginal people as an integral component of the forest ecosystem. The Prince Albert Tribal Council, the Montreal Lake Indian band, the Lac La Ronge Indian band, and the Federation of Saskatchewan Indian Nations are full partners in the program, along with Weyerhauser Canada Ltd., Prince Albert National Park of the Canadian parks service, and the Saskatchewan department of environment and resource management. Three of the seven directors on the board of the model forest partnership are First Nations representatives. Similarly, the Abitibi model forest project in northeastern Ontario — also funded in part by the federal forest service — has the Wagoshig First Nation as a full partner along with Abitibi-Price Ltd. and the Ontario ministry of natural resources. Significantly, a part of that project is the identification of Aboriginal sacred sites and other heritage sites and the documentation of past and present Aboriginal land use.

In keeping with its fiduciary obligation to protect traditional Aboriginal activities on provincial Crown lands, the federal government should actively promote Aboriginal involvement in provincial forest management and planning. As with the model forest program, this would include bearing part of the costs.

**Recommendation**

The Commission recommends that

2.4.50

The following steps be taken with respect to Aboriginal access to forest resources on Crown lands:

(a) the federal government work with the provinces, the territories and Aboriginal communities to improve Aboriginal access to forest resources on Crown lands;

(b) the federal government, as part of its obligation to protect traditional Aboriginal activities on provincial Crown lands, actively promote Aboriginal involvement in provincial forest management and planning; as with the model forest program, this would include bearing part of the costs;

(c) the federal government, in keeping with the goal of Aboriginal nation building, give continuing financial and logistical support to Aboriginal peoples’ regional and national forest resources associations;

(d) the provinces encourage their large timber licensees to provide for forest management partnerships with Aboriginal firms within the traditional territories of Aboriginal communities;
(e) the provinces encourage partnerships or joint ventures between Aboriginal forest operating companies and other firms that already have wood processing facilities;

(f) the provinces give Aboriginal people the right of first refusal on unallocated Crown timber close to reserves or Aboriginal communities;

(g) the provinces, to promote greater harmony with generally less intensive Aboriginal forest management practices and traditional land-use activities, show greater flexibility in their timber management policies and guidelines; this might include reducing annual allowable cut requirements and experimenting with lower harvesting rates, smaller logging areas and longer maintenance of areas left unlogged;

(h) provincial and territorial governments make provision for a special role for Aboriginal governments in reviewing forest management and operating plans within their traditional territories; and

(i) provincial and territorial governments make Aboriginal land-use studies a requirement of all forest management plans.

**Mining, oil and natural gas**

Resource development, including mining activity and oil and gas exploration, has often been problematic for Aboriginal people. With the exception of oil and natural gas in Alberta, First Nations have not generally benefited from the presence of minerals on reserve lands. Aboriginal peoples generally have not been consulted about development activities; usually they have not been guaranteed, nor have they obtained, specific economic benefits from such activities on their traditional lands; and they have had difficulty protecting their traditional use areas from the effects of development. This has been the case, for example, with Dene Th’a in northwestern Alberta.

**Mineral, oil and natural gas resources on reserves**

Where First Nations were able to retain ownership of some subsurface deposits on their reserves, as in the case of oil and gas resources in Alberta, the department of Indian affairs maintained control over all aspects of commercial development. This practice continues today. Consequently, many First Nations have not developed management experience or benefited from employment or the transfer of industry knowledge and expertise. Departmental regulations are also inconsistent in the requirements they impose on industry. For example, while the Indian oil and gas regulations require companies operating on reserves to employ First Nations residents, the Indian mining regulations do not.

Most First Nations have derived minimal benefit from mineral resources on their reserves. Federal/provincial agreements may have satisfied the provinces, which gained half the potential revenue from future mineral development, but, in the words of a recent text on Canadian mining law, those agreements appear to have been concluded “more for
administrative expedience than for legal clarification”. The resulting combination of complexity, contested legal entitlement and inadequate returns for First Nations has had a “dampening effect on mineral exploration on reserves”. Renegotiation of those agreements should be an urgent priority for the federal government.

**Recommendations**

The Commission recommends that

2.4.51

In keeping with its fiduciary obligation to Aboriginal peoples, the federal government renegotiate existing agreements with the provinces (for example, the 1924 agreement with Ontario and the 1930 natural resource transfer agreements in the prairie provinces) to ensure that First Nations obtain the full beneficial interest in minerals, oil and natural gas located on reserves.

2.4.52

The federal government amend the Indian mining regulations to conform to the Indian oil and gas regulations and require companies operating on reserves to employ First Nations residents.

2.4.53

The federal government work with First Nations and the mining industry (and if necessary amend the Indian mining regulations and the Indian oil and gas regulations) to ensure the development of management experience among Aboriginal people and the transfer to them of industry knowledge and expertise.

Mineral resources on Crown lands

Before turning to our specific policy recommendations, we make some general observations about the process of mineral development. A mine involves three phases: exploration and development, mining and reclamation. The industry includes companies involved in mineral exploration, mining or extraction of ore, milling or concentrating, smelting and refining, processing of industrial minerals and environmental reclamation services (a newcomer to the industry) that return the land to an environmentally acceptable state. Smaller firms tend to concentrate on exploration, while larger companies are involved in all phases. The current trend is for larger companies to contract out field work, such as exploration and related services, because many companies have no field workers, tradespeople, or technicians on permanent staff. Exploration continues, as the deposit is mined, in order to extend the life of the mine.
In the Northwest Territories and Yukon it has become standard practice for the territorial government to advise Aboriginal communities of the zones within their traditional land use areas for which mineral or oil and gas exploration permits have been let, along with the name of the company and a contact person. In British Columbia, a 1995 Crown land activities and Aboriginal rights policy framework requires provincial officials to give similar notice to First Nations communities. Commissioners urge all provinces to adopt the same practice.

The provinces should also require exploration companies to contact Aboriginal communities in the area. (The provincial department responsible should provide the names of communities and contact persons.) The Commission urges provinces and companies to develop consultation mechanisms that encourage Aboriginal communities to participate in initial exploration, development and mining plans and provide non-technical information to the communities, so that they can fully appreciate the implications and play a real role in the planning process.

Socio-economic benefits

Aboriginal involvement in the mining industry would include socio-economic agreements with Aboriginal communities affected by development. As with the forest industry, Commissioners believe that Canada and the provinces should encourage partnerships or joint ventures between Aboriginal companies and firms involved in mining or oil and gas exploration and development. Provinces could give preference in awarding licences to natural resource companies that pursue joint ventures, make special training and employment commitments or commit to major contract work with an Aboriginal community or business.

Protection of traditional activities

Commissioners believe that the federal government has an obligation to protect existing Aboriginal activities on Crown land. In the Northwest Territories and the Yukon, where the Crown in right of Canada retains ultimate title and jurisdiction over lands and resources, recent comprehensive claims settlements provide for a wide range of Aboriginal benefits from resource development outside their community lands, as well as guaranteed roles for Aboriginal governments in planning and managing Crown land activities (see Appendices 4A and 4B).

Once new treaties are made (as in British Columbia) or old ones renewed, the same kinds of measures will apply within the provinces. However, even where such agreements have not yet been made, the federal government still has an obligation to maximize net benefits to Aboriginal people in areas adjacent to new mineral and petroleum ventures.

Recommendations

The Commission recommends that
2.4.54

The provinces require companies, as part of their operating licence, to develop Aboriginal land use plans to

(a) protect traditional harvesting and other areas (for example, sacred sites); and

(b) compensate those adversely affected by mining or drilling (for example, Aboriginal hunters, trappers and fishers).

2.4.55

Land use plans be developed in consultaion with affected Aboriginal communities as follows:

(a) Aboriginal communities receive intervener funding to carry out the consultation process;

(b) intervener funding be delivered through a body at arm’s length from the company and the respective provincial ministry responsible for the respective natural resource; and

(c) funding for this body come from licence fees and from provincial or federal government departments responsible for the environment.

2.4.56

The provinces require that a compensation fund be set up and that contributions to it be part of licence fees. Alternatively, governments could consider this an allowable operating expense for corporate tax purposes.

2.4.57

The federal government work with the provinces and with Aboriginal communities to ensure that the steps we recommend are carried out. Federal participation could include cost-sharing arrangements with the provinces.

_Cultural heritage_

Recognition of Aboriginal ownership of sacred and secular heritage sites on Crown land would give Aboriginal people a powerful tool to monitor activities carried out on their traditional land-use areas. Such recognition would also enable Aboriginal people, should they so wish, to derive important economic benefits from tourism and related activities. Lack of certainty about the status of Aboriginal cultural sites continues to create problems for Aboriginal peoples, for state management agencies, and for third parties. For example, the occupation of Ontario’s Ipperwash Provincial Park on Labour Day,
was premised in part on assertions that the park contains sites sacred to local Ojibwa.

In the case of Aboriginal heritage sites already located on-reserve, it is clearly easier to institute protection policies. Dreamers’ Rock, for example, is a votive site on the north shore of Lake Huron that is sacred to the nearby Whitefish River First Nation community and other Ojibwa. Although a provincial highway that is a popular tourist route runs through the reserve, provincial heritage policy requires tourists to obtain permission from the Whitefish River band office before visiting the site. As yet, however, the Whitefish River people do not follow the example of tribes in the American southwest, which charge fees for site visits and photography permits.

Internationally, Aboriginal title and jurisdiction over sacred and secular sites have been dealt with in various ways. In the United States, sacred sites on federal lands are protected through the American Indian Religious Freedom Act of 1978, which guarantees the right to “believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut and Native Hawaiian”. The statute instructs federal agencies to inventory all sacred places on federal lands and draw up management policies to preserve the traditional religious practices and values associated with them. However, the law does not have an enforcement mechanism, and in most instances of conflict between sacred sites and development activities, tribes have been unsuccessful in attempts to invoke the statute. The Hopi and Navajo people, for example, were unsuccessful in blocking development of a ski resort at San Francisco Peaks, Arizona.

In Australia, Aboriginal people are the legal owners of the Kakadu and Uluru-Kata Tjuta national parks in the Northern Territory. The latter park includes the internationally renowned Aboriginal sacred site, Ayers Rock. The parks are leased back to the Australian federal government and managed jointly by Aboriginal people and the Australian national parks and wildlife service. What made recognition of Aboriginal ownership possible was the Commonwealth government’s decision in 1978 to amend the law to allow the Crown to lease parklands, rather than continue to own them outright.

There have also been recent examples of Aboriginal involvement in heritage sites on Crown land. One of the most prominent is Head-Smashed-In Buffalo Jump in the Porcupine Hills of southwestern Alberta, where the government of Alberta constructed and operates an interpretive centre with the active participation of members of the nearby Blood and Peigan nations, part of the Blackfoot Confederacy. Now a UNESCO World Heritage Site, it was used by Aboriginal people for thousands of years. Although there were a number of controversies during development of the project in the early 1980s (involving such important matters as the proper display of medicine bundles and other sacred artifacts), the result has been a significant degree of Aboriginal involvement. Since the opening of the interpretive centre, all guides and supervisors have been Blackfoot people. Moreover, the centre has become a focus of Aboriginal culture, with Blackfoot weddings, funerals and other ceremonies being held there along with an annual powwow. Despite these good relations, the Peigan and Blood nations continue to have
concerns about the fact that the province, not the Blackfoot Confederacy, retains ownership of the site.428

The Yukon Umbrella Final Agreement includes a number of specific measures to protect Aboriginal sacred and secular sites on Crown land. So do most of the recent comprehensive claims settlements. The Yukon agreement calls for the creation of a Yukon heritage resources board, with equal representation from the Council for Yukon Indians and government appointees, to advise on the management of movable heritage resources and heritage sites throughout the Yukon. Furthermore, each Yukon First Nation will own heritage resources on its settlement lands and within its traditional land-use area.429

These modern treaties in the North also provide for setting apart new national and territorial parks, to which Aboriginal people will have guaranteed rights of access, along with economic benefits and a role in management. Aboriginal people will not be the recognized owners of these new parks. The only instance to date in which Canada has agreed to discuss issues of park ownership is in British Columbia, where the federal government and the Haida are sharing jurisdiction over the Gwaii Haanas/South Moresby National Park reserve. The parties have, in effect, agreed to disagree about title in order to allow the park to be set aside as a protected area.

Claims settlements and recent heritage legislation in many jurisdictions, therefore, are making it somewhat easier for Aboriginal people to protect their sacred and secular sites on Crown land. Such protection is in keeping with guidelines issued by the international committee on monuments and sites, which place a priority on recognizing Aboriginal interests. Aboriginal heritage resources can be grouped into three broad categories, which have varying degrees of protection in current policies and legislation:

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

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

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

We are concerned mainly with the first category, which involves the physical location of Aboriginal sites on Crown land — although the third is also relevant to the protection of Aboriginal sites. Issues of archaeological, ethnological, ethnographic or cultural research — and the ownership of the resulting research materials — are sensitive matters to Aboriginal peoples and the academic community and must be dealt with appropriately.

At the beginning of the Commission’s mandate, we developed our own ethical guidelines for research, which we offer as a potential model for drafting future policy and legislation (see Volume 5, Appendix C).
Recommendations

The Commission recommends that

2.4.58

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

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

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

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

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

2.4.59

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

2.4.60

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

2.4.61

Federal, provincial and territorial governments develop legislation and policies to protect and manage Aboriginal heritage resources in accordance with criteria set by negotiation with Aboriginal governments. These might include
(a) detailed heritage impact assessment and protection guidelines for operations involving such activities as forestry, mining, aggregate extraction, road building, tourism and recreation;

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

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

**Fish and wildlife**

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

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

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

Over the past two decades, some provinces have attempted to acknowledge Aboriginal concerns. In 1979, for example, Ontario introduced a leniency policy to guide its conservation officers in enforcing fish and wildlife laws; for the first time in almost a century, the province stopped prosecuting status Indian people for hunting and fishing on unoccupied Crown lands. In 1991, as a reflection of the *Sparrow* decision, that policy was replaced by interim enforcement guidelines, which made Aboriginal priority rights explicit. The guidelines required that potential charges against Aboriginal people be prescreened by senior officials of the ministry of natural resources. Similar guidelines were put in place at the federal level and in some other provinces.
While these kinds of measures are a worthwhile innovation, they are not based on negotiations with Aboriginal peoples. Provincial officials develop policy and interpret the guidelines based on their own (or legal counsel’s) understanding of treaty and Aboriginal rights. If individual harvesters are considered to be in violation, they continue to be charged. Since *Sparrow*, many charges have tended to fall within what enforcement officers consider grey areas — such as hunting or fishing in a different treaty area, fishing during spawning periods, or selling some of the catch.

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

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

General regulatory issues

Some of the difficulties between Aboriginal people and members of the public — including officials of resource management agencies — relate to cultural misunderstanding about matters such as harvesting practices. Aboriginal fishers, for example, were using fish traps, weirs, night lights and spears long before the arrival of Europeans on this continent. If the primary goal is to obtain food with the least amount of effort, then these are all sensible practices — though they remain offensive to recreational anglers for whom the thrill of the catch is part of the sport. There have been various attempts to reconcile these views. In Ontario, for example, Aboriginal communities and political organizations have been providing cultural awareness instruction for government officials responsible for fish and wildlife management. In other jurisdictions, including the Northwest Territories, governments are attempting to incorporate traditional ecological knowledge into their management systems.

These cultural differences are coupled with another difficulty: the long-standing ethos in resource management that perpetuates distinctions between users and managers. These distinctions become particularly problematic when the users are Aboriginal and the managers predominantly non-Aboriginal. The frequent result is a system of wildlife ‘police’ who distrust the harvesters they are regulating. One solution is to increase the number of Aboriginal managers, either by incorporating Aboriginal people into general government regimes for fish and wildlife management, or by establishing co-management regimes. In areas where Aboriginal people form a majority of the population (Manitoba and Saskatchewan north of the 55th parallel, Ontario north of 50) or are a sizeable minority (northwestern British Columbia), there is no reason that many (even
most) resource managers should not be Aboriginal. Since Canada already exercises jurisdiction over migratory birds and fisheries (with inland fisheries being administered by the provinces under federal law), the federal government has a direct role in facilitating greater Aboriginal involvement in fish and wildlife management.

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

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

**Recommendation**

The Commission recommends that

2.4.62

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

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

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

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

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

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

Aboriginal people should also play an active role in fisheries jurisdiction and management. Under the 1985 Pacific Salmon Treaty between Canada and the United States, for example, the countries established a joint Pacific Salmon Commission to monitor and enforce the treaty. But the two countries’ representation on the commission is structured differently. The U.S. part of the commission has four members — one representative each for the United States, the state of Alaska, the states of Washington and Oregon, and the Indian tribes in Washington, Oregon and Idaho who have treaty fishing rights. Canada’s side has four full members and four alternates (who come from the federal department of fisheries and various commercial and recreational fishing interests), including one Aboriginal member. Unlike the Canadian part of the commission, the American side has to achieve consensus among its four commissioners before reaching any agreements with Canadian commissioners. The U.S. Aboriginal commissioner, like his American colleagues, therefore, has a de facto veto and thus more influence than the Canadian Aboriginal commissioner. Given that the fishing rights of the British Columbia First Nations are constitutionally guaranteed, the federal government should at least ensure guaranteed and effective Aboriginal representation on Canada’s side of the commission.

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

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

Public education should also form a major component of any new fisheries strategy. Joint strategies to inform the public about Aboriginal perspectives on fishing might help to resolve differences and overcome fears that Aboriginal entry into the fishery will result in overfishing, loss of control or loss of property. One useful model is that of the Shuswap Nation in the Kamloops region of British Columbia, which has sought local non-Aboriginal involvement in fisheries management issues and created much common ground in the process. In a study of the Shusway example undertaken for the Commission, the author points to these efforts as a key ingredient in success:

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

**Recommendations**

The Commission recommends that

**2.4.63**

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

**2.4.64**
The size of Aboriginal commercial fishing allocations be based on measurable criteria that

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

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

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

2.4.65

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

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

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

2.4.66

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

2.4.67

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

2.4.68

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

2.4.69

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

Hunting

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

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

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

In general, provincial regulatory agencies assume that provincial boundaries prevail over treaty boundaries and that the latter prevail over the boundaries of traditional territories (if boundaries of traditional territories are acknowledged at all). For Aboriginal people, this order of priorities is the reverse of what it should be. Treaty nations believe that the treaties established a relationship with the Crown that was to apply throughout their traditional lands, not some arbitrarily demarcated portion, and they argue that the treaties were intended to guarantee their harvesting rights, not to limit them geographically. Relations within and between Aboriginal communities are founded on kinship; these
family ties are reinforced in turn by activities such as hunting, fishing and sharing. This means that Aboriginal harvesters will range throughout the traditional territories of their own nations and, depending on their family connections, across the territories of other nations as well. But because they continue to face prosecution for crossing treaty or provincial boundaries, there is no certainty about the geographic extent of treaty and Aboriginal harvesting rights.

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

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

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

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

In areas under significant hunting pressure, there must be more appropriate systems of allocation. As with fishing, we encourage the provinces and territories to improve their overall compilation of hunting statistics and to carry out joint studies with Aboriginal governments to determine the actual size of the Aboriginal harvest. This would provide a solid basis for negotiations to establish an appropriate Aboriginal allocation, one that is based on the Sparrow principle of Aboriginal priority for subsistence purposes.
In addition, we urge the provinces and territories to favour non-Aboriginal hunters living in rural and northern areas in any revised allocation systems. This might include such measures as opening the big game season a week earlier for local residents or, in the case of Ontario, establishing a special tag lottery for bona fide northern residents. We note that in district 76 in northern Saskatchewan the provincial government has already established a separate hunting season for local non-Aboriginal residents.

**Recommendation**

The Commission recommends that

2.4.70

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

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

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

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

**Tourism**

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

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

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

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

**Recommendation**

The Commission recommends that

**2.4.71**

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

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

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

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

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

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

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

**Trapping**

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

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

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

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

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

**Recommendation**

The Commission recommends that

2.4.72

By agreement, and subject to local capacity, provincial and territorial governments devolve trapline management to Aboriginal governments.
2.4.73

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

**Water resources**

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

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

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

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

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

Sam Horton
Toronto, Ontario
3 June 1993

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

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

Non-utility generation

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

These projects generally involve sites of less than 25 megawatts. Such small-scale developments do not usually require the reservoirs and impoundment necessary for larger projects and therefore do not have devastating effects of the kind that have sparked Aboriginal protests in northern Manitoba and Quebec. Smaller projects therefore offer great potential for Aboriginal economic development, particularly in northern areas. In northeastern Ontario, for example, a private developer has recently reached an agreement with the Constance Lake First Nation community that would see it participate in the development of a small-scale hydro project on the nearby Nagagami and Shekak Rivers. The agreement includes a share in royalties, participation in construction, and training and management programs for First Nation members.

Shared management

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

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

The board has responsibilities and powers over the regulation, use and management of water in the Nunavut settlement area, “on a basis at least equivalent to the powers and responsibilities currently held by the Northwest Territories Water Board under the Northern Inland Waters Act”. The board is to be made up of an equal number of representatives from the territorial government, the federal government and the designated Inuit organization, with the chairperson appointed by the federal government based on consultation with the other members. All water applications will be approved through the board. In addition to water management duties, the board will play a role in the development and regulation of land use plans and environmental assessment pertaining to water. It is also expected that where a drainage basin is shared by the settlement area and another jurisdiction, agreements pertaining to the use and management of such drainage basins will be negotiated.

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

**Joint Water Management in Montana**

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

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

**Recommendations**
The Commission recommends that

2.4.74

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

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

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

2.4.75

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

2.4.76

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

2.4.77

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

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

(b) provincial governments amend their water resource legislation to provide for Aboriginal participation in water resource planning and for the establishment of co-management boards on their traditional lands.

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

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

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

The origins of co-management

The term co-management has been used loosely to describe a variety of institutional arrangements encompassing consultation with members of the public on matters of land and resource allocation and management; the devolution of administrative, if not legislative, authority; and multi-party decision making. Co-management is thus essentially a form of power sharing, although the relative balance among parties, and the specifics of the implementing structures, can vary a great deal. As can be seen from Appendix 4B, most examples of co-management to date involve Aboriginal parties in a central role, either sharing power with governments exclusively or in conjunction with other interested parties. However, almost all arrangements envisage provincial, territorial or federal governments having the final say on matters of central concern.

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

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

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

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

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

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

• **community-based resource management**, which has the least Aboriginal involvement. It consists of government initiatives (such as Ontario’s community forest program) to involve the inhabitants of resource-based communities in resource management planning.

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

**Claims-based co-management**

Comprehensive claims agreements are the products of negotiation between Aboriginal peoples and the government of Canada (and, in the case of Quebec, the province). Once enacted, they are constitutionally protected. As can be seen in Appendix 4B, co-management under comprehensive claims agreements covers a broad range of land and resource matters. These include power sharing and co-operation as concerns fish and wildlife harvesting, the management of parks and conservation areas, environmental screening and review procedures, land use planning and water. We noted, for example, the usefulness of the Nunavut water management board as a precedent for Aboriginal involvement in other regions of Canada.
All the agreements in the territorial north provide for co-management of wildlife and fisheries. The James Bay and Northern Quebec Agreement and Northeastern Quebec Agreement provide for consultative committees. In each case, a new structure is created: a board whose members are usually appointed in equal numbers by government and beneficiaries. The responsibilities and powers of the boards fall into two main spheres: allocation, in which they have actual decision-making power; and management, in which they have advisory roles. The general pattern is that allocation and licensing are delegated to the boards and the local harvester organizations, while management for conservation remains the prerogative of governments. There is substantial variation with respect to the latter, however. In the James Bay and Northern Quebec Agreement, the roles of the Cree and Inuit are more limited than under the Inuvialuit Final Agreement, where the co-management bodies are the effective determinants of conservation (although, as noted earlier, the harvester support program under the James Bay agreement is the envy of other northern harvesters).

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

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

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

Category II (or shared) lands will be very large. Such an arrangement will undoubtedly work well in the new territory of Nunavut and in the residue of the Northwest Territories,
where Aboriginal people will have a major (and in the case of Nunavut, dominating) role in public government. If regional public governments were established in the northern areas of provinces where Aboriginal peoples are a majority or significant minority of the population (as in Labrador and northwestern British Columbia), this kind of regime could be equally effective. But in more southerly areas, where Aboriginal people continue to be heavily outnumbered, Aboriginal parties to treaty negotiations are likely to resist limitations on their self-governing powers on their own settlement or Category I lands, in exchange for a greater share in power over non-settlement lands (Category II and Category III lands). Moreover, many non-Aboriginal people would object to the shared lands (Category II) being that large.

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

**Crisis-based co-management**

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

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

In essence, most of the other examples in Appendix 4B represent interim measures in advance of treaty negotiations. The Auyuittuq National Park reserve on Baffin Island was established originally in 1976. Because of opposition to its creation from two Inuit communities — in part because of their unresolved comprehensive claim — Inuit were given a role in management decisions, and the resulting committee has since evolved into a true co-management body. The park reserve was established without prejudice to the claim and, under the terms of the Tungavik Federation of Nunavut Agreement, will become a national park. But Inuit have secured continuing harvesting rights within its boundaries and guarantees of employment and other economic benefits.

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

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

The title of the 1994 Interim Measures Agreement Between British Columbia and the First Nations of Clayoquot Sound is self-explanatory. The result of an intense and highly public period of protest over clearcut logging in the Clayoquot Sound watershed of Vancouver Island, the agreement is tied specifically to the B.C. treaty process and is without prejudice to the eventual resolution of the claim of the Haida of the Tla-o-qui-aht First Nation community and the Ahousaht, Hesquiaht, Toquaht and Ucluelet First Nation peoples. Like the Wendaban authority on which it was modelled, the Clayoquot Sound agreement establishes a joint land and resource management process with equal representation from each side.

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

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

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

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

Community-based resource management

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

Ontario’s community forestry initiative, which consists of four pilot projects, is one kind of provincial response. Another is the system of controlled exploitation zones for fish and wildlife in Quebec. A third involves recent proposals for multi-party stewardship of the Bras d’Or Watershed on Cape Breton Island in Nova Scotia. (See Appendix 4B for more details concerning these projects.)
If Ontario’s experience is a guide, these projects will be extremely popular among non-Aboriginal residents of rural and remote Canada. The Elk Lake community forest project in northeastern Ontario, for example, has generated wide public support, and its board members lobbied the government successfully to have its mandate and funding extended beyond the 1995 termination date. Like many northern communities, the principal economic base of Elk Lake is a small sawmill. Community members feel that for the first time, they have obtained some power over resource management decisions that affect their lives and livelihoods, in contrast to a system where most major decisions are made elsewhere and reflect broader provincial interests.

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

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

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

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

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

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

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

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

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

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

**Improving co-management regimes**

Lessons learned

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

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

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

Operations

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

Communication is also an important function of co-management. A good board with low member turnover and regular attendance can develop as a team; mutual respect and understanding can help overcome long-standing differences at the board level. But this can have only limited impact if the wider public — both Aboriginal and non-Aboriginal — does not understand and agree with the board’s decisions. Effective communication is crucial, because traditions of decision making and implementation can vary substantially between government agencies, non-Aboriginal board members and Aboriginal communities. Many of the claims-based co-management boards have tended to operate more in the government than in the Aboriginal style, though some of the crisis-based organizations — such as the Wendaban Stewardship Authority — have tried to operate by consensus and adopt other cross-cultural methods.

Representation on co-management boards

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

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

The notion that government representatives also represent major non-Aboriginal stakeholders is not well accepted. For example, in their submission to the Commission, the Ontario Federation of Anglers and Hunters argued that the appointment of provincial natural resources employees to co-management boards is inappropriate because they cannot, as Crown employees, fairly represent the interests of non-Aboriginal citizens.

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

Technical advice

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

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

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

The research and information requirements of planning and management boards can be substantial, especially for major regional regimes. Questions arise about the knowledge system in which management occurs, the actual requirements and tests for documentation, control of intellectual property, and access to and control over data. For local co-management initiatives, the costs and availability of expertise may be beyond their capacity. This emphasizes the need for better and cheaper ways of disseminating knowledge and experience and for training Aboriginal people in relevant disciplines. One option is to rely on existing secretariats to provide the necessary support. This is being pursued by the Union of Ontario Indians, further to their memorandum of understanding with Ontario respecting the negotiation of sole and shared management of fisheries with member First Nations communities. The parties agree to establish a joint fisheries resource centre to act as a central and independent source of information on technical conservation and management issues. The creation of these centres would go a long way to alleviating conflicts between government and Aboriginal parties on matters such as the accuracy of data and access to and control over information.  

Recognizing and incorporating traditional knowledge

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

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

Encouraging co-management

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

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

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

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

With their constitutional responsibilities for lands and resources, provincial and territorial governments will bear the main burden of ensuring the effectiveness of co-management and co-jurisdiction regimes and play a central role in land selection processes. Most provinces are already sharing management with Aboriginal and other local communities and addressing the concerns of non-Aboriginal resource users, and we applaud these initiatives. We believe, moreover, that it is reasonable to count on these governments to accelerate their efforts, in partnership with the federal government and Aboriginal governments, and to build on the successes already achieved.

**Recommendation**

The Commission recommends that

2.4.78

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

(a) the federal government work with provincial and territorial governments and Aboriginal governments in creating co-management or co-jurisdiction arrangements for the traditional territories of Aboriginal nations;
(b) such co-management arrangements serve as interim measures until the conclusion of treaty negotiations with the Aboriginal party concerned;

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

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

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

8. Conclusions

As with our development activities, Inuvialuit have reached beyond the Settlement Region to build partnerships and achieve agreements that will ensure our future well-being and that of our land and resources. The Settlement Region is neither an economic enclave, nor a protectorate under the watchful eye of government. Like our business activities and development initiatives, our land and wildlife are affected by decisions and events external to where we live and hunt and fish. Here as well, we have sought to exert our influence beyond the specific provisions of the [Inuvialuit Final Agreement] and the boundaries of the Settlement Region.453

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

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

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

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

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

Claims settlements are not the only means of expanding Aboriginal access to lands and resources. According to a 1994 auditor’s report, the Meadow Lake Tribal Council in northern Saskatchewan is making a profit and paying millions in corporate taxes on revenues generated by the sawmill the council bought in 1988 in a joint venture with the mill’s employees. Under the associated forest management licence, the tribal council now employs many of its own members in woods operations in parts of northern Saskatchewan. Chief Raymond Gladue has been happy to publicize the company’s success because, he says, it is important that Aboriginal people be seen as contributors to Canada’s economic prosperity, not a drain on it.\footnote{454}

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

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

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

Contemporary events offer both a lesson and a warning. In the Northwest Territories, a diamond rush is in progress. Diamond formations have also been found recently along the Attawapiskat River, in a remote corner of northeastern Ontario. At Voisey’s Bay in
Labrador, a junior resources company searching for diamonds has instead found a huge deposit of base minerals, one of which has already attracted a multi-million dollar investment from Teck Corporation and the direct involvement of the giant nickel producer, INCO.

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

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

The mining industry is simply following the rules of the game as laid out by governments. For a number of years, the industry has been increasingly solicitous of Aboriginal interests and if government and industry adopt the measures set out in our recommendations, there will be many potential benefits for Aboriginal people from these recent developments. At Voisey’s Bay, for example, Archæan Resources is already employing 15 Inuit and four Innu on its survey crews, and there is the prospect of more employment during the exploration phase.56

Our concerns are more fundamental: they relate to the treaty relationship, or lack of it. The Cree of northeastern Ontario have a treaty with the Crown (Treaty 9), but neither the federal nor the provincial government considers that the treaty guarantees the Cree employment benefits or a share in the revenue from resource development, much less entitles them to oppose projects or control their implementation. Inuit and Innu of Labrador do not have a treaty, although Inuit had been negotiating with the provincial and federal governments until intergovernmental disputes over cost sharing ended the discussions. In the Northwest Territories, while the Gwich’in Dene and the Dene-Métis of Sahtu have now concluded land claims agreements with the Crown, the remaining Dene and Métis people have been negotiating a new arrangement with the federal government for much of the past 20 years. But governments do not consider that assertions of Aboriginal title trump the rights of the Crown or industry.

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

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

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

Courts are a blunt instrument. The process is costly, the outcome is never certain, and the all-or-nothing nature of the process can lead to results that satisfy no one. Legal processes and direct action can also delay projects, leading to accusations that Aboriginal people are obstructionist, that they are harming the country’s economic interests. But if Aboriginal people feel they have no alternative to equalize their bargaining power with government, the choice between doing nothing and direct action is an easy one.

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

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

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

Notes:

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

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

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

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

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


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


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


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

13 See Volume 4, Chapter 6.


19 National Archives of Canada (NAC), Record Group (RG) 10, volume 266, p. 163126, report of Commissioners Alexander Vidal and T.G. Anderson, 1849. See also James Morrison, ‘The Robinson Treaties of 1850: A Case Study’, research study prepared for RCAP (1993). For information about research studies prepared for RCAP, see A Note About Sources at the beginning of this volume.

20 See also Morrison, “The Robinson Treaties of 1850”.


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


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


32 Chapeskie, “Land, Landscape, Culturescape”.

33 Chapeskie, “Land, Landscape, Culturescape”.


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

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


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


44 Claims of territorial sovereignty by European nation-states were bolstered by indefensible assertions of religious, ethnic, cultural and political superiority. As described by Chief Justice John Marshall of the United States Supreme Court, in *Johnson v. M’Intosh*, 5 U.S. (8 Wheaton) 543 at 573 (1823):
The character and religion of [North America’s] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.

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


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

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

51 The Proclamation provides:

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


54 See Indian Treaties and Surrenders from 1680 to 1890, Volume I (Ottawa: King’s Printer, 1905).
On this general subject, see Morrison, “The Robinson Treaties” (cited in note 19).

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

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


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

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


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

John F. Leslie, Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a corporate memory for the Indian department (Ottawa: Indian Affairs and Northern Development, 1985).
The example of the Mohawk sachem Thayandanega (Joseph Brant) æ who lived among his people on the Six Nations Reserve on the Grand River and also owned land on Burlington Bay in his private capacity æ had clearly been forgotten.

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

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

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


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


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

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

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

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

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


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


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


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

Quoted in Morrison, “The Robinson Treaties”.


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


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

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

104 See, for example, *R. v. Syliboy*, [1929] 1 D.L.R. 307 at 313, (N.S. Co. Ct.) in which the Mi’kmaq nation is said to be an “uncivilized people” and its 1752 treaty “at best a mere agreement made by the Governor and council with a handful of Indians”; and *Pawis v. The Queen*, [1980] 2 F.C. 18 (F.C.T.D.) at 25 where the Robinson-Huron treaty is said to be “tantamount to a contract”. For more discussion of these and related cases, see Patrick Macklem, “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (1991) 36 McGill L.J. 382.


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


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


Waisberg and Holzkamm, “‘A Tendency to Discourage them from Cultivating’” (cited in note 112).
116 NAC RG10, volume 10,872, file 901/20-10, part 2, Indian Agent E. McLeod, Lytton, to Chairman of Game Conservation Board of British Columbia, 20 May 1925; Indian Agent H.E. Taylor, Williams Lake, to Assistant Indian Commissioner for British Columbia, 24 January 1936.


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


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


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

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

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

133 Morris, The Treaties of Canada (cited in note 26). See also Morrison, “The Robinson Treaties” (cited in note 19). Morris went on to say that that right would not apply on off-reserve lands; however, “as regards other discoveries, of course, the Indian is like any other man. He can sell his information if he can find a purchaser”.

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


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


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


Justice Latchford had considerable experience in fish and wildlife matters. A prominent amateur zoologist, he had been the first commissioner (in 1898) of the provincial fisheries branch.


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

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


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

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


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


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

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

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

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

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

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


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

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

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

*Syliboy* (cited in note 104).


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

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


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

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


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

185 HBCA, series II, A12/FT 319/1 (a) ff. 57-62, C.C. Chipman to William Ware, 8 April 1910; series II, A12/FT 319/1 (b) ff. 1-3, McCarthy, Osler, Hoskin and Harcourt to Premier J.P. Whitney, 20 January 1913; NAC RG10, volume 6743, file 420-8 1, McCarthy, Osler, Hoskin and Harcourt to Deputy Superintendent General of Indian Affairs, 23 August 1912.

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

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

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

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

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


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

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

195 P.C. 1862, 22 September 1923.


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

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

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

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

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


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


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

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

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


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


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


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


233 On these legal instruments generally, see Volume 1; on Jay’s Treaty, signed by Britain and the United States in 1794, see Rémi Savard, “Un projet d’État indépendant à


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


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


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


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


251 In April-May 1995, B.C.’s ministry of Aboriginal affairs prepared a document entitled “British Columbia’s Approach to Treaty Settlements”. The document has not been officially published, but it is on the Internet and is considered public. Copy provided to RCAP by Nerys Poole, Executive Director, Treaty Mandates Branch, B.C. Ministry of Aboriginal Affairs.


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


For more recent comment, see S.M. Weaver, “After Oka: ‘The Native Agenda’ and Specific Land Claims Policy in Canada” (University of Waterloo, April 1992); Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, Report of the Aboriginal Justice Inquiry of Manitoba (Winnipeg: Queen’s Printer, 1991); Assembly of


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

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


Aboriginal peoples, and all modern treaties have had to deal with questions of overlapping territory.


278 The Gwich’in and the Sahtu Dene and Métis agreements have yet to receive royal assent.


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


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

289 See Indian Claims Commission, *ICCP*, Volume 1 (cited in note 255), p. 179. The policy also includes examples described as “Beyond Lawful Obligation” to accept claims for the taking of reserve lands without compensation and claims based on fraud by government agents. The first set was clearly intended to incorporate B.C. ‘cut-off lands’ claims relating to the reduction of certain reserves on the advice of the McKenna-McBride Commission early in this century. See our discussion earlier in this chapter on how losses occurred.

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


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

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

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


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


298 Russel Lawrence Barsh, “Indian Land Claims Policy in the United States” (1982) 58 North Dakota Law Review 7 at 22-23; 76-77. As in Canada, Native American tribes generally lack investment opportunities or sources of goods and services on their reservations. A cash settlement therefore amounts to a substantial indirect transfer payment to regional non-tribal businesses but results in relatively little reservation capital formation. See also Chapter 5 of this volume.


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

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


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


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

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


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


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


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


See Volume 4, Chapter 6 of this report for a description of this program; see also Ignatius E. La Rusic, “Subsidies for Subsistence: The place of income security programs in supporting hunting, fishing and trapping as a way of life in subarctic communities”, research study prepared for RCAP (1993).
323 Calder (cited in note 47). Six members of the court held Aboriginal title to be recognized by Canadian law. Three members of the Court (Judson, Martland and Ritchie JJ. concurring) were of the view that Aboriginal title had been extinguished by Crown and legislative action; three members of the court (Hall, Laskin and Spence JJ. concurring) were of the view that Nisg_a’a title had not been extinguished; the remaining member (Pigeon J.) held that judicial determination of the case required a fiat from the lieutenant governor of the province.

324 Guerin (cited in note 292).

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


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


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


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

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

335 *Sparrow* (cited in note 250).

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

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

338 *Sparrow* at 1110.


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


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


*Sparrow* at 1077.
358 Guerin (cited in note 292).

359 Delgamuukw (cited in note 257). See also Leonard I. Rotman, “Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility” (1994) 32 Osgoode Hall L.J. 735. Reference should also be made to the landmark decision by the High Court of Australia in Mabo (cited in note 47), in which six members of a seven-member panel agreed that Australian common law recognizes a form of Aboriginal title that, in cases where it has not been extinguished, protects Aboriginal use and enjoyment of ancestral land. Justice Toohey would have gone further to recognize a general fiduciary obligation on the part of the Crown that exists independently of any “obligation arising as a result of particular action or promises by the Crown” (at 204). Extinguishment or impairment of Aboriginal rights to land “would not be a source of the Crown’s obligation, but a breach of it” (at 205). Justice Brennan, Chief Justice Mason and Justice McHugh concurring, together with Justice Dawson dissenting on other grounds, did not agree with this approach, holding that the Crown is not in breach of any duty when it exercises sovereign authority and extinguishes Aboriginal rights. For commentary on Mabo, see Jeremy Webber, “The Jurisprudence of Regret: The Search for Standards of Justice in Mabo” (1995) 17 Sydney L. Rev. 5. For a collection of essays on Australia’s legislative response to Mabo, see M.A. Stephenson, ed., Mabo: The Native Title Legislation À A Legislative Response to the High Court’s Decision (St. Lucia: University of Queensland Press, 1995).

360 Sparrow (cited in note 250) at 1108.


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


365 S. James Anaya, “Canada’s Fiduciary Obligation Toward Indigenous Peoples in Quebec under International Law in General”, in S. James Anaya, Richard Falk and Donat Pharand, Canada’s Fiduciary Obligation to Aboriginal Peoples in the Context of


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


371 This figure is based on the B.C. government’s policy position that settlement land would be proportional to the percentage of First Nations people in the total provincial population æ that is, approximately three to five per cent (information furnished by Nerys Poole, Executive Director, Treaty Mandates Branch, B.C. Ministry of Aboriginal Affairs).

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


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

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


378 Peter W. Hogg, Constitutional Law of Canada, third ed. (Toronto: Carswell, 1992), 27.1 (c). See also Volume 4, Chapter 5, where we discuss Métis people and the constitution.


380 See, for example, Sobeys Stores Ltd. v. Yeomans, [1989] 1 S.C.R. 238.


382 Barrie Conkin, RCAP transcripts, North Battleford, Saskatchewan, 29 October 1992.


385 Indian Claims Commission, ICCP, Volume 1, pp. 159-168.

386 Indian Claims Commission, ICCP, Volume 2, p. 55.


388 For a brief discussion of some of the problems inherent in using government documents to research historical Aboriginal populations, see Bennett Ellen McCardle, Indian History and Claims: A Research Handbook, Volume 1 (Ottawa: Indian and Northern Affairs, 1982), pp. 130-139.


391 Township of Onondaga, Resolution 12, 12 October 1993.


397 Chippewas of Kettle and Stoney Point, “Information Sheet” (1994).


400 Consulting and Audit Canada, “Study of Forestry Sector Opportunities”; and Beeby, “Natives miss out”.


402 National Aboriginal Forestry Association, “Forest Lands and Resources” (cited in note 142).

An Act to revise the Crown Timber Act to provide for the sustainability of Crown Forests in Ontario, S.O. 1994, c. 25, s. 86.


Ontario Environmental Assessment Board, Decision: Class Environmental Assessment (cited in note 142), c. 10, p. 361.


Agreement relative to the Waswanipi Wood Transportation Centre between Domtar Inc. and Waswanipi Mishtuk Corporation, signed on 17 March 1995.

Forest Act, R.S.B.C. 1979, c. 140. See also National Aboriginal Forestry Association, “Forest Lands and Resources” (cited in note 142).

Consulting and Audit Canada, “Study of Forestry Sector Opportunities”; and Beeby, “Natives miss out” (both cited in note 399).

Ontario Environmental Assessment Board, Decision: Class Environmental Assessment (cited in note 142), c. 10, p. 374.

National Aboriginal Forestry Association, “Forest Lands and Resources” (cited in note 142).


Cayoquot Sound Scientific Panel, “Sustainable Ecosystem Management”.

Ontario Environmental Assessment Board, Decision: Class Environmental Assessment (cited in note 142), c. 10, p. 374.
419 Prince Albert Model Forest Association Inc., Certificate of Incorporation (Saskatchewan Department of Justice, 8 January 1993).


431 See, for example, “Interim Guidelines on Aboriginal Use of Fish and Wildlife”, discussion paper, Native Affairs Branch, B.C. Ministry of Environment, Lands and Parks (March 1993).

See, for example, letter from John C. Crosbie, federal minister of fisheries and oceans, 7 October 1991, to C.J. Wildman, Ontario minister of natural resources, and letters to other provinces (Ottawa: Department of Fisheries and Oceans, Native Affairs Division).


An Act respecting the transfer of the Natural Resources of Alberta, 1930 (Dominion of Canada), S.C. 1930, 20 & 21 Geo. V, c. 3.


Statistics provided by the Ontario Ministry of Natural Resources, Sault Ste Marie.

In the context of negotiations concerning the application of the Murray Treaty, the government of Quebec and the Huron-Wendat Nation signed a specific agreement, on 21 February 1995, concerning moose hunting by members of the Huron-Wendat Nation during the 1995 hunting season. The agreement allowed nation members and their families to hunt moose during the week before the season opened to the general public in a territory made up of 48 controlled hunting zones in the Laurentian wildlife preserve.


Rivard Larouche, RCAP transcripts, Montreal, 26 May 1993.

In June 1995, Hydro Quebec put a moratorium on all such contracts.

Note that Article 913 of the new Civil Code of Quebec maintains this general principle, but creates an exception in its second paragraph, which reads as follows: “However, water and air not intended for public utility may be appropriated if collected and placed in receptacles”.

695


Anishinabek Conservation and Fishing Agreement between Anishinabek Nation and Her Majesty the Queen in Right of Ontario (8 June 1993).

Pinkerton et al., “A Model for First Nation Leadership” (cited in note 437).


National Aboriginal Forestry Association, "Forest Lands and Resources for Aboriginal People" (cited in note 142).

Vivian Danielson, "Voisey Bay deposit shows potential to become low-cost nickel producer", The Northern Miner 81/11(15 May 1995).