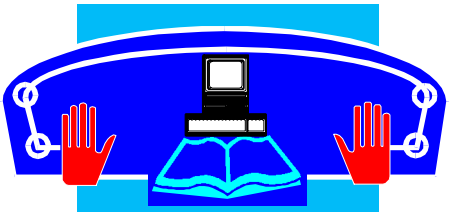

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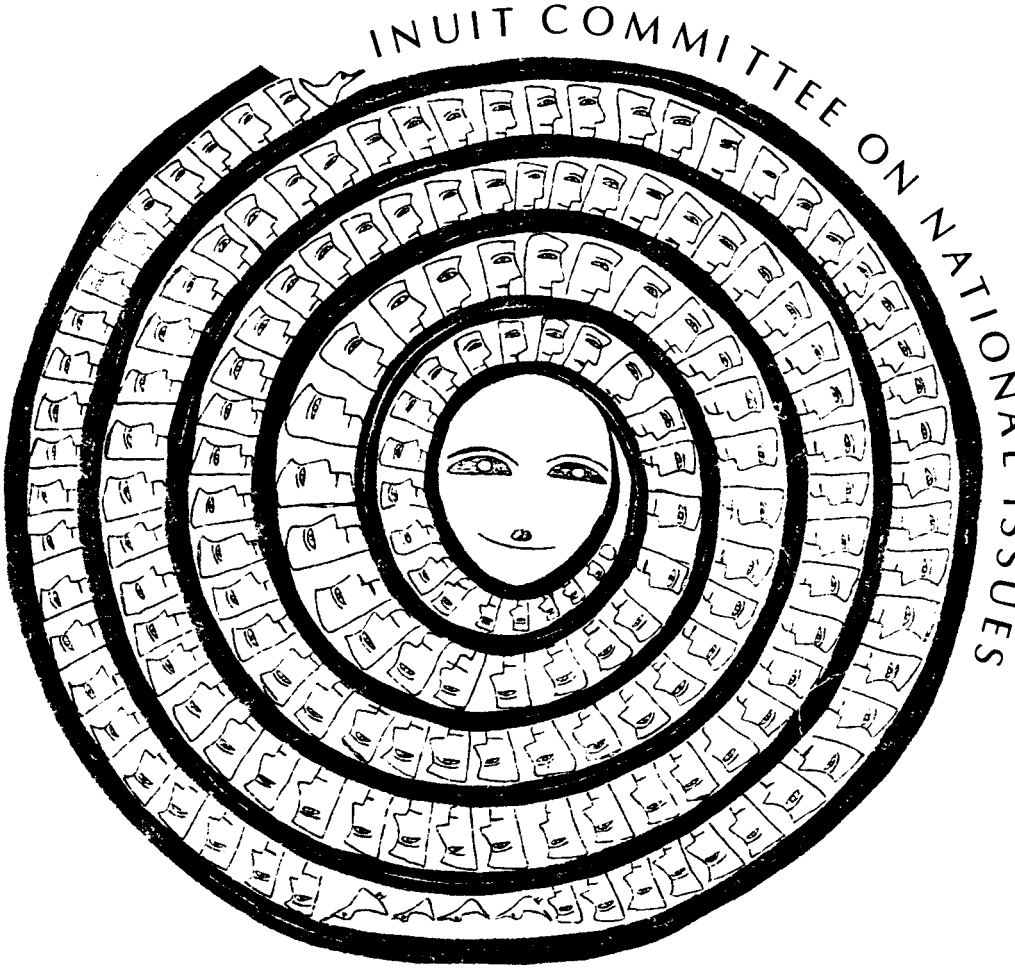

By

Peter J. Usher

and

N. **D.** Bankes

PROPERTY, THE BASIS OF INUIT HUNTING RIGHTS — A NEW APPROACH

By

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and

N.D. **Bankes**

Inuit **Committee on National Issues**

1986

FORWARD

The Inuit Committee on National Issues (ICNI) is a committee of Inuit Tapirisat of Canada, the national organization representing Inuit in Canada. Since its creation it has represented Inuit in the Canadian constitutional reform process, and particularly at the First Ministers' Conferences on aboriginal constitutional matters in 1983, 1984 and 1985. Over the past few years, ICNI has commissioned research on issues of particular interest to Inuit, with a view to publishing those papers which would most contribute to a better understanding"of the nature of aboriginal rights in general and Inuit rights in particular. The topic of Inuit hunting rights is clearly of major importance for Inuit, and ICNI has decided to publish this study as the first of a series of papers on various subjects.

The authors, Peter J. Usher and N.D. Bankes, have been involved with aboriginal and Inuit issues for many years. Dr. Usher is an Ottawa based consultant who has worked with Inuit and other aboriginal peoples, particularly in the Northwest Territories, for many years. He is a well known social scientist and author of numerous articles and monographs on economic development and resource management in the North. Mr. Bankes teaches in the Faculty of Law at the University of Calgary; he has published widely on subjects of resource law and aboriginal rights, and over the past few years has been acting as an advisor to the Tungavik Federation of Nunavut in their land claims negotiations with the federal government.

This monograph proposes a new approach to aboriginal hunting, fishing and trapping rights. It attempts to expose the inadequacies of traditional political and legal perspectives on renewable resource rights. The authors suggest that by using a concept familiar in Anglo-Canadian property law, that of profit-a-prendre, these inadequacies can be overcome, providing more security to aboriginal people and more clarity in judicial decision-making. The authors suggest that this characterization of aboriginal hunting rights provides an apt description in legal terms of the nature of these rights which is consistent with ethnographic and historical facts and, more importantly, provides surer remedies in cases of infringement or violation.

ICNI believes that this paper will contribute to a better-informed discussion of the nature of Inuit harvesting rights and the ways in which those rights should be safeguarded. We consider that the proposals contained in this study will further discussions presently underway between governments and aboriginal peoples on the subjects of land claims and self-government. Should the First Ministers' Conference scheduled for the spring of 1987 be successful, there will be amendments to the Canadian constitution providing for a process by which aboriginal peoples can work out lasting political and legal arrangements for governing their affairs. ICNI hopes that by publishing papers such as this it will have assisted aboriginal peoples and governments in working out acceptable ways of protecting aboriginal property rights and interests.

The authors have acknowledged the assistance and advice of a number of people; ICN1 itself wishes to acknowledge the editorial work of Garry Bowers. who has prepared this study for publication, and Debra Mondello for her word processing services.

Finally, ICNI wishes to emphasize that the opinions of the authors should not be taken as necessarily expressing the views or position of ICNI or its affiliated regional associations.

Inuit Committee on National Issues
Ottawa, October 1986

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PART I:
ETHNOGRAPHIC, POLITICAL AND ECONOMIC PERSPECTIVES

Peter J. Usher

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Peter J. Usher

Chapter One

THE PROBLEM

Introduction

It is generally accepted in Canada that aboriginal title refers to the interest, unsurrendered by treaty and unextinguished by legislation, of aboriginal peoples in lands which they have traditionally used and occupied. [1] Although there is a great deal of debate over what rights that title actually confers upon its holders, the irreducible minimum recognized by the Crown in every major proclamation, treaty and statement respecting aboriginal peoples is the right to hunt, trap, fish and gather in areas of traditional use and occupancy.

It might therefore be expected that this minimum would be defensible against encroachment and capable of remedy and redress when violated. In practice, however, the courts have interpreted aboriginal interests and rights restrictively.[2] Although the courts have accepted that the aboriginal interest is a proprietary interest in the land, they have held — at least prior to the *Constitution Act, 1982* — that aboriginal rights to hunt, trap, fish and gather may in some circumstances be modified or abridged by federal and provincial fisheries and wildlife legislation. By the same token, aboriginal people have not been able to obtain legal redress for the destruction or degradation of traditional resources by third parties who have obtained competing resource or land rights from the Crown. Similarly, compensation for damage to these resources or for the expropriation of aboriginal land or resource rights is difficult if not impossible to obtain.[3] Finally, despite their dependence upon fish and wildlife resources, aboriginal peoples have no special power to regulate or manage these resources or their allocation, harvest or use under provincial or federal resource management programs.[4]

Administrative policy and practice has for many years been based on an assumption that aboriginal rights effectively confer upon their holders no more than a licence to enter, and even that is not exclusive. No Canadian fish and wildlife management agency acknowledges native hunting and fishing rights as constituting a proprietary interest in land or resources. Resource management agencies have generally regarded these rights as an impediment to sound management practice, an imposition on their authority to be eliminated rather than entrenched through settlement of native claims.[5] While the courts have not always upheld the state's narrow interpretation of aboriginal hunting rights, legal challenges are the exception and the everyday experience of native people is with the administration of government policy.

The Inuit contend that this situation is intolerable and inequitable. This discussion paper will show, first, that it is the result of doctrines, policies and beliefs respecting aboriginal peoples and fish and wildlife conservation which are increasingly recognized as outmoded and untenable. Secondly, it will show that the situation can and should be rectified by institutional means which are neither unfamiliar nor repugnant to the Canadian system, and finally it will suggest the benefits that would accrue to all parties as a consequence of reform.

The Present Situation

The Inuit are no strangers to social and economic change. Until recently, however, they took for granted the existence and accessibility of fish and game and the integrity of the traditional land base. Amidst the changes — some welcome and some not — the land and the animals were both strength and refuge. They were a defence against intrusion and a bulwark against the economic downturns that seemed inevitably to follow the boom periods of the whale fishery, the fur trade, defence installations, and oil and mineral exploration. An Inuk from the Western Arctic told the Mackenzie Valley Pipeline Inquiry:

> Just like you white people work for wages and you have money in the bank, well my bank was here all around with the fur and whatever kind of food I wanted. If I wanted caribou I went up in the mountains, if I wanted coloured fox I went up in the mountains, in the Delta I got mink and muskrat. I was never a big trapper, I just got enough for my own use the coming year. For the next year those animals are going to be there anyway, that's my bank. The same way all over where I travelled. Some people said to me, "Why don't you put the money in the bank and save it for the future?" I should have told them that time, "The North is my bank", but I never did, I just thought of it lately.[6]

Threats to the Inuit interest

The Inuit can no longer take their land for granted. The recent pace of settlement and development in the North has changed all that. The following list includes not only those factors which currently threaten the Inuit interest in their traditional territory, but also those which threaten native interests in more southerly areas and may be expected to do so in the North as settlement and development continue.

a) *Industrial development and/or military activities:*

— direct alienation of land for mines, oil and gas development, roads, airfields, townsites, etc.;
use of marine waterways for large-scale resource transport, especially of hazardous substances such as oil;
alteration, destruction or pollution of habitat, especially critical habitat, by deliberate or accidental flooding, terrain disturbance, spills or leaks;

— growing network of access and maintenance roads providing easy access by transients and tourists to traditional hunting areas;
use of northern lands, waters and airspace for weapons testing and for military exercises and training;
increased stress on animals due to noise, harassment, obstructions or other consequences of human activity that result in increased mortality and/or behavioral changes — in particular the diversion of migration routes or the dispersal of animal congregations, especially at critical times such as mating or calving;

— the contamination of fish or game, for example by heavy metals, toxic compounds or radiation, making them unfit for human consumption or use.

b) *Non-native access to traditional resources in the North:*

— increasing numbers of non-native residents in the North who will demand access to fur, fish and game resources for sport and recreation;

— increasing pressure from non-resident sport hunters or fishermen who will also demand access to fish and game resources for sport and recreation;

— increasing pressure from resident non-native business interests for the right to harvest, purchase, process or market traditional Inuit resources for commercial use in such a way as to jeopardize, diminish or preclude future Inuit participation in these activities;
— withdrawal of land for parks or reserves, with possible restrictions on Inuit use and hunting rights.

c) *Control by non-natives over non-exclusive Inuit resources:*
— increasing demands for restrictions on Inuit hunting rights by hunters or conservation organizations in southern Canada or the United States, e.g. with respect to migratory birds;
— increasing restrictions on Inuit hunting rights under international treaties, e.g. with respect to the hunting of migratory birds, whales, and polar bears, or to the trade in endangered species.

d) *Southern conservation interests:*
— demands by southern Canadians for non-consumptive uses of the North, either by themselves or others, as a "wilderness", with consequent restrictions on Inuit use and harvesting rights;
— demands by southern Canadians to combat real or alleged incidents of overkill and waste by restricting Inuit hunting rights;
— demands by anti-hunting or animal rights groups throughout the industrialized world to eliminate hunting, whether on grounds of cruelty to animals, conservation or preservation of species, or on general ethical or philosophical principles, through economic boycotts, public advocacy or political campaigns.

e) Game management by non-native authorities:
— encroachment on Inuit hunting rights by Orders-in-Council declaring more and more species or populations as endangered and therefore subject to special regulation;[7]
— the establishment of restrictive quotas, seasons, licences, gear and bag limits, often not in keeping with traditional or current Inuit practices;
the establishment of limited-entry arrangements for the commercial harvesting of certain species;
— the erosion of native hunting rights by redefining them as "subsistence" hunting rights, thus permitting both non-native access to game resources and restrictions on Inuit use and distribution of resources;[8]
— the expansion and entrenchment of management and research responsibilities in the hands of government agencies beyond the control of Inuit harvesters.

f) *Assimilationist economic development strategies:*
— the creation through a cash-and-development type of claims settlement of a situation in which Inuit corporations are forced to encourage the industrial development of their lands and resources at the expense of traditional values or interests, or in which the funds and resources of these corporations are directed largely or entirely to blue-chip or high-growth investments;
— the imposition of wage employment on a scale and type that renders significant traditional activity by Inuit impractical;

— failure or inability, in the course of harvesting activities, to train and socialize young people in appropriate skills and values.

g) *Other*:

— public health legislation restricting or prohibiting the sale, distribution or consumption of country foods due to inappropriate insistence on southern standards and methods of food processing and storage;

— measures respecting public safety or the Criminal Code — e.g. use or ownership of firearms — which have the effect of restricting the ability of Inuit hunters and trappers to pursue their living in the manner to which they are accustomed.

Status of the Inuit interest

It is hardly surprising that there are competing interests respecting land and resources, or that the exercise by one party of its rights might have adverse effects upon the interests of another. These matters are of pressing concern, however, because the present status of Inuit hunting, fishing and trapping rights fails in practice to provide adequate defence against violation of them. In contrast, resource rights (e.g. relating to minerals, oil and gas, water, timber) granted by the Crown to third parties have, for the most part, the following characteristics:

1. They are exclusive to the holder.
2. They confer certain property rights upon the holder, best characterized as profit a prendre in common law (similar in certain respects to usufruct in the Quebec Civil Code). Inter alia, these rights
   a) constitute an interest in land,
   b) provide security of tenure,
   c) are normally although not necessarily compensable *in* the event of expropriation,
   d) are binding upon third parties, and
   e) provide a basis for obtaining legal remedy in the prospect or event of trespass or nuisance.
3. The holder is subject to the regulation of his activities by the Crown. Such regulation or management is, among other things, for purposes of
   a) ensuring the conservation of the resource (although for non renewable resources, payment as compensation for taking is envisaged),
   b) maximizing the benefits to the proprietor, and
   c) ensuring public safety.

The status of hunting, fishing and trapping rights is much less clear, and both jurisprudence and the administration of public policy have led to a situation in which their status as enforceable property rights is tenuous.[9]

In the limited interpretation (which the Inuit reject, and which this paper seeks to rebut) normally held by the state, the basic aboriginal right to hunt and fish for food on unoccupied Crown lands does not imply exclusive access to fur, fish and game. Subject to regulation and limitation, the general public is also entitled to hunt and fish for recreational and commercial purposes on these lands. Commercial licences for fishing, trapping or outfitting are normally exclusive in the area for which they are granted. In contrast to aboriginal rights (and the narrow interpretation has been that aboriginal hunting and fishing rights are restricted to the domestic needs of the family),[10] commercial rights are open to all residents of a jurisdiction, normally on a

limited-entry basis. Where commercial licences are given exclusively or preferentially to aboriginal peoples, it is as a matter of public policy and not on the basis of their rights.[11]

So the first problem is: what rights do the Inuit have to harvest these resources for their own benefit, in relation to the rights of other parties to do so? This is in part a problem of allocation: to what share of the harvest are the Inuit entitled by right, and is anyone else entitled to a share by right? Although the allocation process is not guided by clear answers to this question, neither is it guided in any direct way by the market. Consequently allocation is both a political and a management problem.

The narrow interpretation of Inuit rights (which the Inuit do not accept) is that the Inuit are not considered to have a full proprietary interest in the resources most fundamental to their existence, at least not a right which can be vindicated at the expense of the Crown's interest, or that of Crown licencees, in these resources. The right to hunt and fish on unoccupied Crown lands means simply that the Inuit are neither trespassers there nor — so long as they are abiding by the applicable regulations — are they engaged in unlawful activity. No administration considers that the Inuit have any rights to the resources themselves, as opposed to the mere right to pursue them. If, for example, wildlife becomes scarce or unfit for human consumption because of disturbance or contamination, hunting and fishing rights are not considered to have been violated. Whether such damage results from the lawful or unlawful, the intended or unintended actions of third parties or of the Crown itself, the Inuit have little chance of redress. They cannot expect to obtain an injunction against those whose actions threaten their resource base, or damages from those whose actions have reduced or eliminated it. The right to hunt and fish in an inanimate landscape is clearly not a useful right, nor is it a fitting recognition of the place and history of the Inuit in northern Canada.

So the second problem is: what are the proprietary interests of the Inuit in the land and in fish and wildlife resources in relation to those of parties granted competing interests in the land? There is no doubt that those who have been lawfully granted competing or incompatible interests in land do have defensible and compensable interests. A number of statutes (e.g. the *Public Lands Grants Act,* the *Territorial Lands Act,* the *Canada Oil and Gas Act)* have been enacted over the years as a means of conveying rights in land from the Crown to private individuals, so as to promote the settlement and economic development of the North. All the while, aboriginal rights, which preceded those of the Crown, were either ignored or never properly codified to give their holders a legally enforceable and practically useful defence. The result is that the foreign oil company recently granted an exploration permit has a right which is more clearly enforceable in law than the Inuk whose ancestors have used and occupied the land for millenia.

Finally, there is the question of regulation. Governments regulate the Inuit exercise of their hunting rights by means of the game laws and various laws of general application. Fish and wildlife are managed chiefly by what is known as "scientific management": the precepts and knowledge base of Inuit harvesters have for the most part been excluded from this system of management. Whatever influence the Inuit actually have in managing fish and wildlife is a privilege granted on policy grounds, not a right. As producers they have not been able to "capture" the relevant regulatory agencies, as is often the case in industries where there are a few large and powerful producers. For example, in no jurisdiction, not even the NWT, is the Fish and Wildlife

Service predominantly staffed at senior management and scientific levels by people with trapping or subsistence hunting and fishing backgrounds.

Lest this description of the situation be thought overstated, consider the example of the pollution of the English River in northwestern Ontario.[12] Since time immemorial the two Indian bands whose reserves are located on the river have depended on fish for a substantial part of their living. By 1970 the abundant fish stocks were the basis of a domestic fishery which supplied much of the bands' food, a commercial fishery in which the bands held several exclusive licences, and a sport fishery which employed most band members in the summer months. In that year it was discovered that the chief economic fish stocks contained levels of methyl mercury so high as to endanger human health, presumably because upstream pulp-and-paper mills had for several years been discharging elemental mercury directly into the river system.

In quick succession, the commercial fishery was ordered closed, the sport fishery declined substantially and a number of lodges actually closed their doors, and health authorities advised the residents of both reserves against eating fish. Sixteen years later, the commercial fishery is still effectively closed, the sport fishery has only partially recovered, and anxiety and uncertainty still cloud the issue of domestic consumption. These events were a devastating economic blow to the reserves. But there were graver consequences: with the basis of individual livelihood and collective life destroyed, the social fabric of both communities was profoundly disrupted. In the years following, the incidence of suicide, violent death, alcohol and drug abuse, child neglect and other indicators of social pathology rose dramatically, compared to previous years and to neighboring reserves. Only recently have these communities begun to recover from these effects.

Nearly sixteen years passed before the bands were able to obtain compensation from industry and government for the social, economic and medical effects of mercury pollution. [13] The struggle for remedial action involved large and sometimes violent public demonstrations, extraordinary media publicity and public outcry, the initiation of legal action, and consideration by a major environmental review hearing (the Ontario Royal Commission on the Northern Environment). It also required nearly seven years of negotiations following the establishment of a mediation process involving all parties.

The compensation agreement is, of course, better late than never, but it cannot undo the grave and extensive damage that has occurred, redress the sufferings of those who died before the settlement was reached, or set right the many lives that have been tragically and unalterably devastated. Yet without the extraordinary and exhausting struggle that continued for so many years, there would in all likelihood have been no compensation and no remedy for the losses and suffering sustained by both communities. The view of the Ontario government appears to have been that the bands had neither grounds nor title to sue by virtue of a proprietary interest in the fishery. This is in spite of hunting and fishing rights guaranteed by Treaty 3, rights which in the view of the Ojibwa existed before the treaty and were merely affirmed by it.

There is at present no basis for the Inuit to suppose that in similar circumstances they might not be equally without effective redress. In comparison with other Canadians the Inuit, as individuals and as a people, are extraordinarily vulnerable and insecure with respect to their most fundamental resources. How has such an inequitable and dangerous situation come about, and what can be done about it?

Chapter Two

BACKGROUND

Introduction

That Inuit hunting and fishing rights should count for so little is the outcome of a colonial history that ignored or denied them, and a contemporary perception that they are unimportant and anachronistic. These can be expressed in the form of five premises:

1. The North was an uninhabited territory where no rights ran before the Sovereign's.
2. The Inuit were an uncivilized people whose conceptions of property were not recognized in and were irreconcilable with English common law.
3. The economic and cultural dependence of the Inuit on fish and wildlife was transitory, and would disappear with the advent of civilization.
4. Civilization having come to pass in the North, the Inuit no longer depend on fish and wildlife.
5. Since the Inuit have neither the means nor the propensity to regulate their own fish and wildlife harvests, the alternative to scientific management by the state is unregulated slaughter.

These premises seem to form both a logical and a chronological progression of arguments against the enhancement or entrenchment of Inuit hunting and fishing rights. As one is discarded, the next can be brought to bear. We will consider them in order.

"Uninhabited Territory"

As European immigrants displaced the aboriginal peoples of the Americas and settled in their place, they developed a body of theories and doctrines to justify and legalize their actions. The acquisition of new territory by European sovereigns could and did occur in a variety of ways, for example by conquest, cession, inheritance, annexation, and discovery or "peaceful settlement". [1] In the case of the first four, there is a presumption that the land was occupied by others and came into the Sovereign's possession by force or by mutual arrangement. In the case of discovery or peaceful settlement, however, there is a presumption that the land was unoccupied: there being no one to displace or conquer and no one to treat with for purchase of land.

The test of occupancy was not necessarily the mere presence of human beings: it turned rather on whether the land was under cultivation.[2] This view was apparently inimical to aboriginal property claims in Canada, where most aboriginal nations relied on hunting and fishing rather than agriculture for their livelihoods. The following statement by the Indian Agent at Kamloops, B.C. in 1885 neatly captures the sentiment that prevailed among Canadians of European origin well into the twentieth century:

> Some of the old Indians still maintain that the lands over which they formerly roamed and hunted are theirs by right. I have to meet this claim by stating that as they have not fulfilled the divine command, 'to subdue the earth,' their pretensions to ownership, in this respect, are untenable.[3]

The Inuit erected no fences, turned no soil, and built few permanent dwellings or settlements. They left the natural landscape essentially unaltered. Their mobility seemed to fit perfectly the European conception of the nomad: unorganized and property less. It is only in the last generation or so that Canadians of European descent have learned that they must transcend the preconceptions of an agricultural and industrial society if they are to understand the nature of aboriginal rights. The Inuit Land Use and Occupancy Reports, which were supported by the Government of Canada as a prerequisite to claims negotiations, showed that the Inuit have used and occupied over 4 million km^2 of land and sea ice from the Yukon coast to the Labrador coast.[4] These studies also showed that although there have been kaleidoscopic patterns of migration and changes in the details of land use, the total area and extent of Inuit land use has remained largely stable down to the present day.

These facts are now generally accepted by the Government of Canada and by the courts.[5] While the Government of Canada has not yet acknowledged legal responsibility for the settlement of what it terms the "Native interest" in northern lands, it has committed itself to negotiating such settlements.[6]

The Lex Loci

While neither the existence of the Inuit nor their use of the land could be denied, there has been another problem -– their alleged primitiveness. Like the notion that people without agriculture could not have recognizable property rights in land, there developed in British and American law a doctrine that those who occupied a territory prior to the assertion of sovereignty by the Crown must have achieved a certain recognizable level of civilization in order for their rights to be recognized. They must have had a *lex loci*, including a demonstrable customary system of land tenure.[7] Just as it was easy for an earlier generation of colonists to ignore the presence of the Inuit, it is still easy to overlook the Inuit *lex loci* because it has no recognizable imprint on the landscape. In fact, we must look for the evidence of Inuit property and tenure systems in Inuit social organization, ideology and values.

Historically in Canada there were eight regional groupings or "tribes" of Inuit, each with a distinct dialect, material cultural expression (e. g.in style of clothing, utensils and tools), and way of life (as distinguished by a particular adaptation to local environmental circumstances, especially the variety and abundance of fauna).[8] A person's entire traceable kinship network would normally also have been confined to one of these tribes.[9] Each of these tribes was associated with a relatively stable geographic area. It is true that these boundaries sometimes changed overtime, and it is also true that not all neighboring tribes had consistently amicable relations with one another. That these boundaries occasionally changed because of intrusive occupation or abandonment does not negate the historical existence in the Arctic of organized societies with territorial boundaries, capable of mediating their relations among themselves, any more than the much more prevalent occurrence of wars in contemporary international society negates the existence of organized, sovereign states.

Within each tribe there were several (typically five to ten) smaller groups, usually

referred to as bands. [10] Each was identified not only with a particular territory, but with a distinctive pattern of land use, in the sense that membership in such a group implied a more or less predictable seasonal round of activity and geographical movement. Members of each of these groups would consider themselves to have unique rights in those territories and — to a lesser extent — rights in the territory of the tribe as a whole, insofar as band membership was flexible over time. These bands were commonly designated by themselves and their neighbors by their territory: a geographical name followed by the suffix *-miut*, meaning "the people of . . ."[11]

It is true that the Inuit have often expressed generous sentiments with respect to their land, such as: "the land belongs to everyone", "the land is large and there is room for everyone", or "it's everybody's country". [12] These sentiments, along with the fluidity of Inuit social organization and the great mobility of individuals and households in former times, may be taken by some to indicate that there was no real system of tenure or concept of property and that the Inuit simply roamed as nomads, unimpeded only because no one else chose to possess their territory.

In fact the Inuit had definite conceptions about the territorial rights and boundaries of the tribe and of the *-miut* group as well as systems of tenure and allocation within those groups. Rights in land resources rested with the group, which maintained the right to use its territory through occupancy. The connection between the land and the group lay in knowledge, naming, travel, foraging, and residence, the first two being the cultural and symbolic expression of the last three. Thus the identification of any group's territory must be based not simply on recent (e.g. three-to-five year) patterns of land use, which may reflect short term changes in animal populations and distributions, but also on the sum total of the land known by the group (and recognized by neighboring groups to belong to it). It is a fundamental Inuit notion that property rights arise through use and, in the case of land rights, occupancy. Consequently those who cannot demonstrate knowledge of an area (expressed through stories based on both personal experience and the fund of lore and legend based on the collective experience of the *-miut* group) clearly do not have rights in it.[13]

There were no attempts to alter or partition the landscape or to appropriate sections or features of it in a manner that would exclude other members of the group. The land and its resources were thus the communal property of the group: no one could either claim exclusive access or be excluded access. To the extent that people articulated their relationship to the land, they saw themselves as belonging to it rather than it to them. [14] Traditional cosmology did not share with western thought the clear subject-object distinction between man and nature, the idea that nature is but insentient matter for man to dominate or master. The land was home and sustenance, but could not be reduced to individual possession and could not be alienated. Land was not a commodity or a factor of production. Nor were animals property — rather, animals existed in a relationship with man that man could to some extent control through knowledge and deliberate action.

The communal lands were more or less clearly bounded, if not by precise geographical landmarks then by relatively narrow transition zones. Every person either knew these boundaries from personal knowledge and could identify them on the landscape, or knew them as part of collective knowledge and could identify them by naming them. There was no need to survey or demarcate these boundaries, but people knew when they were in their own territory or that of another group and that knowledge had a practical effect on their behaviour.[15]

Because the Inuit by and large took an expansive or generous view of land rights, they often allowed others to use their own areas. Individuals could gain acceptance and be incorporated into the community in various ways — through marriage, adoption, friendship or peaceful intent.[16] Kinship (including fictive relationships such as partnerships) meant more or less automatic acceptance. In other cases acceptance could be more gradual, based on behaviour, intent and need. These decisions were made relatively informally, at the family, camp or community level.

Because non-Inuit use of Inuit lands has until recently occurred on such a sporadic and limited scale, these traditional methods of granting outsiders temporary use of the land for sustenance or for incorporating them into the community on a more permanent basis, continued to be appropriate for most situations. Yet there are records of more formal granting of group rights. An account of the Moravian land purchases at Nain in 1770 provides an important insight into such a transaction:

> . . . is it your will that we should dwell among you in your country'? the old men answered you can build, dwell & do in our Land as we do, & have the same freedom, & Liberty to do& act therein as any of us. for your Language & behaviour resembles much that of the Innuits & ye are Innuits (that is, good people, like us) ye are not such Kablunaks, or bad people, like other Europeans .[17]

In the nineteenth century some Newfoundland fishing families began settling along the northern coast of Labrador to hunt, fish and trap. Accounts of this process and of subsequent relations between these Settlers, as they became known. and the Inuit, indicate that there were no significant conflicts over land or resource use, not least because the newcomers soon adopted a mode of life similar to that of the Inuit and did not violate Inuit conceptions of territorial rights or resource use. The Settlers developed distinctive patterns of land and resource use, but these were complementary to and harmonious with those of the Inuit. Ties between the two groups were cemented by intermarriage and bilingualism, as well as by an emerging common interest in the use and management of land and resources. [18]

Throughout Inuit lands, individual and collective rights to hunt, fish and travel in territories beyond one's own were common. The Inuit land use and occupancy studies document considerable overlapping use among groups. No one imagined, however, that such use constituted exclusive possession. What in the context of claims negotiations have come to be called overlapping lands[19] were not, for the most part, disputed lands. but rather lands which were co-utilized by peaceful agreement.

As the Labrador experience suggests, peaceful co-utilization was made possible through the willingness of the entering party to abide by the Inuit code of behaviour respecting the land and its resources. Those who have done so have been welcome — whether Moravian missionaries, Newfoundland fishing families or, today, resource development companies; those who have not have been resisted. Expectation of reciprocal privileges may also have been a factor in the Inuit's willingness to grant such rights, but this is not well documented.

Within the group, particularly a *-miut* group, there was a collective system of use and occupancy of the land. For much of the year, the *-miut* group was broken up into groups of a few families which inhabited particular campsites seasonally. Although these sites often came to be associated with specific families, the composition of the camps was fluid and families could change affiliation from year to year. The organization of production at the camp level was achieved largely by consensus, although there was often a leader or *isumataq* whose views would predominate because of his skill and experience. In cases where dispersed effort was appropriate, these production decisions included such matters as who would hunt where. Even in the case of individual activities such as trapping, there were no individual property

rights in land. Individuals or partners were recognized as having pre-eminent rights to a trapline or a fishing spot so long as they used it; when they stopped doing so, whoever sought to use it in their place would ask their permission. Individuals or families were also recognized as having preeminent rights to dwelling sites, but again only for as long as they occupied them.

At both family and band level, the Inuit system of land tenure successfully incorporated two conflicting principles: that permission must be sought to use territory not one's own, and that no one can deny another the right to make a living. That is why there are such seemingly contradictory statements on record by Inuit themselves with respect to the content or even the existence of the rules governing land use and resource harvesting.[20] If there were no recognized land rights in Inuit society, there would be no basis for the ritual norm of requesting and (generally) being granted land-use rights, yet that has in fact been the norm.[21]

One authority on aboriginal land tenure identifies three elements of the "bundle of rights" entailed in any tenure system.[22] The first is the right to use the land. The Inuit had a viable and established system for determining who was a member of the communal territorial group. The second is the right to permit others to use the land. The Inuit also had a system for permitting or refusing others to enter and use their lands. The third is the right to alienate, sell or encumber the land. The Inuit system contemplated such rights only in the most limited way. An individual could convey use rights, for example to a trapline or dwelling site, to another member of the community. In some instances, the head men appear to have been able to convey rights of settlement and use, but these did not imply a consequent diminishing of Inuit rights in the same territory. There appears to have been no conception of an alienable right to land capable of conveyance.

While the Inuit clearly valued the land as their home and sustenance, specific units of land had no particular economic value, There is no evidence that the control and use of larger rather than smaller territories by an individual or group conferred prestige or authority. The per capita size of a group's territory was to a large extent determined by the quality and abundance of fish and game: value lay in the resources themselves. Specific sites were recognized as important to the group by virtue of their being the source of, or point of access to, fish, fur, game, wood or berries. Stripped of its resources, the land itself had no economic value. That is because there was not, and to a large extent still is not any precise means of relating the abundance and quality of fish and wildlife to the productivity of any particular acreage. Mobile resources depend on many places and habitats and many environmental factors for their well-being; no one place or factor can sustain a mobile resource, and the whole is indivisible in the sense that any part alone is incapable of sustaining even a fraction of such a population.

Finally, as will be elaborated below (pp. 20-24), the Inuit had the means of social control to ensure that individuals used the land and its resources in harmony rather than in conflict with one another, and not in such a way as to endanger the security of the group, at least insofar as the consequences of a given activity could be forseen. The longevity and stability of these systems is an indication that they worked well in practice.

Systems of property rights are entirely a cultural artifact: there being no "natural" or "immutable" system of property rights, each must have a justifying theory accepted by a society as a whole, even though it may benefit individuals differently. The political scientist C.B. McPherson points out that

> . . . Property is controversial . . . because it subserves some more general purposes of a whole society, or the dominant classes of a society, and these purposes change over time: as they change, controversy springs up about what the institution of

> property is doing and what it ought to be doing . . . any institution of property is always thought to need justification by some more basic human or social purpose. The reason for this is implicit in two facts . . about the nature of property: first, that property is a right in the sense of an enforceable claim; second, that while its enforceability is what makes it a legal right, the enforceability itself depends on a society's belief that it is a moral right. Property is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right. . . property has always to be justified by something more basic; if it is not so justified, it does not for long remain an enforceable claim. If it is not justified, it does not remain property .23

In the light of this explanation of the need to justify institutions of property, it seems clear that the absence of well-articulated theories in aboriginal societies was not due to their lack of civilization or intelligence, as earlier European theorists presumed, but to the fact that land and resources were held in common. If no class within Inuit society could or did appropriate land to itself, there was no need of a justifying theory to advance or rebut that process. Now that southern society encroaches on their traditional lands and waters by means of peaceful settlement and development, the Inuit are rapidly elaborating theories which justify their title in a modern context. Their contemporary perceptions of their property rights in land and resources rest on their understanding of the consequences of losing them. These consequences are seen in a collective as well as an individual way.

To summarize, the Inuit, like other aboriginal peoples in Canada, not only occupied distinct territories according to systematic patterns over long periods, but also had relatively stable systems of political authority, land tenure, and resource harvesting which, if their continued existence over generations is anything to go by, worked. This system of law is known to lawyers as a *lex loci*, and may be conceived as the local equivalent of English common law. In the light of several historic court decisions in the 1970s, it is possible to assert that these groups "have a *lex loci* which is, on the evidence, of a class which can be presumed to have survived the assertion of a territorial sovereignty by the Crown. "24

Modernization

Of all the races and cultures of humanity, the Inuit were, and indeed still are, the quintessential hunters. During the past century ethnologists have described the ways of life of many dozens of hunting and gathering societies around the globe.[25] In most cases, hunting was only part of a larger round of activity which included gathering, herding, and horticulture. None of these groups relied so exclusively on hunting as did the Inuit. None obtained so great a proportion of its daily needs — food, clothing, shelter and heat — from fish and wildlife as the Inuit. Few maintained their economies and societies with so little external modification and until so recently as the Inuit.

For most Inuit, subsistence hunting and fishing was the dominant pursuit until the early twentieth century, at which time production was reoriented to produce commodities chiefly for the fur trade, while traditional harvesting continued. Trapping did not displace hunting but was combined with it. Not until the 1950s did the Inuit obtain income in significant amounts from sources other than hunting and trapping, or begin to organize their economic life around any other activities.

Whatever the Inuit thought of this arrangement, and there is no evidence that anyone in authority cared to find out, in the view of the North's would-be colonizers, it was certainly not permanent. When Canadian sovereignty was extended to the lands

of the Inuit, the dominant vision of the country's future was that of an agricultural breadbasket which would support urban, industrial centres. Since the Arctic did not immediately fit into this conception of things, it could be left in its "deep freeze" indefinitely, as a reserve for the future.

' In the early twentieth century, when geographical exploration and the fur trade began to impinge more significantly upon the Inuit, the government sought to protect the Inuit by maintaining their ability to live off the land. In the NWT in particular the fur trade was regulated, vast game preserves were created in which only Canadian-born Inuit and Dene could hunt, and the licensing of white hunters and trappers was restricted.[26] However, the government did not do so on the basis of aboriginal title or the expressed desires of the Inuit. The government had more immediate objectives of its own: to protect the Inuit economy from collapse so that the Inuit would not become charges upon the public purse.

These were seen as temporary measures when they were enacted, and indeed many have since been repealed or altered, again without reference to Inuit desires. It was always anticipated that fish and wildlife and the Inuit way of life based on their harvest would disappear with the advance of the frontier of civilization, just as the buffalo and the Indian way of life on the Prairies had already succumbed. By the 1930s and 40s, mineral discoveries were already changing the face of the North, and the possibility of economic development and white settlement without a local agricultural base was at hand. There was no doubt that these things would and should come about, only differences of opinion about when. Change was not only anticipated but planned.

The changes in Inuit life wrought since the 1950s by the peaceful invasion of the North have been dramatic. The construction and operation of military airfields and warning stations, the extension and development of government administration, the growth of resource exploration and extraction, and the related development of municipal, transport, communications and business infrastructures have all served to transform Inuit society radically and irreversibly.

Many observers assumed that the new economy would finally render the Inuit dependence on fur, fish and game irrelevant, and that the new society would abandon all except recreational interest in those resources. Governments of all political persuasions soon adopted a common approach to the socio-economic development of the Inuit, and indeed of the other aboriginal peoples of the North. Policy makers concluded that the traditional way of life was dead and that the only avenue for the Inuit was to join the white man's world. Oil, gas and minerals — the non-renewable resources of the North — were seen as the key to the future. Consequently the long-term solution to the problems of the day was to educate native people and provide them with wage employment. Only in this way could they be prepared for the industrialization of the North which surely lay ahead.[27]

Given this view of the future, it is hardly surprising that the maintenance of renewable resource stocks and habitat would be secondary to the development and extraction of non-renewable resources. Nor is it surprising that the Inuit interest — legal, economic, social and cultural — in renewable resources should have been disregarded and eroded.

The Significance of Fish and Wildlife to the Inuit

The future did not unfold as most observers of the Northern scene had predicted. Time after time, as oil, gas and mineral exploration proceeded or pipeline and tanker

projects were announced, the Inuit responded with doubt and opposition rather than optimism and welcome. At Coral Harbour, Sachs Harbour, Nain, Baker Lake, Tuktoyaktuk, Arctic Bay, Resolute Bay, Pond Inlet and other communities, the people spoke before public inquiries, board hearings and courts of law, and told visitors from industry, government and the media about their concerns.[28] A theme that emerged repeatedly was the impact on fish and wildlife, on hunting and trapping and on the social and cultural life which depended on them. Again and again the Inuit affirmed their attachment to the land and their traditions with dignity and conviction.

Major research projects, often commissioned by the Inuit themselves, revealed the material basis of these concerns. The land use and occupancy studies showed that the Inuit had by no means abandoned the land; in many areas the geographical extent of land and water on which the Inuit relied for hunting, fishing and trapping is still as great as it was a century ago.

Harvest surveys and estimates revealed unexpectedly high rates of food production.[29] In Northern-Quebec, for example, per capita harvests ranged from 236 to 466 kg annually between 1974 and 1978. At Baker Lake the per capita harvest was estimated at 321 kg in 1976-77. In the Beaufort Sea region per capita harvests were estimated to have averaged 271 kg annually between 1970 and 1975. On the Labrador coast the figure was 131 kg in 1979. In the Baffin region in 1981, per capita harvests were 214 kg, while in the Keewatin region between 198 I and 1983 they were 216 kg. All these figures were substantially higher than the national per capita consumption of meat and fish (117 kg in 1980-81), which suggests that whatever problems beset the Inuit economy, lack of nutritious protein was not one of them. Considering that the local replacement cost of such protein runs to $10.00 or more per kg, we can begin to recognize the substantial economic contribution of hunting and fishing to the average household.[30]

For most Inuit, country foods continue to supply the greater part of protein requirements and most of the essential components of a balanced, nutritious diet. Imported foods available at stores in small northern communities consist chiefly of sugars, starches and tinned fruits and vegetables, and the cost is high. Reliance on country food is a matter of health as well as economics. Dietary studies in these localities have shown that Inuit who live largely on store-bought food are often malnourished and are more likely to suffer from diet-related health problems.[31] At the same time the Inuit have been quick to seize the opportunities presented by mechanized transport — snowmobiles and large outboards — and rising prices for at least some wildlife commodities, to increase their cash incomes from hunting and trapping. In many of the smaller Inuit communities the sale of fox furs, polar bear hides, sealskins and fish constitutes a large part of the cash income of many families. So long as there is a market for these commodities, this will continue to be the case. In recent years wildlife resources have taken on additional economic significance to the Inuit through the development of intersettlement trade, sport hunting, and tourism in the North.

No one has suggested that the economic future of the Inuit lies solely with hunting and trapping, or even with possible secondary uses of fur, fish and game. Yet these activities and resources have remained critically important to the economic well-being of most Inuit households and to the sense of collective identity and social well-being of every Inuit community, even in the face of greatly expanded wage employment and business opportunities in the North. In Labrador, hunting, trapping and fishing

accounted for 25% of net personal income in 1979, and perhaps a further 10% is derived from employment in the fish plants and is thus directly dependent on local renewable-resource production. In the Beaufort Sea region, fur and game account for up to 50% of gross personal income in smaller communities. Even in Tuktoyaktuk, where practically everyone is involved in wage employment for at least part of the year, the figure is about 20%.[32] That is why even today people in that community ask: "When all the wealth is taken out of the ground, will our whales, seals, fish, caribou, bears and foxes still be here?"

To the Inuit, wildlife and the land which supports it constitute a fundamental element of their security. They have seen many economic booms and busts, and know that even in the best of times they are all too liable to be the last hired, the first fired, and to get the lowest paying jobs. Consequently wage employment, even though people may want it, is not considered a permanent or secure source of livelihood; whereas the land provides precisely that security because, properly cared for, it will yield food and fur forever.

The reality of the North today and for the forseeable future is that beyond a basic level of government activity in local administration and public works, there will not be massive employment or business opportunities in or near most communities. There are about 25,000 Inuit in Canada, of whom about 85% live in the Arctic, in about 50 communities scattered along thousands of miles of coastline between the Mackenzie Delta and Labrador. Almost all of these communities number less than 1000, and in almost all of them Inuit account for 80 to 90% of the total population. According to the 198 l census, the cash income of Inuit in these communities was about half of the average for all Canadians[33], which underlines the importance of domestic food production from fish and wildlife resources.

How many of these Arctic communities can expect to have mines or oilwells nearby in the next decade or so? How many men can be expected to take up fly-in or rotational employment far from home, without disrupting the fabric and continuity of their community and family lives? How many will want to? Can local administration be expected to absorb all available labour? Yet despite the present lack of economic opportunity in the Arctic, the Inuit clearly remain attached to their communities and to their land. Immigration has been proposed by several policy- and opinion-makers in the last twenty years, but every census confirms that this solution has no appeal to the Inuit.[34]

The conclusion is inescapable: the economic future of the Inuit depends as much on the continued abundance and availability of fur, fish and game, and the ability of the Inuit to use those resources to their best advantage, as on any other factor. There is no one magic economic solution which will render all other endeavors irrelevant and unnecessary. So the Inuit are trying to ensure that, whatever happens in oil and gas development, commercial expansion, communications and broadcasting, government administration, and all the other developments in which they would like to participate, there will always be a place for fish and wildlife and the habitat which supports them. Whether people want to use those resources for subsistence or domestic purposes, commercial sale, business development such as tourism and guiding, their own recreation, or for ceremonial purposes, there must be a clarification of what rights the Inuit have in those resources.

So there are perfectly sound economic reasons for the Inuit to protect and maintain their interest in fur, fish and game. But hunting, fishing and trapping are not merely

occupations or industries to the Inuit, readily interchangeable with others, depending solely on economic calculations of self-interest. They are bound up with the individual and collective identity of the Inuit and with their personal and social sense of well-being. Because the great majority of Inuit live in small, land-based and relatively homogeneous communities, the social fabric of Inuit life is still very heavily influenced by kin and community. Most Inuit continue to regard traditional activities as essential to the maintenance of their social structure and institutions, their culture, and the solidarity and cohesion of their family and community lives.[35]

Fur, fish and game are not just food and clothing. They are the foundations of a way of life — the system of social rights and obligations, of property and tenure, and of celebration, ceremony, and the spirit. They are the foundation of Inuit identity and self-worth. To the Inuit, regardless of what they or others in their community actually do for a living, the essence of their identity lies in having the ability and the right to hunt, fish and trap. These activities are seen not as specialized occupations — to which entry is limited by licensing restrictions, certification requirements or the closed shop — or as avocations for the privileged, but as the birthright and heritage of every man and woman. To harvest, to share, to prepare and to eat the fruits of the land are an important part of what makes the Inuit special in their own eyes, and of what symbolizes the worthy life. Whether or not a person actually lives out his or her ideals, none is prepared to see the means of doing so foreclosed by alien property concepts or restrained by alien laws.

Inuit Resource Management

We have stripped away the objections to Inuit proprietary rights in fish and game by showing that the Inuit were present on the land and that they had (and continue to have) a recognizable system of tenure. Their reliance on traditional resources has changed but not diminished: the land and its resources continue to have great economic, social and cultural significance. There is every indication that a reliable supply of fish and game and a secure access to that supply will be essential to the Inuit far into the future.

There is a final objection, expressed increasingly in some quarters now that the justifications for the other objections have been shown to be without substance. It is that the Inuit never had, and do not now have, the means or the propensity to regulate their own fish and wildlife harvests.[36] Consequently, although they may be entitled to priority in the allocation of harvesting privileges, management must rest squarely and exclusively with the Crown. Any other arrangement would lead to unregulated slaughter, and hence to the disappearance of the very resources on which the Inuit rely. The Inuit must therefore be protected from this eventuality by scientific management which, since fish and wildlife are common property resources, can only be carried out by the state.

Is this the rock on which the Inuit movement for self-government in the sphere of resource management will finally founder? The problem with this view is that it rests on a simplistic predator-prey model of aboriginal society. No indigenous cultural mechanisms for control or management, and no accumulation of historical experience are acknowledged to have been at work. To explain the behaviour of hunting peoples in terms of a purely biological analogy is to ignore a substantial body of anthropological evidence and theory which indicates that such an explanation is simply incorrect.[37]

Inuit tenure systems and property conceptions were in fact clearly related to the conservation of natural resources. The various Inuit bands and *-miut* groups had enforceable customs and rules, which served to regulate the manner in which individuals hunted, trapped and fished.[38] That these systems of customary law were rarely committed to writing, as was the case with the Elders' Rules in Labrador, is not proof they did not exist.[39] No individual did exactly as he pleased, in some lawless jungle where the strong triumphed over the weak. Every person knew and observed a complex set of rules about how, where and when to hunt and, importantly, not to hunt. These rules were often expressed in terms of religion and spirituality rather than of science as we understand it today. However, the fact that many of these rules served, even if not in conscious or well-articulated intent, to conserve the resource base on which people relied as well as harmony within the band, suggests that there was a material as well as an ideological basis for them.

It is true that, as in any society, these rules were sometimes violated. But the social pressures of ridicule, gossip, and exclusion could be brought to bear against transgressors. It is also true that these rules did not always or invariably work, but that fact is not a valid basis for rejecting their existence and function. Such a suggestion, coming from a society which has managed to exterminate more wildlife species in Canada in the last century than its aboriginal predecessors did in the previous 10,000 years, would have to be regarded as astonishing.

Yet the paradigm of scientific management does not rest solely on misconceptions about the nature of aboriginal society. It is also based on assumptions about the nature of property, and in particular of common property. The contemporary western view of property is that it is either private or belongs to the state. What is neither is not real property. Resources not amenable to private appropriation we call common property, but contrary to aboriginal conceptions we do not mean that they are collectively owned by a group. We mean that they are not owned by anyone, that they are free goods, there for the taking. Fish and wildlife are administered as common property resources. Because of their mobility and wildness, fish and wildlife are not property under the common law until they have been reduced to possession by killing or capture. This stems from an important tenet of western thought — that property arises through the application of human labour. Since labour is involved only in the capture or killing of wildlife and not in its creation, wildlife is not only not property, but has no value prior to the application of labour.

In England the Crown did not actually own wildlife, but had the right to reserve the taking of wildlife to itself by forbidding its subjects to do so. In North America more democratic ideas have prevailed. No one has the pre-eminent right to use fish and wildlife to the exclusion of others, except where they are on private lands. In Canada, preferred access to and use of fish and wildlife on Crown lands has been granted to at least three categories of people: aboriginal peoples, scientists, and those deemed privileged by the Crown. This preferred access is not unrestricted and unregulated. The authority to manage fish and wildlife rests with the Crown in right of Canada or of a province, because of the Crown's jurisdiction over the lands and waters that fish and wildlife inhabit.[40] Whether this proposition of law has been diminished as a result of the aboriginal guarantees set out in section 35 of the *Constitution Act, 1982* remains to be seen.

The transformation of communal property into common property — and it is essential to make the distinction between the two forms of ownership — came about

through expropriation. This occurred against the wishes of native people, although usually without their organized resistance. This expropriation constituted more than mere transfer of title, for it invested the concept of title itself with entirely new meanings.

The effective or de facto transformation of property has been quite recent. The state has only chosen to exercise its authority (chiefly through the granting of competing interests in land and through regulation of fish and wildlife harvesting) in the last generation or so in much of the North. It is this exercise of authority which has given such strong impetus to the native claims movement.

The prevailing conception of common property as state property was imposed, not on a lawless, free-for-all situation in which no one owned or had responsibility for anything, but rather on a functioning system of communal property managed by the occupying group. It has been observed with reference to the early American colonists that "had they cared, they would have found considerable land area already vested with ownership concepts understandable to them as 'common lands', and other lands clothed with 'rights of common', particularly fishing and hunting rights".[41] It would not be unjust to apply this observation to the more recent colonial history of the Canadian North.

The management implications of common property as opposed to communal property are profound. Consider Hardin's well-known essay on "The Tragedy of the Commons''.[42] A number of herdsmen have access to common grazing land. For each head of cattle the herdsman puts out, he receives all of the utility from its use or sale. The consequent effects of overgrazing are felt equally by all herdsmen, however, so that the disutility to the individual is only a small fraction of the utility he receives. It is therefore perfectly rational for each herdsman to continue putting more cattle on the commons until the pasture is bare and can no longer support any cattle.

What is omitted from this scenario is social organization and its mediating role between individuals and their environment. Instead we have individual herdsmen, each making calculations about personal gain, "each pursuing his own best interest in a society that believes in the freedom of the commons. *Freedom in a commons brings ruin to all*".[43] (emphasis Hardin's). Hardin sees two options: sell the commons off as private property or keep it as public property while allocating the right to enter, either of which will introduce the required element of individual responsibility. According to Hardin these new social arrangements require mutual coercion, mutually agreed upon.

The view that all arrangements other than individual property ownership lead to negative or even tragic consequences is seductive, but unsupported by historical and anthropological evidence. The reason is that in Hardin's common the social arrangements that have prevailed in most instances of communal property tenure are absent. Gordon, one of many economists who have criticized common property arrangements, tells us that under feudalism "the manor developed its elaborate rules regulating the use of common pasture, or 'stinting' the common: limitations on the number of animals, hours of pasturing, etc., designed to prevent the abuses of excessive individualistic competition", and further, "stable primitive cultures appear to have discovered the dangers of common property tenure and to have developed measures to protect their resources. "[44]

Aboriginal and feudal systems of land tenure were characterized by similar restraints. Unrestricted individualistic competition was not a feature of traditional

Inuit life. Indeed. Inuit culture was highly resistant to such personality traits, not least in the economic sphere. It seems likely that in both feudal and aboriginal systems these arrangements were achieved under the very conditions of social stability which Hardin supposed would remorselessly generate the tragedy of the commons.

The commons without law, restraint or responsibility is an appropriate metaphor not for these societies, but rather for laissez-faire industrial capitalism and the imperial frontier, both of which were the historical contexts for such events as the Arctic whale fishery, the Pacific salmon fishery, and the buffalo and passenger-pigeon hunts. Hardin's herdsmen were putting into practice the economics not of medieval times but of Adam Smith. Their behaviour is what we expect when community and its restraining institutions are absent.[45]

It is therefore essential to distinguish between traditional *communal* systems of property and what we now conventionally call *common* property arrangements. The latter are characteristic of rapid economic change, unstable social institutions and the absence of local, community control. The Pacific salmon fishery, to biologists and economists alike the classic illustration of the evils of common property tenure, resulted from the expropriation of historic, local fishing systems and the deliberate creation of an economic free-for-all in which the spoils went only to the strong. In other words, it was the substitution of piracy for community; and it is the former, not the latter, that managers are, or should be, trying to overcome.

This is not to suggest that individual native people never found it convenient or necessary to behave as pirates once the institutions of community were overturned; However, aboriginal systems of tenure must be acquitted of the charge of lawless individualism. The biological analogy can be rejected on the grounds that the propensity to conserve wildlife resources (or not to do so) is a function not of the psychological or genetic makeup of ''human nature'' but of social organization and the system of property rights.

It is true that traditional systems of tenure and of customary law have been under substantial assault for many years in the North, so it might be wondered what relevance all this has for future management strategies. Is the final objection to Inuit management that whatever existed before no longer does, or is no longer relevant? Has the old system simply withered away in the face of commerce and technology? Is that system immutable and are the Inuit unable to adapt old law or create new law? These appear to have been the assumptions underlying wildlife and fisheries management as practised in the North. But the Inuit do not accept them. If self-government is to mean anything, it must mean the ability to manage one's own affairs. The administration of game was, after all, one of the first responsibilities the federal government in Ottawa delegated (in 1948) to the territorial administration then located in Fort Smith.

That a body of law is referred to as customary does not mean it is necessarily any more antiquated or immutable than the common law or the statutes under which all Canadians live.[46] All legal systems evolve with the societies they serve and by which they were created. The atrophy of Inuit customary law is not a function of any intrinsic inability to cope with change, but a consequence of deliberate suppression. Too often among the Inuit, customary law is celebrated only in the minds of the elders as something that worked well long ago. The challenge to the Inuit now is to seek the guidance of the elders and the cooperation of the young in making customary law relevant again. And the challenge to wildlife managers is to listen. The conservation of

fish and wildlife is not simply a matter of good science, nor is it a purely utilitarian exercise. It requires viable community institutions, a sure recognition of the interdependence rather than opposition of man and nature, and a system of ethics, whether expressed in philosophical, spiritual or religious terms. Despite the great transformation of Inuit life, the Inuit have not forgotten these things. And wherever these things already exist, it only makes sense to foster them and to build on them, rather than continue to undermine them.

Chapter Three

THE SOLUTION

Introduction

Today, Inuit hunting rights must serve two practical objectives. One is to vest in the Inuit a proprietary interest in fish and wildlife which constitutes an enforceable claim against all others. This would provide for a fair and effective system of deterrence and, if necessary, compensation for nuisance or trespass by a third party or for expropriation by the Crown. The other is to provide the Inuit with some legislative and regulatory powers over fish and wildlife, in effect to entrench rather than extinguish Inuit rights. This would provide a framework within which local customary law could operate with respect to resource harvesting and management, and within which the Inuit could effectively influence administration and policy decisions that affect their interest in the resource base.

In the following section we shall propose a characterization of aboriginal hunting, trapping, fishing and gathering rights that meets these objectives. It will be argued that these rights are best interpreted as interests in land in the nature of a profit a prendre, and that the judiciary should be invited to characterize these rights in this manner, notwithstanding the absence of a direct grant of the interest. For the Inuit contend that their rights do not and should not depend upon the existence of a Crown grant, since their interest in the land predates that of the Crown. But the common-law profit interest provides the closest accommodation of the aboriginal interest within a dominant and foreign legal system. The judiciary should be invited to recognize the analogy and develop the profit interest imaginatively; but in the event that it fails to do so, these rights could be *deemed* to be an interest in the nature of a profit. Such a statutory or constitutional deeming provision would recognize the status and protection required by the aboriginal interest but would save the Inuit from doing the unacceptable — acknowledging that their interest derived from the Crown rather than from their own *lex loci.*

Property Rights

The Inuit recognize that they cannot expect to obtain fee simple title to their entire traditional land base through claims negotiations. [1] The Inuit also recognize that fee simple title, whatever other advantages it holds for them, cannot by itself solve the problem of the conservation of fish and wildlife stocks.

No matter how large an entitlement to land results from a claims settlement, the land base alone could not provide for the needs of the Inuit with respect to fish and wildlife. The caribou know no boundaries and cannot be fenced in. Seals, fish and whales come and go, sometimes far beyond Inuit territory. Hunting and fishing rights as presently constituted offer less than full protection for the Inuit interest in fish and wildlife on Crown lands. Even exclusive hunting rights on Inuit lands could not protect the Inuit interest, so there must be some proprietary and management interest in fish and wildlife separate from the land base itself.

Such a proprietary interest does not require full ownership in the form of fee simple title. A grant to certain resource rights, specifically to game, fish and fur resources, would suffice. But a grant of such interest implies a right of profit a prendre. This differs from a mere licence to hunt and fish, even an exclusive licence to do so, in the following ways, inter alia:

1. It is a property right in land, which is inheritable.
2. It is not revocable at will.
3. It is binding upon third parties.
4. It provides remedies at law in trespass and nuisance.

A profit a prendre is an enforceable claim to land, which cannot simply be ignored when the Crown expropriates the interest or grants a competing interest to a third party, or when a third party interferes with the interest. It is an interest which provides for some continuity and security of tenure, which a licence does not. It is an interest which can be evaluated in economic terms and compensated accordingly.

We suggest that aboriginal title be interpreted by the courts as embracing, inter alia, an interest in fur, fish and game resources. Further, this interest should be interpreted as the original interest. This arrangement would not prevent the Crown from granting freehold or lesser interests in land to other parties, nor would it prevent other parties from exercising their lawful interests. However, such action by the Crown would not terminate the Inuit interest; rather, all subsequent grantees would be subject to the pre-existing interest of the Inuit. The Inuk hunter or fisherman would thus be in a much more equitable relationship with the holder of an oil and gas exploration permit or a mineral claim. This is in stark contrast to the present interpretation of hunting and trapping rights, in which the licence holder is generally interpreted as having no interest in land or resources as such, only a right of entry and use. The issues and implications which arise from this proposal are discussed below.

The nature of the interest

Although commercial trapping and fishing licences are not at present deemed to be rights of profit a prendre in Canada, the analogy with other commercial grants which are, is straightforward enough.[2] Indeed, because the Inuit use of fish and game is not exclusively or even largely commercial, the right of profit must also encompass the subsistence interest. There must be a recognition that subsistence resources have value to the Inuit and that their loss has consequences which are at least in part measurable and compensable. It is both possible and useful to impute a value or shadow price to subsistence production insofar as it replaces the necessity to purchase goods of equivalent value. Whether it is possible to evaluate anything more than this, for example the value to the producer of his or her way of life, is a technical question: whether one should even attempt to do so in dollar terms is an ethical and political question. But it is as possible to measure the subsistence value of fish and wildlife to the Inuit as to measure the commercial value of fish and fur or, for that matter, a mineral claim or timber licence to its holder. The right of profit should therefore attach as easily to a grant of interest in fish and wildlife as it does to other resource rights.

A problem does arise, however. as a consequence of the mobility of fish and wildlife resources which, unlike minerals, timber and pasture, are not firmly attached to particular sites or areas. Should the right of profit be construed as relating to a

specified geographical area, or to a resource which is by nature mobile and not geographically predictable? It would appear that there are three possibilities.

1) *An ownership interest in particular land.* In this case the holder would, subject to the terms and conditions of the interest, be entitled to reap whatever benefits might be derived from the entire range of resources. The Inuit do not seek such an interest with respect to fish and wildlife. The Inuit anticipate that through the settlement of claims they will have their title to a certain proportion of their traditional lands confirmed, . but this will not itself vest in them any proprietary interest in fish and wildlife except the right to prohibit others from hunting and fishing on these lands.

2) *An interest in a specified territory with respect to specified resources.* This would be analogous to timber or grazing rights. The value of such rights over time cannot be predicted with certainty. Natural succession, climatic conditions and management strategies will all serve to vary the annual potential yield over time. Indeed the holder risks sudden and catastrophic reduction of the value of his interest due to fire or drought. The level of uncertainty and risk is even greater in the case of wildlife. There is also the fact that an animal population may simply move elsewhere, so that the holder of a grant to a particular area could lose his or her entire interest without any concomitant loss of abundance in wildlife. In this case there might result a windfall gain to some other grantee.

This option would appear to be the closest in principle to the aboriginal situation, in which the Inuit, although highly mobile in pursuit of fish and wildlife, were nonetheless organized into bands which were clearly identified with their respective territories. These territories, it should be noted, included land and water, sea ice and freshwater ice. It is also consistent with the current administrative practice of managing game by geographic zones. For example, registered group trapping areas (see below) would simply become registered group harvesting areas in which the exclusive right of members to trap for furs would be extended to harvest fish, game, berries or whatever is locally appropriate. Neighboring communities could be free to work out arrangements with each other to deal with the issue of resource mobility across boundaries.

3) *An interest in specified* resources *without reference to geographical location, subject only to jurisdictional boundaries.* For example, it would be possible to view the Inuit as having the exclusive right of profit in a particular caribou herd, or a shared right (e.g. condominium) with some other aboriginal titleholder on the basis of traditional use and occupancy. While this option is less familiar than option 2), it might bear consideration with respect to resources such as caribou.

Options 2) and 3) do not grant exclusive ownership of the resource to the Inuit, nor do they ipso facto challenge the right of the Crown to manage the resource. The state would manage fish and wildlife as it manages forests and grazing lands in which grantees have a right of profit. Whatever involvement the interest holders might have in management (and the Inuit argue that it should be substantial in the case of fish and wildlife — see below) would be negotiated.

The interest holder

In principle, a court could construe the profit as vesting in either a group or an individual; in Canada commercial trapping and fishing rights have been granted to both, The registered trapline system which prevails in most Canadian jurisdictions provides chiefly for the use of specified areas by individuals. However, in some

jurisdictions there are also provisions for group trapping areas, chiefly for Indian bands. In the NWT the principle extends to the Inuit, although they are not organized as bands in the same way as Indians are (either traditionally or under the provisions of the *Indian Act*). There are several registered group trapping areas in the NWT, the rights to which are vested in the members of the local trappers' association, all of whose names appear on the certificate of registration. Whereas in the case of band licences trapping and fishing rights extend to all band members as defined by the *Indian Act*, in the NWT community trappers' associations have been able to define their own membership as long as they admit only persons who are entitled to trap by the N WT *Wildlife Ordinance*.

Where the interest is vested in a band or community, the situation is analogous to one in which property is held communally. All members of the community have a right to hunt and fish, and precisely where they do so within the tract of land or body of water is a matter for local custom and decision-making. The Crown asserts no authority in this regard, except insofar as it may be called upon to protect the legal rights of individuals.[3]

In all cases these are exclusive rights. Whether the licence is granted to an individual, a partnership (an arrangement envisaged in several jurisdictions) or a group such as an Indian band or Inuit community, it cannot be granted to anyone else for the same purpose. Thus two principles are already clearly established with respect to fish and wildlife: first, the harvesting rights may vest in a group, and not necessarily an incorporated one; and second, the rights so vested may be exclusive.

Conditions of the interest

The proposed profit would be based on aboriginal title, not on the Crown's prerogative to maximize the returns from its assets or achieve other economic policy goals. The profit would be a means by which the Inuit would be entitled and enabled to pursue their legitimate interest as recognized by the Crown. This suggests the following conditions of tenure:

a) the interest would be in perpetuity, as long as the conditions of the interest are met;
b) the interest would be free, and not subject to fee, royalty or any other payment;
c) there would be no economic performance criteria attached to the interest, e.g. annual expenditure or improvement requirements or annual production targets or quotas;
d) the only performance criteria attaching to the interest would be those related to resource conservation; and
e) expropriation could only occur through an act of Parliament or of the competent legislature (where this is constitutionally possible).

Conveyance

To encourage the conservation of fish and wildlife resources and their perpetual availability to the Inuit, the interest should be interpreted as vesting in the Inuit collectively. While specific areas would be granted to specific groups of Inuit, and those groups could in turn allocate rights to smaller groups or individuals within the community, it is not envisaged that any group or individual could sell, exchange or transfer the profit or any element of it in perpetuity. This provision would in no way interfere with the right of the Inuit to sell or exchange their resource rights on a

temporary basis — for example, permitting sport hunters to take part of the local quota of polar bears, or a neighboring community to hunt caribou in certain areas. The delegation or sale of such rights would only be on a temporary, fixed-term basis and would not involve a sale of the entire grant. The profit itself would not be a marketable commodity and would have no exchange value. If a particular Inuit community were entirely abandoned, its associated profit would in the first instance remain with its members and their successors; failing that, it would revert to the Inuit regional collectivity (Nunavut, Northern Quebec or Labrador) as a whole. While the interest itself would not be a negotiable asset, damage to or expropriation of it would at the least be compensable in the amount of the potential income foregone.

Relationship to Inuit lands

The existence of any property interest in wildlife, assuming it pertained to a specified geographical area, might or might not coincide with Inuit lands as confirmed by a negotiated claims agreement. There is no necessary or implied connection between the two. The geographical extent of an interest in fish and wildlife would coincide roughly with the extent of traditional use and occupancy. It would therefore be much greater than the area of land to which Inuit title was confirmed. The Inuit might wish to have their title confirmed in certain areas for the added protection of their harvesting interests, but they might also wish to select lands for townsites, mineral rights or any other purpose. Where the interest existed on Crown lands in which the Inuit had no other proprietary interest, they would be on a more or less equal footing with those granted other resource rights, in being able to defend those rights. Should the Crown alienate those lands for an inconsistent use, the Inuit would have to be compensated for loss of interest. Whether such compensation should be in the form of cash or alternate lands is beyond the scope of this discussion.[4] We need only note that a variety of arrangements is possible. Where the interest is on Inuit lands, it would provide an additional proprietary right. For example, parties with subsurface rights would have to negotiate terms and conditions of entry which ensured the protection of the interest in fish and wildlife as such, as well as in the land surface. There would be broader grounds for the Inuit to seek abatement or redress. Clearly, recognized Inuit title, including the subsurface estate, coupled with a recognized interest in fish and wildlife, would provide the maximum protection of the Inuit interest in those resources and a greater degree of protection than either of those proprietary forms of interest separately.

Management Rights

The proprietary rights we have discussed would recognize that the Inuit have an enforceable claim on the benefits which flow from renewable resources. These rights will strengthen the means of redress available to the Inuit. But the Inuit are primarily concerned with preventing and avoiding damages rather than being compensated for them after the fact. As well, the Inuit are not mere passive consumers of resources made available to them by others, whether private parties or the state. The Inuit have coexisted with fish and wildlife for thousands of years and want an active role in determining the nature of that relationship in future.

The Inuit must therefore have significant management rights over fish and wildlife resources. These rights must be more than advisory, and they must be effective at all

levels of management: national and international, territorial, provincial and local.

National and international powers

The Inuit recognize that there are many fish and wildlife populations which, although crucially important to them, are also important to others. These populations are present in traditional Inuit lands only seasonally or occasionally. The Inuit wish to cooperate in the management of these resources with appropriate authorities.

The Inuit recognize that effective joint management of such populations must occur on a government-to-government or user-group-to-user-group basis. However, because they are the Canadians most critically affected by whatever proposals and agreements are made by Canada in international negotiations or by their provincial or territorial administrations in interprovincial negotiations, the Inuit assert their right to be represented on the relevant official delegations and in the policy-making process which instructs and informs these delegations.

Provincial and territorial powers

The Inuit recognize certain prerogatives of the Crown to manage resources on Crown lands, but the Inuit propose that a Wildlife and Fisheries Management Board be constituted in each jurisdiction in which the Inuit reside, with representation appointed by the Inuit. All management decisions with respect to the areas in which the Inuit enjoy rights of harvesting shall be made by the Board. The Crown may set total allowable annual harvest limits for each species or population within the grant-of-interest areas. However, these shall be the only limits that the Crown may place on harvesting by licence holders within their designated areas. These limits shall refer to the quantity of the species to be harvested for any purpose, without reference to such end-use categories as domestic, commercial or recreational.

Within the areas encompassed by the Inuit interest, and subject only to the total allowable harvest limits, the Boards or other Inuit organizations delegated by the Boards shall be responsible for governing access by individual community members, for allocating the total harvest to domestic, commercial or other uses, and for setting all non-quota limitations on harvests (e.g. gear, size and sex restrictions, closed seasons).

The Boards' advice shall be sought with respect to regional, territorial or provincial management decisions concerning species whose populations lie partly outside the geographical area of the Inuit rights, and with respect to land use or environmental protection measures which may affect the interest of the Inuit. This will include advice as to the terms and conditions attached to grants of interest of a proprietary nature to third parties. The Boards shall be empowered to commission research, to conduct public hearings and otherwise gather information necessary to arrive at their decisions.

Local powers

Wherever a local hunters' and trappers' association or other designated Inuit organization chooses, the Wildlife and Fisheries Management Board shall delegate to it all powers of allocation and regulation within the community. The local organization shall be entitled to govern these matters according to local or traditional custom and in accordance with the wishes of the community.

Chapter Four

THE BENEFITS

We have proposed a two-part solution to the problem of Inuit hunting rights. One is to construe or deem this right as an interest having the nature of a profit a prendre. The other is to provide the Inuit with specific management authority over fish and wildlife and related matters. The benefits to the Inuit would be substantial, and our proposal also envisages significant benefits to governments and to third parties: these are itemized below.

Benefits to the Inuit

Security of tenure

It seems clear that aboriginal hunting rights were conceived, at the various times they were recognized in British and Canadian colonial policy, as temporary or interim measures until the Indians and the Inuit either disappeared or became "civilized". As we have shown, this was based on a series of erroneous assumptions about the social and economic development of aboriginal peoples and about the significance of fish and wildlife to them.

By construing or deeming Inuit hunting and fishing rights to be in the nature of a profit, the Crown would recognize the Inuit as having a certain proprietary interest in those resources. They would then enjoy the same security of tenure which all other property holders enjoy. It is not an absolute security, insofar as the Crown may expropriate the right and may grant other rights in the same land to third parties. It would, however, mean that hunting and fishing rights would no longer be hostage to shifting public opinion and the changing social and economic policies of successive governments. It would also constrain all subsequent grants of interest to take account of the rights of the Inuit to hunt and fish in the territory — these subsequent grants would not terminate the Inuit interest.

It is clearly inequitable and anachronistic that fur, fish and game should be the only resources in which legally entitled harvesters are not recognized as enjoying rights of profit. Vesting such rights within the context of existing systems of tenure and management would not appear to be a major departure, but rather the correction of an historic oversight and injustice. [1] In negotiations with the Inuit the Government of Canada has already undertaken to give sympathetic consideration to the Inuit's view of the legal nature of the hunting right as a profit a prendre.[2]

Remedies at law

The Inuit would have the usual remedies available to property owners: the right to sue for abatement, injunction or damages, and the rights with respect to expropriation that are provided by law. These remedies could be pursued in the courts or through the statutory creation of an administrative system to deal with Inuit property rights.

Compensation

An enormous practical consequence of the recognition of hunting rights as a profit would be in the sphere of compensation for damages. An appropriate compensation regime should accomplish two things. One is to deter those granted competing land-use rights by the Crown, as well as unauthorized trespassers, from taking the destructive risks of their activities lightly. The other is to ensure that if damage does occur, the losses and grievances of the affected individuals and communities are dealt with fairly, quickly and effectively.

At present, compensation to harvesters *need* be paid only:

a) where there is a licensed entitlement to harvest, and
b) with respect to damage to property or works, i.e. cabins, traps or animals actually caught in traps.

Some companies also pay a nominal sum for the furbearer that could have been caught in a damaged trap, but this is not a legal requirement unless specified in a contract between the parties.

Under the proposed system, subsistence as well as commercial harvesting would be eligible for compensation and the entitlement would include the value of what might have been taken in the area. The amount of compensation would be related not to actual previous harvests but to potential ones on a sustainable-yield basis, in the same way that payment of fair market value for expropriated land is based on the highest and best use of the land and not on what a particular owner did with it in the past. The grounds for compensation would be very much broadened, because they would include the critical factors of the value of foregone production and of additional costs incurred, as well as damage to works and property.

The Inuit recognize that development activities will continue in the North, and that no matter how well-regulated, will from time to time have adverse effects on their interest in fish and wildlife. If their interest in these resources is recognized as a profit, then at least the economic consequences of interference or damage could not be simply ignored. For the thousands of Inuit who make their living at least in part from the land, this is a matter of no small importance.

Self government

The extension and entrenchment of management rights with respect to renewable resources is an essential element of Inuit self-government. Fish and wildlife in the Arctic are of much greater significance and consequence to the Inuit than to others residing there. This is a matter of historical record and current fact. While the Inuit share stewardship responsibilities for many species and populations with people in other parts of the world, certain others are of importance to the Inuit exclusively. The proposed management system reflects that fact. If self-government is to mean anything, it must provide the Inuit with a substantial measure of control over their basic resources.

Customary law and knowledge

Two basic aspects of Inuit culture are knowledge of animal life and the environment and traditions about how to behave towards animals and the environment, especially with respect to hunting and fishing. In other words, the traditional knowledge of the Inuit consists not only of a set of observations and conclusions about animal

behaviour, but of rules for human conduct. While this has been suppressed and has to some extent atrophied, the knowledge and traditions remain and their creative potential still exists. There is thus a viable traditional basis for Inuit self-management based on customary law and knowledge.

Benefits to Governments

All levels of government, in pursuing whatever they define as northern development, must balance various concerns. These include the conservation of natural resources and the provision of an institutional framework for orderly development. Our proposals help to serve these ends in two chief ways.

Cooperative management

The northward advance of non-native settlement and development has inevitably threatened a wide range of environmental and social values, including wilderness quality, the preservation of unique habitats and species, recreational potential, food and income sources, and traditional ways of life based on hunting, trapping and fishing. How extensive incompatible uses will become in the North, to what extent their adverse effects can be mitigated or avoided, and the degree to which they will foreclose other benefits, is widely debated and will depend heavily on the competence and effectiveness of resource management.

Yet scientific management skills, which are conventionally viewed as essential for the creation of abundance, are being pressed into service in the Arctic precisely at a time when abundance is being transformed into scarcity. The irony is not lost on the Inuit, who are inclined to attribute the cause of this transformation to the very process of encroachment and industrialization that brought scientists and managers in its wake. What they see as the consequences of development are that these resources are already growing scarce (or are in danger of becoming so), that they are forced to share them with a growing number of recent immigrants and occasional visitors, and that their views on the management and allocation of these resources are too often ignored. The danger of this situation is that it can lead to mistrust, concealment and even confrontation. In so large a territory as the North, no conceivable number of restrictions or strictness of enforcement could, under these conditions, save wildlife populations from undue and possibly disastrous hunting pressure. However, substantial and tangible managerial authority by the Inuit and the practical incorporation of customary knowledge and rules into the management system could achieve significant benefits.

First, an effective system of customary and locally controlled law and enforcement would simplify the tasks of "official" wildlife managers and enforcement officers and make these occupations more attractive to the Inuit, since they would be implementing their own system or something reasonably congruent with it, rather than an alien one. A management regime which hunters can understand, support and even demand will require a minimum of enforcement and achieve a maximum of results.

Second, it could provide a forum in which the Inuit could consider, without the pressures and polarization generated by crisis, the very real ways in which the demands they currently place on wildlife resources are not the same as those of their forefathers, and what to do about this fact.

Third, it could provide a forum in which scientists and hunters could deal with at least some of their misunderstandings with respect to the facts at issue.

A recognized system for dealing with resource rights

We referred earlier to the appalling situation in northwestern Ontario in which whole Indian communities were shattered, socially and economically, by the loss of their basic natural resource. While no government intended or desired this outcome, none had any clear means at hand with which to respond to it. For fifteen years, substantial criticism and adverse publicity were heaped upon both the federal and provincial governments for their handling of the affair. During that time, both governments funded, at a cost of several million dollars, what they perceived to be remedial measures, as well as research, negotiations, and other means of dealing with this increasingly embarrassing problem. In 1985, a compensation agreement was finally reached whereby the paper companies together with the two governments pledged nearly $17 million to the two bands. Had the kinds of measures we propose been in place, the problem would have been much more manageable from both governments' point of view. There would have been clear grounds for compensation and for remedial action, which could have been initiated without delay. What became a bitter political struggle could have been at least partly resolved through established legal remedies and administrative measures.

No one can rule out a similar catastrophic event occurring somewhere in the Arctic. Equally important, however, are the much more frequent instances of minor disruption and damage affecting only a few individuals. There must be a way of dealing with these events quickly, fairly and equitably. We suggest that all parties, and certainly governments, would be better able to do so if our proposals were adopted.

There is a growing recognition on the part of governments of the economic nature of the Inuit interest in fish and wildlife, as well as its social and cultural nature, and perhaps also a growing appreciation of how these aspects of the Inuit interest are intertwined. There is also a growing recognition on the part of governments and major development corporations in the North of the need for a fair and equitable system of compensation to deal with this interest. Several reports of social and environmental commissions in recent years have called attention to the need for an institutionalized system of compensation with respect to the hunting, trapping and fishing interests of aboriginal peoples.[3] The government of the NWT has undertaken a major review of policy options in this area.[4] Some provincial administrations have recently established such systems with respect to commercial fishing and trappings Some major resource development companies have also undertaken policy reviews and initiatives with respect to compensation, generally in the form of negotiated agreements attached to specific development projects.[6] Finally, the claims negotiation process has set some significant precedents, especially the wildlife compensation section of the Inuvialuit Final Agreement.

All of these approaches indicate a growing recognition of the problem and a determination to solve it, although we do not necessarily endorse any one of them as an ideal model. Surely the time has come for a more systematic approach. We submit that the characterization of Inuit hunting, fishing, and trapping rights as profits provides a more universal and equitable basis for dealing with the problem.

Benefits to Third Parties

Third parties would benefit from these arrangements because they would result in clear and predictable outcomes in situations that are at present unclear. Those seeking other land and resource rights from the Crown would know in advance the nature of their liability to the Inuit, because the nature of aboriginal interest will have been clarified. Those with subsequent grants of interest could deal with the Inuit interest as they deal with the interest of all other proprietors: through negotiation and, if necessary, the courts, rather than have to engage in political battles every time they wish to proceed.

As for other parties with an interest in fish and game, no change is contemplated with respect to non-consumptive uses, except that such uses would not interfere with the Inuit profit. Non-Inuit would continue to enjoy the right of sport and recreational hunting and fishing on Crown lands, subject to regulation by the Crown. That regulation would, however, incorporate an Inuit management role and would recognize the priority of Inuit harvesting rights. The latter is not a departure from past principle, as it has been well established in the NWT for decades. However, no harvesters save the Inuit (or others with a recognized aboriginal right), would have rights of profit.

Notes to Chapter One

(1) P. Cumming and N. Mickenberg, *Native Rights in Canada,* 2nd cd., Indian-Eskimo Association of Canada, Toronto, 1972; N. Zlotkin, *Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference,* Institute of Intergovernmental Relations, Queen's University, Kingston, 1983.

(2) Cumming and Mickenberg, *Native Rights in Canada, op. cit.; Hamlet of Baker Lake et al v. The Minister of Indian Affairs and Northern Development et al. [1980] 1.* F.C. 518. The jurisprudence on native hunting rights deals chiefly with such matters as the relative precedence of the treaties, s.88 of the *Indian Act,* and the Natural Resources Transfer Agreements with the Prairie provinces and so on, as they affect legislative competence. No case has turned directly on the question of whether hunting rights are property rights, and Mahoney J in *Hamlet of Baker Luke* provides little guidance. All jurisdictions in Canada administer fish and wildlife as though native hunting and fishing rights were not property rights.

(3) There is recent strong authority for the view that the presumption that a legislature should pay compensation for an expropriation of vested rights applies with additional force to Indian lands; *Paul et al v. Canadian Pacific Ltd. et al. [1984], 2* DLR (4th) 22 (NBCA) per La Forest JA at 34 (on appeal to the Supreme Court of Canada).

One exception to this generalization would appear to be the Inuvialuit Final Agreement (*The Western Arctic Claim*, Department of Indian Affairs and Northern Development, Ottawa, 1984). This agreement contains provisions for wildlife compensation which are. among other things, intended to "compensate Inuvialuit hunters, trappers and fishermen for the loss of their subsistence *or* commercial harvesting opportunities" (p.22). The effectiveness of these provisions has yet to be assessed.

(4) Recent claims agreements obviously provide for aboriginal participation in the various wildlife management boards set up under those agreements, e.g. the Inuvialuit Final Agreement, and *Wildlife Provisions of an Agreement-in-Principle, 27* October 198 1 (between the Tungavik Federation of Nunavut and the Government of Canada). In all cases. however, this participation is merely advisory in nature — that is all that is envisaged in current federal policy (Department of Indian Affairs and Northern Development, *In All Fairness: a Native Claims Policy,* Supply and Services Canada, Ottawa, 1981, p. 24). While the recent Report of the Task Force to Review Comprehensive Claims Policy (*Living Treaties, Lasting Agreements,* Department of Indian Affairs and Northern Development, Ottawa, 1985) suggests that native involvement in wildlife management should go beyond an advisory role (p.56), it remains to be seen at the time of writing whether this recommendation will be implemented by the federal government. Certainly the federal government's current position falls short of the proposals made here. See infra, chapter 3.

(5) This view has been widely held among wildlife officials since at least the turn of the century. See for example D. Gottesman, "Native Hunting and the Migratory Birds Convention Act: Historical, Political and Ideological Perspectives", *Journal of Canadian Studies 18(3), 1983,* pp. *67-89.*

(6) Bertram Pokiak, p.4234 of the transcript of hearings, vol. C44, Tuktoyaktuk, 8 March 1976, Mackenzie Valley Pipeline Inquiry.

(7) As envisaged e.g. in the *Northwest Territories Act,* RSC 1970, c. N-22, section 14(3).

(8) The "Subsistence Law" in Alaska *(An Act Relating to Fish and Game Management,* ch. 151 SLA 1978) provides for subsistence access on the basis of customary and traditional use rather than on aboriginal entitlement: ethnic criteria are completely avoided. In the most recent *Wildlife Ordinance* of the N WT (1978) all references to Inuit and Indians have been deleted, in particular with reference to the General Hunting Licence, although the ordinance does not remove the rights recognized in section 14(3) of the Northwest Territories Act.

(9) However, it should be noted that aboriginal rights have been recognized to include an interest in land — to be more than mere personal rights. Although aboriginal hunting and fishing rights have in practice been treated as licences rather than property rights, no court has actually rejected the concept of aboriginal rights as profits (see Bankes, this volume).

(10) See David Bennett, *Subsistence v. Commercial Use,* Working Paper no. 3, Canadian Arctic Resources Committee, Ottawa, 1982.

(11) For example, Inuit commercial fisheries on the Arctic coast and in the Mackenzie Delta, Indian commercial fisheries in inland waters, and the preferential allocation of registered traplines to Indians in many of the provinces and the Yukon.

(12) There are numerous popular accounts of these events, for example W. Troyer, *No Safe Place,* Clarke Irwin, Toronto, 1977; G. Hutchison and D. Wallace, *Grassy Narrows,* Van Nostrand Reinhold, Toronto, 1977. The most detailed account of the impact of the loss of the fishery is in P.J. Usher, P. Anderson, H. Brody, J. Keck, and J. Torrie, *The Economic and Social Impact of Mercury Pollution on the Whitedog and Grassy Narrows Indian Reserves, Ontario,* a report to the Anti-Mercury Ojibwa Group, the Islington Band, and the Grassy Narrows Band, P.J. Usher Consulting Services, Ottawa, 1979.

(13) *Memorandum of Agreement between Her Majesty the Queen in Right of Canada as Represented by the Minister of Indian Affairs and Northern Development, Her Majesty the Queen in Right of the Province of Ontario, Reed Inc., Great Lakes Forest Products Ltd., the Islington Indian Band and the Grassy Narrows Indian Band, 22* November 1985.

Notes to Chapter Two

(1) M. Asch, *Aboriginal Rights in Canada,* Methuen, Toronto, 1984; G.S. Lester, "Primitivism Versus Civilization: A Basic Question in the Law of Aboriginal Rights to Land", in C. Brice-Bennett ed., *Our Footprints are Everywhere,* Labrador Inuit Association, Nain, Labrador, 1977, pp.351-374.

(2) Asch, *op. cit.*; Lester, *op. cit.;* G.S. Lester, The *Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument*, unpublished doctoral dissertation, York University, Toronto, 1981 (for a summary of the last, see G.S. Lester, *Inuit Territorial Rights in the Canadian North west Territories*. Tungavik Federation of Nunavut, Ottawa, I 984.

(3) J.W. Mackay, Okanagan Indian Agency, Dept. Interior *Annual Report, 1886, p.92.* I am indebted to Jill Torrie for bringing this reference to my attention.

(4) M.M.R. Freeman cd., *Report, Inuit Lund Use and Occupancy Project,* Department of Indian Affairs and Northern Development, Ottawa, 3 vols., 1976; Brice-Bennett (cd.), *Our Footprints are Everywhere,* Labrador Inuit Association, Nain, Labrador, 1977. The Inuit land use and occupancy studies were undertaken by the Inuit Tapirisat of Canada in preparation for the documentation of the Inuit claim. The August 1973 *Statement on Indian and Inuit Claims* by Jean Chretien, Minister of the Department, committed the federal government to negotiate Native claims "where their traditional interest in the lands concerned can be established. " The NWT study began the following year with the support of the Department of Indian Affairs and Northern Development. The Labrador study was undertaken soon after. No such study was deemed necessary in Northern Quebec because the Inuit there had already entered into negotiations with the governments of Canada and Quebec, and a final agreement was signed in 1975.

(5) The federal government has not disputed the findings of any Inuit land use and occupancy study conducted pursuant to the 1973 statement (supra, note 4) as an indication of the title of any group to negotiate a claim. Evidence based on the Inuit land use and occupancy studies has been accepted as proof of use and occupancy on at least two occasions, at the *Mackenzie Valley Pipeline Inquiry* and in *Hamlet of Baker Lake.*

(6) August 1973 statement (supra, note 4); and *In All Fairness, a Native Claims Policy,* Supply and Services Canada, Ottawa, 1981.

(7) Lester, "Primitivism Versus Civilization", op. *cit.*, and Lester, *The Territorial Rights of the Inuit, op. cit.; Hamlet of Baker Lake.*

(8) Historically the identification of these groups has varied. See for example K. Birket-Smith, *The Eskimos,* Methuen, London, rev. ed. 1959, pp. 233-34; D. Damas, "The Diversity of Eskimo Societies", in R. B. Lee and I. Devore eds., *Man the Hunter,* Aldine, Chicago, 1968, pp.

11 1-17; D. Damas, "Characteristics of Central Eskimo Band Structure", in D. Damas cd., *Contributions to Anthropology: Band Societies,* National Museums of Canada. Bulletin 228, Ottawa, 1969, pp. 116-38. Although the use of the term "tribe" to denote these Inuit groups is common in the literature, it is generally accepted that it refers only to (a) what is observable to outsiders as a common heritage of environmental adaptation, material culture, and dialect, and (b) a marriage universe in which the members recognize themselves to be genetically interrelated. It does not refer to the level or type of socio political organization that the term "tribe" normally implies in anthropological discourse, nor is it a term of self-identification favoured by the Inuit (see also D. Damas, "Introduction", in D. Damas cd., *Handbook of North American Indians, Volume 5, Arctic,* Smithsonian Institution, Washington, 1984, p. 3).

(9) For discussion of kinship networks within tribes (extended ilagiit), see A. Balikci, *Development of Basic Socio-economic Units in Two Eskimo Communities,* National Museum of Canada, Bulletin 202, Ottawa, 1964; and L. Guemple, "The Institutional Flexibility of Inuit Social Life", in Freeman, *Inuit Lund Use, op. cit.,* pp. 181-86.

(10) Band is the most common usage (see e.g. Damas, *Handbook, op. cit.)* for these local residential groups. In the context of the Inuit, the term "band''(unlike "tribe") normally implies a distinctive form of social organization, including a common territory and system of land and resource use, rules of residence and kinship, and in some cases a local leader or isumataq (Damas, "Characteristics," *op. cit.).*

(11) *-miut is* essentially a geographical designation which of itself does not necessarily imply anything about social structure or the nature of the relationship to place. See H. Brody, "Permanence and Change among the Inuit and Settlers of Labrador", in Brice-Bennett, *Our Footprints are Everywhere,* p. 341; and E.S. Burch, Jr., "The 'Nunamiut' Concept and the Standardization of Error", in E.S. Hall. Jr. cd.. *Contributions to Anthropology: The Interior Peoples of Northern Alaska,* National Museums of Man, Mercury Series, Archaeological Survey of Canada paper no. 49, Ottawa, 1976, pp. 52-97. In this sense, one can identify (or be identified with) a heirarchy of *-miut* groups, in the same way that a Canadian may also say that he or she is an Edmontonian or an Albertan. T.C. Correll stresses the importance of dialect as a feature of *-miut identification* ("Language and Location in Traditional Inuit Societies". in Freeman, *Inuit Land Use, op. cit.,* pp. 173-79).

(12) See for example numerous quotes obtained by the land use and occupancy projects as cited in H. Brody, "Land Occupancy: Inuit Perceptions", in Freeman, *Inuit Land Use, op. cit.,* pp. 185-242; and H. Brody, "Permanence and Change Among the Inuit and Settlers of Labrador", in Brice-Bennett, *Our Footprints, op. cit.:* pp. 311-47.

(13) For a comment on the legal significance of Inuit place-naming to aboriginal title, see G.S. Lester, "Aboriginal Land Rights: The Significance of Inuit Place-Naming", bruit *Studies. 3(1), 1979,* pp. 53-76. The association between knowledge of the land and sovereignty over it is common among northern aboriginal peoples. See for example S. Vincent and J. Mailhot, "Montagnais Land Tenure", *Interculture, 25(2-3), 1982,* pp. 61-69.

(14) This echoes the comment made by Mr. Justice Blackburn in the Gove *Land Rights Case (Milirrpum et al. v. Nabalco Pty et al. (1971) 17* F.L.R. 141, at 197.

(15) It is pertinent in this context to cite the characterization of Inuit land ownership in Northwest Alaska by E.S. Burch, Jr. in *The Traditional Eskimo Hunters of Point Hope, Alaska: 1800-1875,* North Slope Borough, Barrow, Alaska, 1981, p. 61:

> Hunting peoples, such as the traditional Point Hopers, are commonly thought to have been "free wanderers," that is, people who were free to roam about the countryside, living anywhere they wished, and doing whatever they wanted to do. That view is untenable . . . The members of Point Hope Society owned a clearly delimited territory. By "owned" I mean that they were the only people who had a legitimate right to use any land within its boundaries for any purpose. This fact was clearly understood by the members of neighboring societies, whose own territories were similarly defined and controlled. Foreigners crossed the boundary either by invitation or else armed and prepared to fight. Any uninvited outsider discovered on Point Hope land was regarded as a hostile intruder and was just as automatically met with armed force. These people could *not* wander freely in any useful sense of the term.

(16) See for example Guemple, "Institutional Flexibility", *op. cit.*

(17) Haven and Drachart, cited in J. K. Hiller, "Moravian Land Holdings on the Labrador Coast: A Brief History", in Brice-Bennett, Our *Footprints, op. cit.,* p. 85.

(18) Brody, "Permanence and Change", *op. cit.,* pp. 341-44.

(19) E.g. W.C. Wonders, *Overlapping Land Use and Occupancy of Dene, Metis, Inuvialuit and Inuit in the Northwest Territories,* Indian and Northern Affairs Canada, Ottawa, n.d.

(20) Brody, "Land Occupancy: Inuit Perceptions", *op. cit.,* and Brody, "Permanence and Change", *op. cit.*

(21) See for example R. Petersen, "Family Ownership and Right of Disposition in Sukkertoppen District, West Greenland", *Folk, 5, 1963,* pp. 269-81. This norm applies to most northern aboriginal peoples (see for example A. Tanner, *Bringing Home Animals,* Social and Economic Studies no. 23, Institute of Social and Economic Research, Memorial University of Newfoundland. St. John's, 1979; and Vincent and Mailhot, "Montagnais Land Tenure", *op. cit.).*

(22) 1. Sutton, *Indian Lund Tenure,* Clearwater Publishing, New York, 1975, pp. 5-6. That any particular system of tenure might not encompass all three does not, of course, suggest either that it is not a tenure system or that it does not work.

(23) C. B. McPherson cd., *Property: Mainstream and Critical Positions,* University of Toronto Press, Toronto, 1978, pp. 11-12.

(24) Lester, "Primitivism Versus Civilization", *op. cit.,* p. *367.* This principle was recognized in a general way by the Special Committee of the House of Commons on Indian Self-Government (see its report *Indian Self Government in Canada,* Ottawa, 1983, pp. 12-14).

(25) See, for example, R.B. Lee and I. DeVore eds. *Man the Hunter,* Aldine, Chicago, 1968; L. Leacock and R. B. Lee eds., *Politics and History in Band Societies,* Cambridge University Press, Cambridge, 1982; E.R. Service, The *Hunters,* Prentice-Hall, Englewood Cliffs, N. J., 1966.

(26) C. Hunt, "The Development and Decline of Northern Conservation Reserves", *Contact, 8(4), 1976: 30-75;* D. Jenness, *Eskimo Administration: II. Canada,* Technical Paper No. 14, Arctic Institute of North America, Montreal, 1964; M. Zaslow, "Administering the Arctic Islands 1880-1940: Policemen, Missionaries, Fur Traders", in M. Zaslow cd., *A Century of Canada 's Arctic Islands,* Royal Society of Canada, Ottawa, 1981, pp. 61-78.

(27) See for example R.G. Robertson, "The Future of the North", *North, 8(2), 1961,* pp. 1-13; and B.G. Sivertz, "The North as a Region", in *Resourcesfor Tomorrow, vol. 1,* Department of Northern Affairs and National Resources, Ottawa, 1961, pp. 561-577.

(28) See for example H. Brody, *The Peoples' Land,* Penguin, Harmondsworth, 1975; T.R. Berger, *Report of the Mackenzie Valley Pipeline Inquiry,* Supply and Services Canada, Ottawa, 1977; M. M.R. Freeman and L. Hackman, "Bathurst Island, N. W. T.: a Test Case of Canada's Northern Development Policy", *Canadian Public Policy, 1(3),* pp. 402-14; P.J. Usher, *The Bankslanders: Economy and Ecology of a Frontier Trapping Community, vol. 3, The Community,* NSRG-71-3, Northern Science Research Group, Department of Indian Affairs and Northern Development, Ottawa, 1971; P.J. Usher and G. Beakhust, *Land Regulation in the Canadian North,* Canadian Arctic Resources Committee, Ottawa, 1973; see also transcripts of proceedings, Lancaster Sound Environmental Assessment Review Panel, 1978; National Energy Board hearings re Arctic Pilot Project, 1982; *Hamlet of Baker Luke;* and the Newfoundland Department of Consumer and Corporate Affairs (Environmental Branch) hearings re Brinex uranium mining proposal, 1979.

(29) James Bay and Northern Quebec Native Harvesting and Research Committee, *Research to Establish Present Levels of Native Harvesting — Harvests by the Inuit of Northern Quebec,* Montreal — various reports 1976-1982; Interdisciplinary Systems Ltd., *Effects of Exploration and Development in the Baker Lake Area,* Winnipeg, 1978; Berger, *Report op. cit.,* Volume 2 — *Terms and Conditions,* chapter two, (Beaufort Sea figures recalculated from original data by P.J. Usher); P.J. Usher, Renewable *Resources in the Future of Northern Labrador,* Labrador Inuit Association, Nain, 1982; Baffin data calculated by L. Simpson, *Memorandum to*

Superintendent, Renewable Resources, Government of the NWT, Frobisher Bay, 3 February 1984, from J. Donaldson, *1981 Wildlife Harvest Statistics for the Baffin Region, Northwest Territories,* Technical Report no. 1, Baffin Region Inuit Association, n.p., 1983; R.L. Gamble, *A Preliminary Study of the Native Harvest of Wildlife in the Keewatin Region, Northwest Territories,* Canadian Technical Report of Fisheries and Aquatic Sciences no. 1282, Dept. Fisheries and Oceans, Winnipeg, 1984.

(30) P.J. Usher, "Evaluating Country Food in the Northern Native Economy", *Arctic, 29(2), 1976: 105-20;* P.J. Usher, *Assessing the Impact of Industry in the Beaufort Sea Region,* report prepared for the Beaufort Sea Alliance, Ottawa, 1982.

(31) See for example O. Schaefer and J. Steckle, *Dietary Habits and Nutritional Base of Native Populations of the Northwest Territories,* Science Advisory Board of the Northwest Territories, Yellowknife, 1980; and D.W. Spady et al., *Between Two Worlds,* Occasional Publications no. 16, Boreal Institute for Northern Studies, University of Alberta, Edmonton, 1982.

(32) Usher, *Renewable Resources, op. cit.,* and *Assessing the Impact, op. cit.*

(33) N. Robitaille and R. Choinière provide detailed breakdowns of the 198 I census results for Inuit population and income distribution *(An Overview of Demographic and Socio-economic Conditions of the Inuit in Canada,* Department of Indian Affairs and Northern Development, Ottawa, 1985).

(34) For some data on Inuit population distribution by community size and function from 1961 to 1981, see *Northern Consumers, Socio-Economic Change, and Access to Traditional Food Resources,* Economic Strategy Division, Department of Indian Affairs and Northern Development, Ottawa, 1985.

(35) See for example Brody, "Land Occupancy — Inuit Perceptions" *op. cit.;* and Brody, "Permanence and Change", *op. cit.*

(36) For a view from the perspective of sport hunters and anglers, see for example Canadian Wildlife Federation, *Recommendations to 44th Federal-Provincial Wildlife Conference on "The National Wildlife Policy",* Ottawa, 1980; K.A. Brynaert (Executive Vice-President, Canadian Wildlife Federation), *Notes for a Speech to the Canadian Society of Environmental Biologists,* Ottawa, 5 January 1982. For a view from the perspective of wildlife biologists and managers, see A.H. McPherson, "Commentary: Wildlife Conservation and Canada's North", *Arctic, 34(2), 1981,* pp. 103-07; J.B. Theberge, "Commentary: Conservation in the North — An Ecological Perspective", Arctic, 34(4), 1981, pp. 281-85. For commentaries on the various perspectives see Quebec Human Rights Commission, *Native Rights in Quebec: The Need to Raise the Level of Discussion,* n.p., 1980; and P.J. Usher, "Fair Game", *Nature Canada,* 11(1), *1982,* pp. 4-11, *35-43.*

(37) The best known general theory on cultural and economic mechanisms of self-regulation among foraging societies is advanced by M. Sahlins, *Stone Age Economics,* Aldine, Chicago, 1972. Evidence of cultural self-regulation in the Canadian North is best documented among the James Bay Cree: see for example F. Berkes, "Fishery Resource Use in a Subarctic Community", *Human Ecology 5 (1977),* pp. 289-307; F. Berkes, "An Investigation of Cree Indian Domestic Fisheries in Northern Quebec", *Arctic 32(l),* pp. 46-70; H. Feit, "Conflict Arenas in the Management of Renewable Resources in the Canadian North: Perspectives Based on Conflicts and Responses in the James Bay Region, Quebec" in *National and Regional Interests in the North,* Canadian Arctic Resources Committee, Ottawa: 1984, pp. 435-58: and H. Feit, *North American Native Hunting and Management of Moose Populations,* a paper presented to the Second International Moose Symposium, Uppsala, Sweden, 1985. For evidence among the Inuit, see note 38 below. Much of the material in this section is condensed from the following three articles by the author: "Sustenance or Recreation? The Future of Native Wildlife Harvesting in Northern Canada", in M. M. R. Freeman (cd.), *Proceedings, First International Symposium on Renewable Resources and the Economy of the North,* Ottawa: Association of Canadian Universities for Northern Studies, 1981, pp. 56-71; "Property Rights: The Basis of Wildlife Management", in *National and Regional Interests in the North, op. cit.*, pp. 389-415; and *The Devolution of Wildlife Management and The Prospects for Wildlife Conservation in the Northwest Territories,* CARC Policy Paper 3, Canadian Arctic Resources Committee,

Ottawa, 1986. See also *Native People and Renewable Resource Management, The 1986 Symposium of the Alberta Society of Professional Biologists,* Edmonton, 1986.

(38) See for example M.M.R. Freeman, "Appeal to Tradition: Different Perspectives on Arctic Wildlife Management", in J. Brosted J. Dahl, A. Gray et al. eds., *Native Power: The Quest for Autonomy and Nationhood of Indigenous Peoples,* Universitetsforlaget As, Bergen, Norway, 1985, pp. 265-8 1; P.J. Usher, "The Use of Snowmobiles for Trapping on Banks Island", *Arctic, 25(3), 1972,* pp. 171-81; and R. Worl, "The North Slope Inupiat Whaling Complex", in Y. Kotani and W. B. Workman eds., *Alaska Native Culture and History,* National Museum of Ethnology, Osaka, 1980, pp. 305-20.

(39) See C. Brice-Bennett, "Land Use in the Nain and Hopedale Regions", in Brice-Bennett, Our *Footprints, op. cit.,* pp. 97-203; and Brody, "Permanence and Change", *op. cit.*

(40) I.T. Gault and R.J. Lothian, *Legal and Equity Issues Arising From Petroleum Operations in the Beaufort Sea-Mackenzie Delta Area.* A report submitted to Dome Petroleum Ltd., Esso Resources Ltd., and Gulf Canada Resources Inc., Canadian Institute of Resources law, n.p., 1983.

(41) J.C. Juergensmayer and J.B. Wadley, "The Common Lands Concept: a 'Commons' Solution to a Common Environmental Problem", *Natural Resources Journal, 14(3),* 1974, p. *372.*

(42) G. Hardin, "The Tragedy of the Commons", *Science, 162, 1968,* pp. 1243-48. Although Hardin's essay was directed primarily at the problem of population control, the analogy with individualistic rationality in the abuse of common property resources was obvious and intended. Hardin's solutions are precisely those of mainstream scientific resource management, and his essay is well known and influential among resource managers.

(43) *ibid.* p. 1244.

(44) H.S. Gordon, "The Economic Theory of a Common-Property Resource: the Fishery", *Journal of Political Economy, 62, 1954,* pp. 124-43.

(45) For an incisive critique of the "Commons paradigm", which stresses among other factors the importance of community institutional mechanisms which control the exploitation of fisheries resources, see F. Berkes, "Fishermen and 'The Tragedy of the Commons'", *Environmental Conservation 12(3), 1985,* pp. 199-206.

(46) Anglo-Canadian law has always recognized that property rights (particularly those concerning easements and profits) could be established by legal custom even if that custom were contrary to the general law of the land: See E.H. Burn cd., *Cheshire and Burn 's Modern Law and Real Property,* London, 1982, pp. 542-45.

Notes to Chapter Three

(1) Nunavut Land Claims Project, *The Lund and Resource Elements of an Agreement-in-Principle,* n.p., 1982, pp. 5-6, 13-15.

(2) For a discussion of the nature of the right granted by a Certificate of Registration for a trapline in Alberta, see G. Sutton, *Trappers' Rights,* a report prepared for the Alberta Trappers' Central Association and Native Outreach, n.p., 1980. Sutton claims that although the legislation is imprecise in defining the nature of this interest, there is a sound legal argument that it is a profit and that consequently the holder has remedies at law and security of tenure.

(3) The collective interest of the Inuit in their resources is asserted in a Nunavut Constitutional Forum discussion paper entitled *Building Nunavut,* n.p., 1983.

(4) But see article 3 of *The Northern Manitoba Flood Agreement,* 16 December 1977, in which the bands are entitled to receive four acres of land in compensation for every one acre of affected reserve lands.

(5) This is to a large extent already envisaged in the NWT. Section 91 (z. 1) of the *Wildlife Ordinance* empowers the Commissioner to make regulations "delegating to individual Hunters' and Trappers' Associations who consent to the delegation of any of the powers, duties or functions forming the subject-matter of regulations made under any other paragraph in this section".

Notes to Chapter Four

(1) Indeed, in the author's opinion, non-aboriginal Canadians who hold commercial trapping and fishing licences should also be considered to have rights of profit.

. (2) Section 4.3.1 of *Wildlife Provisions of an Agreement-in-Principle*, 27 October 1981, pp. 55-56.

(3) See for example Federal Environmental Assessment Review Office (FEARO), *Arctic Pilot Project (Northern Component), Report of the Environmental Assessment Panel,* Supply and Services, Ottawa, 1980, p. 82; and FEARO, *Norman Wells Oilfield Development and Pipeline Project, Report of the Environmental Assessment Panel,* Supply and Services, Ottawa, 1980, p. 61; K.M. Lysyk et al., *Alaska Highway Pipeline Inquiry,* Supply and Services, Ottawa, 1977, p. 70.

(4) See for example Canadian Resourcecon Ltd., *A Renewable Compensation Program for the Northwest Territories: Review of Policy Options,* prepared for Department of Renewable Resources, Government of the Northwest Territories, Vancouver, 14 May 1982.

(5) See for example the Registered Trapline Program developed by B.C. Hydro in British Columbia, the Trappers' Compensation Review Plan in Alberta, and various programs in Manitoba regarding commercial trapping and fishing, including the Northern Flood Agreement. For descriptions of these arrangements, see Canadian Resourcecon Ltd.. *op. cit.*

(6) See for example T. Spearing, *Mitigation and Compensation for Impacts of Petroleum Resource Development Activity on Renewable Resources and Renewable Resource Based Activities,* Petro-Canada, n.p., 1980. Specific compensation arrangements are being negotiated between the Fort Good Hope Dene Community Council and Esso Resources in connection with the latter's operations at Norman Wells, NWT.

PART II:
A LEGAL ARGUMENT

N.D. Bankes

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PART TWO

A. INTRODUCTION

Since this paper is conceived as a legal commentary on the foregoing essay by Peter Usher, the approach taken is to parallel the scheme of the first four chapters, while avoiding repetition as much as possible. The paper commences with an outline review of the legal status and character of hunting, fishing, trapping and gathering rights based on an unextinguished aboriginal title, both before and after 5.35 of the Constitution Act, 1982. This is followed by a discussion of the attributes of a *profit a prendre* and a statement of the effect of so characterizing aboriginal hunting, fishing, trapping and gathering rights. The paper concludes with an evaluation of the utility of characterizing these rights as profits. The discussion is limited to rights based upon an unextinguished aboriginal title, although from time to time reference will be made to the general law on hunting, fishing and trapping rights.

Part of the difficulty with the concept of aboriginal hunting, fishing and trapping rights — and indeed the whole concept of aboriginal title — is that such concepts are foreign to Anglo-Canadian principles of property law. This problem has been recognized for a long time at the level of taking cognizance of aboriginal customary laws and determining whether such systems are capable of recognition by the common law,[1] but there has been much less attention given to the problems of *enforcing* elements of an aboriginal title against third parties. [n several cases, notably the decision of the Privy Council in *Amodu Tijani*,[2] the courts have warned us that we should beware of viewing customary aboriginal tenures through common law spectacles. These warnings certainly apply at the stage of "recognition" (i. e.. have the aboriginal peoples crossed the hurdle of primitivism) but do they apply with equal force at the stage of enforcement'?

It is part of the thesis of this paper that in appropriate circumstances the courts should be willing to adopt principles of property law in the interests of certainty and protection. It is all very well simply to categorize aboriginal interests as being "sui generis"[3] and to assert that such rights are recognized in Canadian law but that doesn't help very much if the law has fashioned no remedies to protect these sui generis interests. The argument therefore is that rather than insisting on theoretical purity while watching rights slip away or be eroded, we should be willing to say something like "aboriginal rights to hunt, trap, fish and gather are similar in nature to a *profit à prendre*. The common law recognizes and protects such rights and therefore we should adopt those rules applying to profits and apply them, with suitable modifications, to aboriginal renewable-resource rights. "

Hence, what is proposed here is far from revolutionary: we are simply endeavoring to accommodate an unusual form of interest within the superstructure of the common law. and to suggest a possible line of interpretation for the courts.

B. LEGAL STATUS AND CHARACTER OF HUNTING, FISHING, GATHERING AND TRAPPING RIGHTS BASED ON AN UNEXTINGUISHED ABORIGINAL TITLE

Whatever else an unextinguished aboriginal title embraces, it seems clear that it includes the rights to hunt, trap, fish and gather on unoccupied Crown lands and to wander over and use those lands and not be considered a trespasser.[4] This bare

irreducible minimum is sufficient for the purposes of this argument. Such a title is based upon aboriginal use and occupancy of particular lands and marine areas which can be established by land use and occupancy studies. In the *Baker Lake* case, Mr. Justice Mahoney adopted four criteria for determining "aboriginal title cognizable at common law":[6]

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.[7]
4. That the occupation was an established fact at the time sovereignty was asserted by England.

The title may be confirmed by the Royal Proclamation 1763 or simply rely upon the acceptance by the common law of the customary *lex loci* of the aboriginal inhabitants.[8] In either event, the rights embraced include the rights to hunt, trap, fish and gather on unoccupied lands.

Before considering how particular elements of this title have been interpreted by the courts, it would be useful to review judicial interpretation of the entire bundle of rights known as aboriginal or Indian title. Apart from the question of *content* of title (i.e., what rights are embraced) there is the question of *quality* of title. Here the leading case is the *St. Catherine's Milling* case, which held (based in this case on the Royal Proclamation of 1763) that "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign" under which lay the "substantial and paramount estate" of the Crown.[9]

There has been some academic and judicial dispute as to what Lord Watson meant by a "personal" right. Did he mean that the title was an interest in personality rather than an interest in land? This question is of some significance in this context, since it ought to influence the classification of rights based on an unextinguished aboriginal title, and rights derived directly from or forming part of that title, for example treaty-recognized hunting, fishing and trapping rights.

The better view of the use of the word "personal" is the interpretation placed on it by Mr. Justice Duff in *A. G. for Quebec v. A. G. for Canada*.[10] The case involved a surrender of reserve lands to the Crown. The lands were set aside for a particular tribe of Indians pursuant to an Act for the Better Protection of the Lands and Property of the Indian in Lower Canada, a statute of the Province of Canada. The lands were surrendered in 1882 and the issue for the court was whether the beneficial title vested in the Dominion or the Province of Quebec. In the course of his judgment for the Privy Council, Mr. Justice Duff observed that "the right recognized by the statute is a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown."[11] Their lordships were of the view that the title held by the Commissioner of Indian Lands under the 1850 Act was no different from a right based upon an unextinguished title. There was no "intention of enlarging or in any way altering the quality of the interest conferred upon the Indians by the instrument of appropriation or other source of title."[12] Mr. Justice Duff therefore qualifies the "personal" nature of the interest, making it clear that it is "personal" because the interest may only be alienated to the Crown.

Recent confirmation of this view comes from the judgments of Mr. Justice Le Dain (Federal Court of Appeal) and Dickson J. (Supreme Court of Canada) in *Guerin v. R.*

After a review of Canadian, United States and Privy Council cases and academic opinion on the subject, Le Dain J. stated that:[13]

> Professor K. Lysyk (now Mr. Justice Lysyk), in his article. "The Indian Title Question in Canada: An Appraisal in the Light of Calder", 51 Can. Bar Rev. 450 (1973), at p. 473, expressed the view that the Indian title amounts to a beneficial interest in the land. He drew this conclusion from the implication, in what was said in *St. Catherine's Milling* and subsequent decisions of the Privy Council, which I have cited, concerning the effect of the extinguishment of Indian title, that until such extinguishment the beneficial interest in the land was not available to the province and only passed or reverted to the province upon the extinguishment of the Indian title. There is in my opinion much force in this view. For the reasons suggested by Viscount Haldane in *Amodu Tijani*, to which Professor Lysyk also makes reference, if the Indian tide cannot be strictly characterized as a beneficial interest in the land it amounts to the same thing. It displaces the beneficial interest of the Crown. As such, it is a qualification of the title of the Crown of such content and substance as to partake, in my opinion, of the nature of a right of property. I am, therefore, of the opinion that it could be the subject of a trust.

There is however authority for the contrary view, the most pertinent from our perspective being the *Baker Lake* case. In that case Mr. Justice Mahoney boldly asserted that[14]: "It is, however, clear that aboriginal title that arises from *The Royal Proclamation is* not a proprietary right. If the aboriginal title that arose in Rupert's Land independent of *The Royal Proclamation* were a proprietary right then it would necessarily have been extinguished by the [Hudson Bay Charter]. " The use of the *St. Catherine's* case as authority for this proposition seems to be unsupportable. Furthermore, the authority of *Baker Lake* on this point must now be read subject to the judgment of the Supreme Court in the *Guerin* case. There, Mr. Justice Dickson referred to the aboriginal interest, either in a reserve or in traditional lands, as being "a unique interest in land".[15]

What conclusions can be draw from this? If an aboriginal interest is itself an interest in land, are not also the respective elements of that interest, such as the rights to hunt, trap, gather and fish? And if these distinct interests are themselves interests in land, they must either be sui generis or fall within some recognized category of proprietary right, of which only a *profit à prendre* seems appropriate.[16] While it may be rather artificial to break down the aboriginal interest in this manner (one would hardly do the same thing for a fee simple corporeal estate), it does suggest that the entire aboriginal interest is at least as great an interest as to amount to a profit.

Having reviewed the broad character of an aboriginal title, it remains to consider how the courts have viewed and interpreted the exercise of particular aboriginal rights, namely the rights to hunt, gather, trap and fish.

1. Federal Laws and the Aboriginal Rights to Hunt, Gather, Trap and Fish

The leading case on the application of federal legislation to an aboriginal right to hunt, trap, gather or fish unsupported by any treaty is the cryptic judgment of the Supreme Court of Canada in *R. v. Derriksan.*[17] In this case, the question arose as to whether an aboriginal right to fish "arising out of Indian occupation" was subject to the federal Fisheries Act and regulations. The court per Laskin C.J. C. simply stated that even if an aboriginal right to fish could be established (and this was not confirmed by the Court), the Act and regulations ("have the effect of subjecting the alleged right to the controls imposed by the Act and Regulations."[18] The *Derriksan* case was relied upon by Mr. Justice Mahoney in *Baker Lake* for the proposition that the mining regulations, passed pursuant to the Public Lands Act and the Territorial Lands Act, prevailed "to the extent it does diminish the rights comprised in an aboriginal title. "[19] Similarly in *Kruger and Manuel v. R.* Mr. Justice Dickson for a unanimous Supreme

Court of Canada remarked that "it has been conclusively decided that such title, (i.e., aboriginal title) as any other, is subject to regulations imposed by validly enacted federal laws."[20] Federal legislation even applies to permit regulation of aboriginal hunting rights where they are specifically guaranteed by treaty, although in some cases the treaties themselves specifically envisage future regulation of hunting, gathering, trapping and fishing rights.[21]

It should be noted that these rights are subject to regulation irrespective of their classification as interests in land or mere personal interests. An aboriginal property interest is therefore as likely to be cut down by competent legislation as any other property interest unless it can be constitutionally protected by s.9 1(24) vis-à-vis provincial legislation or by other applicable constitutional protections, such as are found in the Constitution Act, 1982. Hunting, fishing and trapping rights entrenched in the Natural Resources Transfer Agreements of 1930 are not immune from regulation by federal legislation.[22]

2. Territorial Ordinances and the Aboriginal Rights to Hunt, Gather, Trap and Fish

Pursuant to the terms of the Northwest Game Act, the federal government exercised direct control over the preservation of game in the Northwest Territories until 1948.[23] At that time an amendment was made to the Northwest Territories Act granting the Commissioner in Council the right to regulate the preservation of game. The government of the Northwest Territories has subsequently exercised its delegated jurisdiction through a series of game ordinances, some of them specifically confirmed by legislation.[24]

The current formulation of the Northwest Territories Act provides that:[25]

> 14(2) Notwithstanding subsection (1) but subject to subsection (3), the Commissioner in Council may make ordinances for the government of the Territories in relation to the preservation of game in the Territories that are applicable to and in respect of Indians and Inuit, and ordinances made by the Commissioner in Council in relation to the preservation of game in the Territories, unless the contrary intention appears therein, are applicable to and in respect of Indian and Inuit.
>
> (3) Nothing in subsection(2) shall be construed as authorizing the Commissioner in Council to make ordinances restricting or prohibiting Indians or Inuit from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct.

These sections were in essentially the same form in 1966, where the *Sigereak E1-53* case was decided by the Supreme Court of Canada. Sigereak E 1-53, an Inuk, was charged with killing three barren-ground caribou and abandoning parts of the three caribou which contained meat fit for human consumption, contrary to s. 15(l)(a) of the Game Ordinance. At the time there was a declaration of the Governor in Council in force, to the effect that barren-ground caribou were in danger of becoming extinct. The sole question for the court was whether or not the Game Ordinance ands. 15(l)(a) of the Ordinance applied to Inuit. The Supreme Court held that the regulations did apply to Inuit. In the light of the declaration, the Inuit did not have an unrestricted right to hunt barren ground caribou and in any event "the offence here was in abandoning parts (of game) suitable for human consumption even if he had the legal right to hunt them for food."[26]

Consequently, the case law suggests that Inuit are subject to territorial game ordinances, both generally — where they do not relate to the right to hunt for food —

and specifically, where they purport to regulate the right to hunt for food and a particular species has been declared to be "game in danger of becoming extinct".[27]

3. Provincial Laws and Aboriginal Rights to Hunt, Gather, Trap and Fish

Most of the cases dealing with the application of provincial laws to regulate Indian hunting, gathering, fishing and trapping deal with Indians and the interpretation of s.88 of the Indian Act,[28] treaties and the Natural Resources Transfer Agreements (NRTA).[29] The issue is usually presented to the court as a division-of-powers problem. Is provincial game legislation ultra vires the province as legislation in relation to Indians, or as legislation interfering with NRTA guaranteed rights? The issue has rarely been presented as an aboriginal right or title problem, and indeed in several cases the plaintiff Indians have expressly eschewed any intention to rely upon an aboriginal title: *Kruger and Manuel* v. *R.*,[30] *Dick v. R.*,[31] *Simon v. R.*[32] Consequently, these cases are of limited value in determining to what extent Inuit hunting, fishing and trapping rights are subject to provincial legislation. However, there are two distinct issues here: first, can provincial game legislation be construed as legislation which singles out Indians/ Inuit for special treatment or which is legislation[33] in relation to Indians/ Inuit qua Indians/ Inuit? and second, can provincial game legislation be construed as legislation in relation to "lands reserved" for the Inuit/ Indians? The first question has received far more attention in the case law than the second.

(i) PROVINCIAL LEGISLATION: INDIANS QUA INDIANS

In *Cardinal v. A. G. for Alberta,*[34] a treaty Indian was charged with selling meat on his home reserve to a non-Indian, in contravention of the Alberta Wildlife Act. Although in that case the judgment of Martland J. for the majority in the final analysis turns upons. 12 of the NRTA, a substantial part of his judgment is concerned with the general constitutional issue. Martland J. reached the conclusion that game legislation does not affect Indians qua Indians[35] and furthermore was of the view that, as generally applicable legislation, the Wildlife Act could even apply on reserve, because of the provisions of the NRTA.

In *Kruger and Manuel*[36] the issue was whether provincial game legislation could apply to a non-treaty Indian hunting for food without a permit and out of season on unoccupied Crown land. It was held that it could, either on the basis of s.88 of the Indian Act, which permitted such legislation to be referentially incorporated into federal law, or simply because laws of general application would apply to Indians ex *proprio vigore*. The Court, per Dickson J., held that "game laws, which have as their object the conservation and management of provincial wildlife resources,"[37] do not relate to Indians qua Indians.

More recently, in *Dick v. R.*[38] the Supreme Court of Canada had the opportunity to consider the argument that in certain circumstances provincial wildlife or game legislation may strike at the core of Indianness and should therefore be read down so as not to apply to Indians. In *Dick*, the accused, a non-treaty Indian, was charged with two violations of the British Columbia Wildlife Act: killing wildlife (deer) out of season and possession of dead wildlife out of season. The deer had been taken by the accused off reserve but within the traditional hunting grounds of the band of which he was a member. In the Court of Appeal, Lambert J.A. (in dissent) found that the facts

of *Dick* disclosed significant differences from those of *Kruger and Manuel,* which made it possible for him to distinguish that case and find that the Wildlife Act had crossed the line "demarking laws of general application from other enactments".[39] In summary, the evidence was that hunting was essential to the way of life and culture of Dick and that it was therefore vital that he and his people be allowed to hunt for food at all times of the year.

Unfortunately, while Mr. Justice Beetz seemed favorably disposed towards Lambert J.A.'s opinion,[40] he simply assumed that the argument had been made out, and devoted the bulk of his opinion to s.88 of the Indian Act. On this point Beetz J. found that although he had been prepared to assume that Lambert J.A. was correct in stating that the wildlife legislation impaired the status and capacities of Indians, he was only prepared to make that assumption for the purpose of the initial constitutional characterization of the law. It did not follow, according to Beetz J., that the law must therefore not be a law of general application within the meaning of s.88 of the Indian Act. Quite the contrary; for if the law was not of general application, if it had specifically contemplated Indians, it would not merely have been read down — it would have been completely ultra vires.[41] In order to determine whether or not a law is a law of general application for the purposes of 5.88, one must look not only at the effect of the legislation but also at its intent. Thus, legislation which is *intended* to apply to all persons in a province, including Indians, will be a law of general application for s.88 purposes even if it has the incidental effect of impairing their status or capacities. If, however, the legislation *intended* to impair status and capacity, then it would not only not apply to Indians *exproprio vigore,* but it would not be a law of general application. In conclusion, therefore, s.88 of the Indian Act may incorporate by reference a provincial act which applies to Indians qua Indians provided that it was not intended to impair their status. This particular conclusion is fortunately of little relevance to the position of Inuit within the provinces, since they are not subject to the strictures of s.88 of the Indian Act. *Dick is* therefore of far more significance to the provincial Inuit than to Indians, especially if one takes Beetz J. to have approved of the opinion of Lambert J.A. that in this instance the provincial legislation did apply to Indians qua Indians, and could therefore not apply ex *proprio vigore.*

The Supreme Court of Canada had further to consider the validity of provincial game legislation in *Jack v. R.,*[42] a case in which judgment was given on the same day as *Dick*. In *lack,* the accused had killed a deer out of season for use in a religious burning ceremony for a relative. It was argued on behalf of Jack inter alia that the British Columbia Wildlife Act should be held inapplicable to the accused on the grounds that it interfered with aboriginal religion and therefore regulated Indians qua Indians. Unfortunately for our purposes, Jack's argument was held to be without merit since he had failed to prove that the Wildlife Act did in fact interfere with his religious practices. In other words, he did not meet the burden, set out in *Kruger and Manuel,* of proving that he could not at one and the same time both fulfill his religious needs and comply with the provincial wildlife legislation.

For our purposes there are two important points to be made about the above cases. First, they were all defended on the basis of the "Indians" head of s.9 1(24), and therefore the defendants were vulnerable to 5.88 Indian Act arguments. Second, the wide interpretation of the term "laws of general application" adopted by the court in *Dick* does not prejudice provincial Inuit.[43]

(ii) PROVINCIAL GAME LEGISLATION AND THE "LANDS RESERVED" ARGUMENT

Thus far we have considered defences to provincial game infractions based only upon the "Indians" head of 91(24). In this section we shall briefly canvass the proposition that hunting, trapping, fishing and gathering rights based upon an unextinguished title fall within the ambit of "lands reserved'' because they are property rights and can thereby be protected from inconsistent provincial legislation which must be seen as legislation in relation to "lands reserved". From an Indian perspective this solution has the advantage that it cannot be met by a s.88 Indian Act argument.

This argument was rather tantalizingly referred to in Mr. Justice Beetz's judgment for the Supreme Court *Dick v. R.*[44]

> One issue that does not arise is that of aboriginal title or rights . . . As in the *Kruger* case. the issue will accordingly not be dealt with any more than the related or included question whether the Indians' right to hunt is a personal right or . is a right in the nature of a *profit à prendre* or some other interest in land covered by the expression "Lands reserved for the Indians", rather than the word "Indians" in s.91(24) of the Constitution Act, 1867 . . . [T]he case has been argued as if the Indians' right to hunt were a personal one.

(a) *St. Catherine 's Milling*

in the *St. Catherine 's* case,[45] as is well known, the Privy Council held that the result of the surrender of the Indian title by the N. W. Angle Treaty was to disencumber the "substantial and paramount estate*' of the Crown in right of the Province, of the burden represented by the personal and usufructuary interest of the Indians. Consequently the timber growing on lands in the treaty area had become fully vested in the Crown in right of the Province.[46] But did that conclusion apply to the Indian hunting, fishing and trapping rights, rights which were reserved to the Indians by Treaty in these terms:

> Her Majesty further agrees with her said Indians, that they. the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement. mining, lumbering or other purposes, by her said Governrnent of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

There are several indications in Lord Watson's judgment that this conclusion did not apply. First, after reciting the basic terms of the treaty, Lord Watson indicated[47] that the legal effect of extinguishing the Indian title was to vest in the Crown the entire beneficial interest in the lands "freed from encumbrance of any kind, save the qualified privilege of hunting and fishing mentioned in the treaty". Thus Lord Watson clearly contemplated that these remaining interests amounted to an encumbrance on title; and presumably these interests continued to be an "interest other than that of the province", within the meaning of s. 109. This view is confirmed by Lord Watson's obiter at the conclusion of misjudgment. His Lordship had just established that Treaty 3 had left to the Indian no rights in the timber and then continued:[48]

> The fact, that it (the Dominion) still possesses the exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose . . of that beneficial interest in the timber which has now passed to Ontario,

From where could this "exclusive power to regulate" be derived"? In part this is undoubtedly a reference back to the treaty clause, but this alone could not invest the Dominion with legislative authority. Implicitly, therefore, Lord Watson must have reached the conclusion that Indian hunting rights must fall within the heading "lands reserved".[49] That this conclusion suggests a broad interpretation of the term "lands reserved" would not I think have bothered Lord Watson, who earlier in his judgment had resisted the contention of counsel for Ontario that the term "lands reserved" be given an interpretation confined to "Indian reserves". Instead, Lord Watson stated that the words used were "sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation".[50] It appears that his Lordship considered that the lands dealt with in the Royal Proclamation, 1763 were embraced within the term "lands reserved. "

At the very least, then, the *St. Catherine's* case left open the argument that lands encumbered by an unextinguished title, or by reserved hunting and fishing rights[51] with respect to those rights, are "lands reserved". The ambit of the case, however, was certainly confined to Royal Proclamation lands; and while in the *Nishga* case[52] both Hall and Judson JJ. were of the view that the Royal Proclamation was not the sole source of aboriginal title, they did not deal with the argument that lands encumbered by a "common law" title were "lands reserved".

However, a strong argument in principle can be mounted for suggesting that there should be some congruence between "an interest other than that of the province" within the meaning of s. 109, and "lands reserved" jurisdiction under s.91(24).5J *St. Catherine's* confirmed that a Royal Proclamation aboriginal interest was an interest other than that of the province, and Lord Watson further eludicated that concept in the first *Indian Annuities Case*[54] when he stated that it denoted "some right or interest of a third party, independent of and capable of being vindicated in competition with the beneficial interest of the old province. "

There is no reason for thinking that a "common law" aboriginal interest is not "an interest other than that of the province" and therefore not available for disposition by the province[55] and not subject to provincial jurisdiction under s.92(5). Furthermore, there is no reason to think that responsibility and jurisdiction for getting in the aboriginal interest is not with the federal government for the common law title, just as it is for Royal Proclamation lands.[56] That jurisdiction must find some source in ss.91 to 95. and the obvious repository is s.9 1(24). Given that Lord Watson has already sanctioned a broad interpretation of "lands reserved", there is a sound basis for extending this term to lands reserved on the basis of general principles of colonial constitutional law. Such a conclusion would also be consistent with the "plain policy" of the 1867 Act that "in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority. "[57]

(b) *R. v. Commanda*

The next case to be considered is *R.* v. *Commanda,*[58] a 1939 decision of the Ontario High Court. Commanda, a Robinson Treaty Indian, was charged with an offence under the Ontario Game and Fisheries Act. His defence, on appeal from conviction by way of stated case, was that his treaty-reserved hunting right was either an interest or a trust within the meaning ofs. 109, and could "only be interfered with or taken away by the Parliament of Canada"[59] under s.9 1(24). The argument was rejected but not very convincingly. Mr. Justice Greene relied heavily on the first *Indian Annuities* case[60]

but, with respect, that case was hardly to the point. The issue in the *Indian Annuities* case was: did the annuities payable to the Indians under the Robinson Treaty amount to a charge on the Crown lands of the province which was either a "trust" or an "interest" within the meaning ofs. 109? The Privy Council was of the view that they did not. Lord Watson suggested that the treaty did not reveal an intention to charge particular lands, and pointed out that the Indians would have no reason for doing so. The same reasoning, however, does not apply with equal force to hunting rights, for of those rights it would not be possible to say, as the court said of the annuities:[61] "Practically it does not now, and it never did, make any difference to the Indians, whether they were declared to have an interest in the proceeds of the land or not. " Furthermore, at no point does the Privy Council consider other obligations under the treaty. Finally, even if the *Commanda* case is correct on this point, it should be noted that the language of the Robinson treaties differs from that found in the later numbered treaties. In the Robinson treaties the province "promises and agrees . . . to allow (the Indians' the full and free privilege to hunt over the territory now ceded . . ." The numbered treaties speak of "a right to pursue their avocations. "

(c) The Cardinal Case

Although *St. Catherine's* suggested a line of argument, the potential proprietary basis for aboriginal hunting, fishing and trapping rights does not seem to have been further considered by a senior Canadian court until the *Cardinal case* came before the Supreme Court of Canada in 1973. We have already referred to this case above in our discussion of the "Indian" head of jurisdiction in s.9 1(24). There, Martland J. reached the conclusion that the provincial Wildlife Act did not apply to Indians qua Indians, but since the alleged offence occurred on reserve, it was incumbent upon the court to go on and consider whether the legislation might not be impugned on the alternative basis of the "lands reserved" head of s.9 1(24). However, the Court also had to wrestle with the ambit of Article 12 of the NRTA. The discussion of these issues in Martland J.'s judgment is not especially clear, but the following propositions maybe extracted. First, prior to the NRTAs the case law was inconsistent as to the question of the application of game legislation to Indians *on reserve*.[62] Second, provincial game laws could apply to Indians off reserve without the need to rely upon Article 12, because such legislation did not apply to Indians qua Indians. Third, the intent of Article 12 was to make it clear that provincial game legislation would apply to all lands in the province to which the Indians had a "right of access", including reserves. Hence, Martland J.'s conclusion that provincial game legislation applies on reserve is largely based on Article 12 of the NRTA. His judgment cannot be cited as authority for the proposition that provincial hunting legislation is not legislation in relation to lands reserved. In fact the doubts he expresses as to the application in the absence of the NRTA, of game laws on reserves, tend to support the view that such legislation *would* be legislation in relation to lands reserved:[63]

> In my opinion, the meaning ofs. 12 is that Canada, clothed as it was with legislative jurisdiction over "Indians, and Lands reserved for the Indians", in order to achieve the purpose of the section, agreed to the imposition of provincial controls over hunting and fishing, *which, previously, the province might not have hadpower to impose.* By its express wording, it provides that the game laws of the province shall apply "to the Indians within the boundaries thereof". To me this must contemplate their application to all Indians within the province, without restriction as to where, within the province, they might be. (emphasis supplied)

This dictum is actually quite broadly phrased and extends Martland J.'s doubts to the application of game legislation anywhere in the province. Since his Lordship had just concluded that game legislation did not apply to Indians qua Indians (and would therefore be valid under that head), his doubts could only be based upon a "lands reserved" argument.

The dissenting judgment of Mr. Justice Laskin in *Cardinal* is also worthy of note. Laskin J. was of the view that the provincial game legislation could not apply on reserve and this view was not altered by the wording of Article 12 of the NRTA. As part of his conclusion on the latter point Laskin J. commented:[64]

> It is clear from cases like *Rex v. Wesley, supra,* and from the *Daniels* case, and from others like *Rex* v. *Smith, [1935] 2* W.W. R. 433,64 C.C.C. 131, [1935] 3 D.L. R. 703 (Sask. C.A.), in which the history of Indian cession Treaties is narrated, that Indians who ceded their lands were assured of hunting privileges over time. I need not consider whether such privileges are themselves property interets of a kind which bring them exclusively within federal jurisdiction under s.91(24) as coming within the phrase "Lands reserved for the Indians", or whether the jurisdiction attaches because the rights involved are those of Indians: see *Regina v. White (1964), 52* W.W. R. 1983,50 D.L. R. (2d) 613, affirmed 52 D.L. R. (2d) 481 (Can.). What is evident is that the existence of such privileges in such surrendered lands gives subject matter to s. 12 of the Alberta Natural Resources Agreement without compelling the inclusion therein of reserves which are of a different order than lands in respect of which there are only hunting rights or in respect of which hunting rights are assertable by the force ofs. 12 alone.

This paragraph has the same tantalizing effect as the comment of Beetz J. in *Dick* quoted above, and does little to resolve the point at issue here.

(d) *Kruger and Manuel, and Derrickson*

Finally, we should consider the *Kruger and Manuel* case and the recent *Derrickson* case. *Kruger* requires discussion because, although the case was argued and considered on the "Indians qua Indians" ground, several of Mr. Justice Dickson's comments might be taken to detrimentally affect a "lands reserved" argument. This concern arises from the third argument made in *Kruger,* namely, that the Court of Appeal had erred in finding that aboriginal hunting rights could be expropriated by provincial legislation without compensation. Dickson J. for the Supreme Court rejected that argument because, he said, the Wildlife Act is a regulatory statute "not directed to the acquisition of property".[65] While one may cavil at the particular conclusion, it is clear that Dickson J. was dealing with the issue of whether or not there was a taking of property. He was not dealing with the division-of-powers issue (i. e., was this legislation legislation in relation to lands reserved?), and he was not suggesting that *hunting* rights were not property rights.

Derrickson v. Derrickson[66] requires mention here, not because of any discussion of hunting rights in the case, but because of certain references in Chouinard J.'sjudgment to s.88 of the Indian Act, and because it is an important treatment of the "lands reserved" head of s.9 1(24), which Professor Sanders has suggested may be the one true example of interjurisdictional immunity in the constitution.[67] The facts of *Derrickson* were as follows: the husband and wife were members of the Westbank Indian Band and each held a certificate of possession to certain reserve land. The wife sought a divorce and a declaration that she was entitled to an undivided 50% interest in the property under the terms of the provincial Family Relations Act. The issue before the Supreme Court of Canada was whether the Act had any application to reserve

property. The Act dealt wth such matters as ownership, right of possession, transfer of title, partition or sale, and severance of joint tenancies. Chouinard J. for the unanimous court held that the legislation could not apply to reserves because of the "lands reserved" head ofs.91(24):6s

> The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s.9 1(24) of the Constitution Act, 1867. It follows that provincial legislation cannot apply to the right of possession of Indian reserve lands.
>
> When otherwise valid provincial legislation, given the generality of its terms, extends beyond the matter over which the legislature has jurisdiction and over a matter of federal exclusive jurisdiction, it must, in order to preserve its constitutionality, be read down and given the limited meaning which will confine it within the limits of the provincial jurisdiction.

That should have been sufficient to dispose of the appeal, but the Attorney General for Ontario had made the argument that the Family Relations Act was applicable because of s.88 of the Indian Act. Unfortunately, instead of curtly dismissing this argument on the basis, outlined above, that s.88 refers to Indians and not "lands reserved", Chouinard J. treated it with unwarranted respect going to the length of establishing that the provincial act would not apply in any case because of inconsistencies with provisions of the Indian Act. Nevertheless, it is submitted that this sympathetic treatment of the argument cannot affect the traditional and, with respect, correct, interpretation of s.88. I would thus argue that once we establish that hunting rights are property rights which are embraced by the term "lands reserved", provincial legislation which affects the exercise of those rights must be read down and cannot be saved by s.88.

(iii) CONCLUSION

The best that we can say is that the case law on provincial legislation and the protection of hunting rights under the "lands reserved" head of s.91(24) is inconclusive. There is, however, no clear authority to suggest that if a "lands reserved" defence is mounted, provincial game legislation unsupported by the NRTAs can validly apply to hunting rights on lands which are clearly reserved. Whether the ambit of invalidity is wider and extends to treaty-reserved rights, and whether lands within provinces subject to a common-law, unextinguished title can support a "lands reserved" argument remains to be seen, but the argument must be strengthened if hunting, fishing and trapping rights are to be recognized as property rights. As to the possibility of a defence based on the "Indians" head, the cases have clearly recognized the *possibility* that provincial legislation which preserves caribou before Inuit, or which attacks the Inuitness of the people, may be struck down as invalid. Such provincial legislation cannot be saved with respect to Inuit by s.88 of the Indian Act.

The remaining issue to consider in this part is the effect of s.35 of the Constitution Act, 1982.

4. The Effect of Section 35

Section 35 provides that:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Not surprisingly, there is a great deal of uncertainty as to how this section will be

interpreted by the courts, particularly with respect to the term "existing". At the time of its insertion the Ministers of Justice and of Indian and Northern Affairs expressed the view that the term "existing" carried no legal consequences, to which Professor Lysyk (as he then was) remarked:[69]

> In support of that view it may be pointed out that the section speaks of rights which are thereby "recognized", which implies the prior existence of such rights. Further, with respect to the first of the two classes of rights, the term "aboriginal" connotes historically based rights traceable to the situation at the time of discovery and colonization by the Europeans. Problems arise, however, if the term 'existing' is taken to mean that the scope of the right in question is delimited by the existing jurisprudence.

Therein lies the dispute. To what extent are aboriginal rights frozen as of April 1982, and to what extent may aboriginal groups rely upon s.52 to annul inconsistent federal and provincial legislation?

If one takes a reasonably expansive view of the section, one may argue that:

1. Federal and provincial legislation and territorial ordinances enacted after April 17, 1982 are of no force or effect to the extent of any inconsistency;
2. Rights *extinguished* prior to April 17, 1982 are not revived;
3. Rights which were merely *restricted* (as in *Derriksan*) prior to April 17, 1982 are revived. In other words, federal and provincial legislation and territorial ordinances enacted prior to April 17, 1982 are also of no force or effect to the extent of any inconsistency.

This summary effectively represents the position taken by Kent McNeil,[70] and it can be contrasted with the more restrictive approach espoused in the last sentence of the Lysyk quotation.

Early indications are, however, that the courts are preferring the more restrictive approach, although it will be some time before the effect of the section can be authoritatively stated. For example, in *Bear v. R.*, Bear, a treaty Indian, was accused of shooting two mallard ducks, contrary to s.6 of the Migratory Birds Convention Act. The conviction was upheld by Mr. Justice Milligen of the Saskatchewan Court of Queen's Bench, since "Bear's right to hunt migratory birds under the treaties had at the coming into effect of the Constitution Act, 1981 [sic] been restricted by the Migratory Birds Convention Act."[71]

Milliken J.'s judgment was affirmed on appeal, where it was also emphasized that the treaty right to hunt (under both treaties 8 and 10) was explicitly made subject to regulation by either the Dominion or the "government of the country". Irrespective, then, of whether or not the Indian hunting right was actually subject to the Migratory Birds Convention Act in 1982, the very rights which were entrenched "were not unqualified or unconditional". Hence, in the opinion of the Court of Appeal it could hardly be contended that s.35(1) exempted Bear from the operation of the Migratory Birds Convention Act.[72]

The most pertinent decision on s.35 to date is that of the British Columbia Court of Appeal in *Sparrow v. R.* (72a) which deserves an extensive analysis. Sparrow was a member of the Musqueam Indian band and was charged on May 25, 1984 under the federal Fisheries Act with the offence of fishing with a drift net longer than that permitted by the terms of the band's Indian Food Fishing Licence. Sparrow argued that the net length restriction was inconsistent with s.35(1) and therefore of no force or effect because of the language of s.52. He was convicted at trial and his appeal to the

County Court dismissed. The Musqueam band has never signed a treaty and although it has a reserve, the activity which gave rise to the charge did not occur on the reserve but on their traditional fishing grounds. The band fishing licence had been issued annually since 1978 and from then until March 1983 had permitted the use of 75 fathom nets. The 1983 licence cut this back to 25 fathoms which was also the limit of the licence in effect when Sparrow was charged. The limit seems to have been imposed in part for conservation reasons and in part because of a belief that salmon caught under the food licence were being sold commercially.

The Court began its judgement by noting that the Musqueam Indians had an organized society and that fishing had always been an integral part of that society stating later in the judgement that Sparrow was undoubtedly exercising "an existing aboriginal right". However, the Indian right to fish had been subject to increasing regulation since British Columbia joined Confederation in 1871 .[72b] The court went on to discuss the judgments of the two lower courts which had held that no aboriginal right to fish could be asserted in British Columbia because of the judgement of the Court of Appeal in *Calder* which had been affirmed by the Supreme Court of Canada albeit for different reasons. Since the Court of Appeal in *Calder* had held that any aboriginal title had been extinguished, 5.35 of the Constitution Act, 1982 could not be called in aid. The court in *Sparrow,* in trenchant terms, scotched this argument on two grounds. First, it was stated that the Court of Appeal's judgement[72c] in *Calder* could not bind "anyone" in light of the judgement of the Supreme Court of Canada.[72d] And second, the Court was of the view that the cases were easily distinguishable on the facts; Calder dealt with a declaration of aboriginal title to land, the instant case dealt with a right to fish, a right which[72e] "has always been recognized; and continues to be recognized today in the regulations under the Fisheries Act". Not only then was the right recognized, but it was also an existing right albeit, pursuant to *Derrickson*,[72f] subject to federal regulation prior to April 1982.

With the above as an introduction the court moved on to consider the effect of s.35(l). Counsel for the provincial Crown had argued that 5.35 had no effect on aboriginal or treaty rights but was merely a preambular statement to Part 11 of the Constitution Act, 1982 and the federal-provincial conferences called to identify and define those rights. This specific argument lost its force because 5.37 had since been supplemented by a new 5.37.1 which included a non-derogation clause protecting s.35.[72g] But the court also found the submission unacceptable on the broader ground that it eviscerated s.35, contrary to the principle that the Constitution should be interpreted in a broad and remedial way.[72h]

Having held that the right was entitled to constitutional protection the court had to consider the degree of protection accorded by 5.35. Counsel for intervening tribal councils had argued that any fisheries regulation which interferes with, rather than protects, an aboriginal right must be of no force or effect. Counsel for the appellant argued that any such regulation was prima facie invalid but might be preserved if the restriction was reasonably necessary for conserving the fishery. Integral to this approach was the proposition that the right to regulate was an integral part of the aboriginal right and should be carried out by the possessor of that right as it had historically been.

How **did** the court react to these submissions? In the first place it rejected the argument that the right was one which should be subject only to internal regulation.

That was inconsistent with the "existing" nature of the right which was entrenched. It was a right which had long been subject to government regulation which[72i] therefore must continue to be so, "because only government can regulate with due regard to the interest of all". But that did not mean that the federal power to regulate, said to be derived from s.91(12) and s.91(24), was an unrestricted one. Hence the court seemed prepared to accept that the power to regulate could not be used[72j] to "limit the number of fish to be taken to one insufficient for support and subsistence". What the Musqueam had was a right to take fish for food purposes, but not by any particular method. The right had to be interpreted liberally and could not be confined to subsistence, and furthermore the right was one which was constitutionally entitled to priority[72k] over all other user groups and could not be extinguished. Regulations restricting the exercise of the right could only be valid if[72l] "reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest". The result of the case was that the conviction was set aside and a new trial directed in light of the court's statement of the law and applicable principles.

We have dealt with *Sparrow* at length for several reasons. First, it is a case based on a non-treaty right to fish and second it represents the most sophisticated treatment yet of s.35; one which balances constitutional entrenchment with the supposed need for some regulation, indicating quite clearly that although pre- 1982 the aboriginal right could have been subject to all fishery regulations, there are now limits on the ambit of that right to regulate. The court was referred to other s.35 cases such as the *Bear* case but found them to be of little assistance because of the treaty language used. The *Sparrow* approach represents a more enlightened approach than that taken in *Bear* but it remains to be seen how broad in practice is the power to regulate which has been left with the federal Department of Fisheries. Furthermore, although the case recognizes limitations on the federal right, it has rejected self-regulation. It does not preclude, however, the co-operative management approach being taken in modern land claims settlements, and recommended by Usher in the main body of this paper.

As yet then it is difficult to predict which way the courts will ultimately lean with s.35 cases. The term "existing" seems to have been used to justify a restrictive interpretation of s.35 but attempts to deny any meaning to s.35 have received a major setback in *Sparrow* and from the 1983 amendment to s.35 which added subsection 35(4) and the important word "guaranteed''.'[zn]'

C. THE NATURE AND CHARACTERISTICS OF A *PROFITA PRENDRE*[73]

In this section we shall review the characteristics of a profit and consider the effect of so characterizing hunting, gathering, fishing and trapping rights.

In order to ascertain the value of deeming aboriginal hunting, fishing and trapping rights to be in the nature of a *profit à prendre*, it is necessary to elucidate the nature and characteristics of a profit at common law. A profit, granted by deed, is a right in the nature of an incorporeal hereditament, which simply means that it is a right (rather than a *thing*, which is corporeal) which is inheritable. It is an interest in land which grants the right to go onto the property of another and remove something, or part of the soil, which is of value. For example, the right to drill for and abstract oil and gas from somebody else's land is normally granted as a profit, as is the right to cut and

remove trees, mine for hard minerals, fish, or hunt for game.[74] A profit may be either exclusive or nonexclusive and be held in gross; that is to say, unlike an easement it need not benefit a particular block of land (or servient tenement). As an interest in land, and unlike a mere licence, a profit is not revocable at will: it entitles the holder to important remedies, and it binds third parties. A profit may be granted for the equivalent of any estate known to the common law. Thus it may be granted for a term of years or in fee.

(i) THE REMEDIES OF A PROFIT HOLDER

(a) *Remedies Against Third Parties*

The holder of a profit is able to avail himself of remedies in trespass and nuisance. For example, in *Fitzgerald. Firbank*,[75] Fitzgerald and others held from Lord Ebury, the owner of the bed and banks of a river, the exclusive right of fishing along a particular tract of the River Colne for a term of years. The right of fishing was limited to "fair rod and line angling at proper seasons and to netting for the sole purpose of procuring fish-baits. "

The defendants operated some gravel pits on a tributary upstream from the Colne, and in the course of doing so pumped out quantities of water loaded with mud. The effect of this was to make the stream too opaque for the fish to see the bait, to drive away the fish, and to damage the spawning beds. The plaintiffs sought an injunction and damages. In the Court of Appeal, Lord Justice Lindley held that the plaintiff's right was more than a mere licence: "it is what is commonly called *a profit à prendre*, and it is of such a nature that a person who enjoys that right has such possessor rights that he can bring an action for trespass at common law for the infringement of those rights."[76] While the defendant had not challenged the plaintiffs' rights, "he has done that which prevents the plaintiffs from exercising them to the extent to which they would exercise them if not wrongly prevented. " Consequently, the injunction granted by the trial judge was maintained. Lord Justice Lindley appears to have been of the opinion that the remedy here lay in nuisance, while Rigby L. J., the only other judge to express an opinion on the matter, stated[77] that "the grantees of the incorporeal hereditament have a right of action against any person who disturbs them either by trespass or nuisance, or in any other substantial matter. "

More recently, an interesting case came before the British Columbia Court of Appeal on an application for an interim injunction. In *Boulton et al. v. Forest Pest Management Institute et al.,* [78] the plaintiffs sought an interim injunction[79] to restrain the defendants from a herbicide spraying program in the Skeena area of British Columbia, pending resolution of the merits of the plaintiffs' case in nuisance and negligence. The defendants were planning to spray in order to test the effects of the herbicide on fish and wildlife, and part of their argument against the grant of the injunction was that the plaintiffs did not have a sufficient or suitable legal interest on which to base an action in public or private nuisance. The plaintiff Boulton was the holder of a registered trapline within the area to be sprayed and the remaining plaintiffs were members of an Indian band who harvested natural foods in the area for their own consumption, and fish in the Skeena pursuant to food fish permits.

At trial Madam Justice Southin had found that the statutory interest created by the fishing licence and trapline licence did not amount to a *profit à prendre,* but was merely a statutory licence. Therefore the plaintiff could not maintain an action in private nuisance. The appeal was founded in the main upon the argument that the

trapping licence granted pursuant to SS.42-46 of the Wildlife Act did amount to a property interest. Macfarlane J.A. (in chambers) commented that "While it does not give the holder of the trapline any proprietary rights in wildlife or restrict other persons from capturing wildlife, it nevertheless is a right to take animals *ferae naturae* [wild game] from the lands over which the registered trapline is given". Consequently, Macfarlane J. A., after quoting from the recent *Tener*[80] case, concluded that the licence fell within the description of a profit. He was prepared to hold that the plaintiffs could maintain an action in private nuisance and furthermore would probably have standing to maintain an action in public nuisance without the assistance of the Attorney General. Macfarlane J.A. went onto find that the defendants would not necessarily be able to rely upon a defence of statutory authority on the appeal of the action, and that therefore there was some merit in the plaintiffs' case.

Having found merit, Macfarlane J.A. considered whether or not the injunction should be granted on the facts of the case. Section 10(2) of the Court of Appeal Act permits a justice to make "an interim order to prevent prejudice to any person". Macfarlane J.A. was of the view that an injunction ought to be available because if the spraying were permitted to go ahead, and were the pesticide found to be toxic, the harm would be "irreparable and irremedial",[81] and damages would be an inappropriate remedy. On the other hand, Macfarlane J.A. was unable to find any factors which would outweigh the prejudice to the plaintiffs.[82]

The *Boulton* case, then, is an ideal modern illustration of the advantages of viewing both treaty-derived hunting rights and aboriginal title-based rights as interests in the nature of a profit rather than as mere licences. For without a proprietary basis for their claim, the plaintiff would, I think, have been unsuccessful in this case.[83]

The two cases dealt with to this point have considered remedies by the profit holder against a third party. We shall now turn to a consideration of remedies against the holder of the corporeal estate — that is, the owner of the land on which the rights of profit are exercised.

(b) *Remedies Against the Owner or Lawful Occupier of the Corporeal Estate*

Direct interference by the owner or lessee of the corporeal estate with the rights of the owner of the profit will always be restrainable. An example of the application of this principle is *Mason v. Clarke*.[84] There the appellant, Mason, obtained the "rabbiting rights" from year to year on the Holthorpe Estate. The rights were granted to him by the landlord of the Holthorpe Estate, who had also leased the corporeal estate, the agricultural lands, to Clarke by a prior instrument. In the earlier lease to Clarke, the landlord had reserved to himself all the game, rabbits, wildfowl and fish, together with the liberty to himself and other persons authorized by him to take and remove anything killed. As Viscount Simonds stated,[85] "it is clear law that the so-called reservation operates as a regrant of the rights therein described in favour of the landlord and his assigns and that a *profit a prendre is* thereby created. " The dispute arose when Clarke interfered with Mason's rabbit snares and did his utmost to prevent him from exercising his rights. Mason sought an injunction to prevent Clarke from interfering with his profit. The House of Lords unanimously held that Mason was entitled to the injunction. Viscount Simonds indicated[86] that the slightest amount of possession of "a *profit à prendre is* sufficient to support an action for trespass . . . and the respondent was nonetheless a trespasser upon that incorporeal hereditament

because he was himself the occupier of the land and had certain rights under the Ground Game Act. " Mason's claim was supported by the fact that all his actions constituted reasonable use of his rabbiting rights .87

Other cases deal with a direct conflict between the profit holder and the owner of the corporeal estate, and show the courts dealing with what are essentially multiple resource-use conflicts, as they attempt to ascertain with some precision the ambit of the rights granted and the rights retained.[88]

In *Willingale v. Maitland*,[89] the Rev. Maitland was the lord of the manor of Leighton. The waste lands of the manor were subject to common rights claimed by inhabitants of the parish, including the right to lop and top timber trees. Maitland proposed to sell part of the waste lands to third parties who intended to build there. On application by the inhabitants an injunction was granted, as any building would tend to the destruction of the timber which, although not owned by the commoners, was subject to their use rights. In the similar case of *Robertson v. Hartopp*,[90] where the tenants of the manor claimed rights of pasturage, estovers, turbary and the right to dig loam, the court granted an injunction to restrain the lord from enclosing the waste land, since the result would be a shortage of land available for pasturage.

Other conflicts could not be so easily handled, as the case of *Gearns v. Baker*[91] illustrates. In that case, Baker granted to Gearns hunting rights across a block of land which at the time was wooded. Subsequently Baker took steps to grub up and fell the timber on the property, and Gearns sought an injunction on the grounds that this would destroy the value of the shooting rights. The court refused the injunction on the pragmatic grounds that one would hardly have expected Baker to forgo all the benefits of the property merely because he had leased out the hunting rights. *Pattisson v. Gilford*[92] *is* a case on the other side of the line, on similar facts. There the court indicated that it would be prepared to grant an injunction in favour of the holder of hunting rights where the owner of the property intended to build houses all over the land. Presumably the point here was that any such action would be entirely inconsistent with the rights granted.

The leading case in this area of the law is probably the decision of the English Court of Appeal in *Peech v. Best*.[93] There, by agreement under seal of 1921, Best demised to Peech for a term of 14 years the exclusive shooting and sporting rights over Hazely Farm. Best also covenanted that he would endeavour to keep up the head of game on the lands and preserve the eggs and young of game birds. In 1929 Best sold 12 acres of the land to one De Mestre, who intended to erect several houses on the lands and horse boxes. When De Mestre began to clear the land immediately after the sale but before the conveyance, the plaintiff commenced an action, seeking inter alia an injunction restraining both defendants. Subsequently, Best conveyed the land to De Mestre. The trial judge found for Peech and the Court of Appeal confirmed, with the leading judgment being given by Lord Justice Scrutton.

Scrutton L.J. began his judgment by distinguishing the cases in which the profit holder begins an action to restrain a third party, and pointed out that here the question was rather different, viz.[94] "What is the effect when the person disturbing the right to a *profit à prendre* is a person doing an action which, unless his grant of *a profit à prendre* prevents him, he has a right to do as owner of the land affected? Is he derogating from the grant, or is his grant subject to the implied term that he may use his land in an ordinary and legitimate way, so long as he himself does not sport, or himself take the *profit à prendre,* or wilfully damage the right to a *profit aprendre?"To* Scrutton L. J.,

the latter question circumscribed the rights of the profit holder too narrowly, and he obviously believed that a fundamental alteration of the use of the land which entirely destroys the profit, could be restrained or at least compensated by damages:[95]

> It appears to me that fundamentally changing the character of the land over which sporting rights are granted, though it is not with the deliberate intention of injuring the sporting rights. and though it is a thing which a landowner would have power to do if he does not injure the rights of others, if it has the necessary effect of substantially injuring the rights of others is derogating from the grant, and is a substantial Interference with the *profit à prendre* granted.

Hence, in the opinion of Scrutton L.J. the defendant's action here was a derogation from the grant,[96] an infringement on the right of the profit holder and a breach of the covenant for a quiet enjoyment.[97] Greer L.J. was of a similar view, holding that any action by Best which amounted to an ouster of Peech's sporting rights would be restrainable or compensable by damages.[98] On the other hand, reasonable use or cultivation, or putting the land to a use which was consistent with the purpose for which it was being used at the time of the grant, would not be restrainable.[99]

In conclusion, then, the holder of a profit can avail himself of a powerful battery of remedies, not only against third parties but also against other persons who have interests in the land. These remedies, notably nuisance and trespass, are simply not available to the holder of a mere licence.

(ii) OBJECTIONS TO THE PROFIT CLASSIFICATION

As a matter of *common law* (but not statutory law), there are powerful theoretical objections to characterizing the aboriginal rights to hunt, trap, fish and gather as being species of profit.[100] These objections, however, could be overcome by an imaginative bench (one prepared to extend the remedies associated with a profit to an aboriginal plaintiff, without actually making the categorization), appropriate statutory provisions, or an appropriate clause in a land claims agreement. The first objection is that a profit cannot be vested in a fluctuating and uncertain body. The basis for this proposition is that a right, for example, to dredge oysters without stint for personal use and for the purpose of sale, would tend to the destruction of the oyster fishing. This argument was raised in Goodman v. *Mayor of Saltash.*[101] In this particular case the class of benefited persons was not unlimited. and neither was the time of year during which the rights could be exercised. Furthermore, the right was subject to regulation by the Borough of Saltash by by-law, and the exercise over several centuries of the right to take oysters tended to rebut the presumption that a deemed grant "to the inhabitants of ancient messuages within the borough" would tend to a destruction of the fishing. Furthermore, if this be the only basis of the objection then it is surely arguable that the rationale for the objection is undermined by proof that the grantee (or deemed grantee) may exercise the type of self-restraint and regulation which has been described by Usher in the main body of this report with respect to Inuit management practices. In any event, the objection is a purely formal objection to the common law, and easily overcome by specific statutory wording *deeming* the aboriginal rights to hunt, trap, fish and gather to be in the nature of *a profit à prendre*. Furthermore, the judiciary has from time to time got around the formal objection by means of such constructs as a presumed or actual lost grant, a presumed or actual incorporation of the class, and a presumed or actual charitable trust, in favour of a class.[102] In fact it may be that the doctrine is still open to reconsideration by a Canadian court. [103]

A second theoretical problem might arise with respect to fishing rights. At common law there is a public right of fishing in tidal waters based either on Crown ownership of the solum or on general custom. Prior to Magna Charta, it lay within the Crown's prerogative to grant exclusive or special rights of fishing to other persons which would have. the effect of defeating or restricting this public right. In the British Columbia *Fisheries Case*,[104] Viscount Haldane L.C. remarked upon this aspect of English law in the following terms: [105]

> Since the decision of the House of Lords in *Malcolmson v. O'Des,* it has been unquestioned law that since Magna Charta no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation. This is now part of the law of England, and their Lordships entertain no doubt that it is part of the law of British Columbia.

Viscount Haldane went on to remark that: [106]

> Such, therefore, is undoubtedly the general law as to the public right of fishing in tidal waters. But it does not apply universally. To the general principle that the public have a "liberty of fishing in the sea or creeks or arms thereof." Lord Hale makes the exception "unless in such places, creeks, or navigable rivers where either the King or some particular subject bath gained a proprietary exclusive of that common liberty ." This passage refers to certain special cases of which instances are to be found in well-known English decisions where separate and exclusive rights of fishing in tidal waters have been recognized as the property of the owner of the soil. In all such cases the proof of the existence and enjoyment of the right has of necessity gone further back than the date of Magna Charta. The origin of these rare exceptions to the public right is lost in the darkness of the past as completely as is the origin of the right itself. But it is not necessary to do more than refer to the point in explanation of the words of Lord Hale, because no such case could exist in any part of British Columbia, inasmuch as no rights there existing could possibly date from before Magna Charta.

Undoubtedly, Viscount Haldane did not have the native people of British Columbia in mind at the time he made these comments. Once again, the objection is purely formal. There would be nothing to prevent the competent legislature from deeming the aboriginal right to fish and gather shellfish to be a profit, exclusive or otherwise. [107]

A third formal objection might be made to the profit argument, based on the civil law position that a right to hunt, trap or fish cannot exist in gross, and severed from the land, except as a personal right. But once again I would suggest that such an objection is purely formal, for while it is true that the traditional civil law position has been to reject such an interest, there is high authority to the contrary, and in any event, just as with the other objections, this objection can be overcome by the competent legislature, and should not be seen as an affront to the integrity of the civil law.

The main authority to the contrary is the decision of the Privy Council in *Matamajaw Salmon Club v. Duchaine.*[108] The Salmon club claimed to be entitled to the benefit of a deed dated September 1890 between Blais and Stephen under which Blais purported to cede to Stephen:

> Tous les droits de pêche clans la Riviere Matapédia vis-a-vis le lot du cédant situé ., avec droit par le dit Sir George Stephende passersur le dit lot, tant a pied qu'en voiture pour l'exercise du dit droit de pêche.

Stephen assigned his rights to X, who in turn assigned them to Matamajaw. Matamajaw sought a declaration that they were the sole proprietors of the bed of the River Matapedia and of the fishing rights therein. At trial Matamajaw succeeded as to

the right of fishing, but the Supreme Court of Canada was of the view that Stephen's interest was personal and did not extend beyond his life. The right of fishing might have passed if the bed of the river had been conveyed, but since the bed had not been, and since Quebec law did not recognize real incorporeal rights which did not benefit any particular land (i. e., in gross), no interest could have been taken by Matamajaw. Mignault J. in the Supreme Court of Canada took the view that in Quebec law there was nothing similar to the common law's *profit à prendre,* which could endure in perpetuity.

In the Privy Council, Lord Haldane began his judgment by recognizing the separate development of the civil law, but his Lordship clearly took strength from the divergence of opinion which had already been expressed in the lower courts. However, in his opinion it was clear that while Roman and early French law might have viewed a right of this nature as a usufruct, a burden on title and a personal interest, such a view was no longer tenable in modern Quebec law. One must now, his Lordship urged, recognize that a usufruct was "a true real right [enforceable] against all who seek to interfere with it". [109] Furthermore, there was nothing in the Code which could be read as preventing the creation of a right of this nature (Articles 406 and 408) or limiting its duration to the life of the grantee (Article 479). Finally, the Privy Council was of the view that[110] "There is no inherent reason for refusing to treat a fishing right as a self-contained and separable subject. In the seignorial cases they appear to have been treated as self-contained and separable. "

The principle established by the *Matamajaw* case has recently been considered by both the Federal Court and by the Quebec Court of Appeal. In *Boucher v. R.,* [111] Mr. Justice Marceau recognized that it was possible to grant perpetual real fishing and shooting rights which did not benefit any particular property. However, such a grant, being exceptional in nature, must clearly indicate an intention that the right be perpetual, and that had not been done in this case. On appeal, the majority of the federal Court of Appeal agreed with this opinion, emphasizing that the right was reserved in favour of the vendor rather than the land and therefore could not be a real servitude. However, neither could it be a perpetual servitude in gross, because of the inadequacies of the deed of sale. [112] In the case of *O'Brien v. Ross*[113], the Quebec Court of Appeal had to consider a slightly different problem, that is, whether certain hunting rights granted by Alcide Ross to Brown constituted a servitude in favour of Brown's property, which Ross had sold to him (in which case it could enure to the benefit of O'Brien), or whether it was a personal right in favour of Brown and his heirs, which could not have been transferred to O'Brien when O'Brien purchased the property. The Court of Appeal unanimously decided that the parties intended the interest to be a personal interest rather than an interest benefiting particular property. The case therefore turned on the construction of the deed in question, but in giving judgment the court gave a narrow interpretation of the *Matamajaw* case. Mr. Justice Rothman stated that[114]

> I do not believe the judgement in that case is of much help in interpreting the present clause. Whatever possibility there may be of separating ownership of a riverbed from ownership of fishing rights, no such separation of ownership is possible in the case of hunting rights except in those limited and exceptional cases where a servitude has been created.

The final theoretical objection to the profit analysis is the most profound. It is that there are inherent in a profit (whether based on a direct grant or the doctrine of lost

grant) two features: first, a recognition that the corporeal estate over which the profit is exercised is vested in another party; and second, that the interest is derived from an actual or notional grantor. Both of these features of a profit render direct comparisons with aboriginal interests untenable because it is a fundamental part of the aboriginal rights thesis that native rights are not derived from the Crown, but pre-exist and are independent of the Crown's own interest. At best, therefore, we are merely inviting the judiciary to draw analogies or indulge in legal fictions and *deem* the aboriginal hunting, fishing and trapping rights to be interests in the nature of a profit.

D. WHAT IS ACHIEVED

Having considered the nature and character of a profit, it remains to consider what is gained by so characterizing the respective aboriginal rights.

Dr. Lester has stated that "the advantage of putting an aboriginal title [he was referring to title per se at common law rather than particular elements of that title] on this theoretical footing is that it not only reflects the actual economic importance of the right sought to be protected . . . It also means that the right [sic] to hunt. trap and fish can be characterized as rights *in rem,* enforceable against the whole world, and not merely against the (notional) grantor. Finally, the principle on which the security of private rights over game rests is that of the law of trespass. Trespass is actionable *per se,* and thus difficult problems of causation and remoteness of damage are thereby avoided. "[115] This statement encapsulates the main advantages of using the classification of a *profit à prendre.* The profit represents an accepted form of incorporeal right in the common law which, of all the possible classifications of the rights, most closely describes the nature of some of the rights being exercised.[116] A profit is a secure form of right and has associated with it a traditional group of remedies. At the very least it is a dramatic improvement upon the uncertainty surrounding the usufruct (both in terms of the concept and remedies) and "personal licence" interpretations of treaty rights to hunt, gather, trap and fish. Use of the term profit makes it crystal clear that the respective rights are interests in land and not merely personal interests. This itself would be a useful clarification because even if we can conclude (as we did above) that an unextinguished title is itself an interest in land, it does not necessarily follow that hunting, gathering, fishing and trapping rights based on treaties or the Natural Resources Transfer Agreements for example, also constitute interests in land. In fact, it has been suggested that these rights constitute a form of licence.[117] Thus, the main advantage of classifying the rights as a profit lies in the remedies which are then available against third parties who interfere with the exercise of the right. However, it should also be noted that a taking or expropriation of vested rights, and particularly property interests will normally give rise to compensational [18] which itself would be a valuable right.

The second major advantage to classifying aboriginal based hunting rights as profits is that such rights would arguably be immune from inconsistent provincial legislation. This argument is based on the lands reserved head of s.9 1(24) and is of most utility to the Inuit of Labrador. and the Indians of the provinces. The argument depends for its validity upon the proposition that lands subject to an unextinguished title are "lands reserved" an argument which must be assisted by the recognition language found in s.35 of the Constitution Act, 1982.

However, simply to classify the right as a profit is inadequate. For at least two reasons, this property right must also be securely entrenched constitutionally. The

first reason is that, as property rights, the rights to hunt, trap, fish and gather, will be subject to regulation by the competent legislature. The second reason is related to the first and may be stated thus: the holder of a property right will be denied his traditional common law remedies against a third party if that third party can argue that his actions have been explicitly or implicitly condoned by the competent legislature, thereby setting up the defence of statutory authorization. We shall deal with these two limitations in turn.

In the absence of constitutional entrenchment it is clear that aboriginal rights to hunt, trap, fish and gather would be subject to regulation even if classified as a profit. Our conclusions with respect to the pre-1982 position noted above would not differ. except insofar as an argument based on "lands reserved for Indians" would be strengthened vis-à-vis *provincial* regulation. Similarly, it would probably continue to be impossible to make an argument that regulation of aboriginal rights amounts to a compensable taking. Such an argument could still be met by the judgment of Mr. Justice Dickson in *Kruger and Manuel.* In this case it was argued inter alia that the British Columbia Court of Appeal had erred by "ruling in effect, that aboriginal hunting rights could be expropriated without compensation and without explicit federal legislation." Mr. Justice Dickson met this remark by stating: [119]

> The British Columbia Court of Appeal was not asked to decide not did it decide. as 1 read its judgement, whether aboriginal hunting rights were or could be expropriated without compensation. It is argued that absence of compensation supports the proposition that there has been no loss or regulation of rights. That does not follow. Most legislation imposing negative prohibitions affects previously enjoyed rights in ways not deemed compensatory. The Wildlife Act illustrates the point. It is aimed at wildlife management and to that end it regulates the time, place and manner of hunting game. It is not directed to the acquisition of property.

The *regulation* of aboriginal rights does not amount to a compensable *taking,* and this conclusion applies whether or not the respective rights are classified as profits. Of course, as noted above, if aboriginal rights were clearly classified as profits, then provincial legislation may well be inapplicable because of the wording ofs.91 (24).

The second reason for the inadequacy of the profit classification is less obvious, but it equally limits the value of characterizing the rights as a profit, by denying the holder the opportunity to vindicate his rights. Thus, in the situation where the competent legislature enacts legislation authorizing the construction and operation of a refinery or pipeline, or the disposition of oil and gas rights owned by the Crown, or authorizes the abstraction of water, any of which activities interfere with property rights held by other individuals or groups, the authorized party may plead "statutory authorization" and thereby escape liability in actions brought by affected parties. [120] The defence most often arises in the context of nuisance,[121] but it may only be successfully pleaded if the statutory authority to commit a nuisance or other tort is express or necessarily implied, and provided that the person is not negligent. Thus, "where a statute has authorized the doing of a particular act, or the user of land in a particular way, which act or user will inevitably involve a nuisance [or any other tort], any resulting harm is not actionable, providing every reasonable precaution consistent with the exercise of the statutory powers has been taken to prevent the nuisance occurring."[122]

In light of the plethora of statutory authorizations available to third parties (particularly in the territories), for example, Crown leasing statutes (Canada Petroleum Resources Act, Public Lands Grants Act, Territorial Lands Act, Mining Regulations) and pollution legislation (e.g., Fisheries Act, Northern Inland Waters

Act, Arctic Waters Pollution Prevention Act) — the existence of this defence severely erodes the usefulness of classifying the respective aboriginal rights as profits. [123] Consequently, for the two reasons noted, the profit as a vehicle for further protection should be looked at in the context of constitutional entrenchment.

E. CONCLUSION

Constitutional entrenchment may be tackled in two ways: through the s.37 constitutional conferences and, at least for the Inuit, through the negotiation of land claims agreements entitled to the protection accorded to s.35 rights. Section 35(3) has confirmed that "treaty rights" include "rights that now exist by way of land claims agreements or may be so acquired". For a number of reasons the latter course may well be preferable since it allows for a more flexible approach and permits the parties to address issues such as: in whom should the rights be vested? how much regulation will be permissible'? and how can conflicts between user groups be resolved? – all questions already alluded to by Peter Usher in the main body of the paper. It also allows the parties to resolve once and for all the theoretical objections to the profit analysis referred to above.

Secure constitutional entrenchment of aboriginal hunting rights is the ultimate goal, but it will still be a respectable achievement if the courts can be persuaded to protect hunting rights as property rights and to recognize that within the provinces they constitute "an interest other than that of the province" exempt from provincial regulation because of s.91(24).

NOTES

(1) Lester, *Inuit Territorial Rights in the Canadian Northwest Territories,* Ottawa, Tungavik Federation of Nunavut,1984; *Amodu Tijani v. Secretary of Southern Nigeria, [192 I] 2* A.C. 399 (P.C.); *Calder et al. v. A.G. B. C.. [1973] 4* W.W.R. I (S.C.C.), esp. per Hall J.

(2) *Id.*

(3) Guerin v. R., [1986] 6 W.W.R. 481 at 499 (S. C.C.), per Dickson J.

(4) *Hamlet of Baker Lake et al.* v. *Minister of Indian Affairs and Northern Development et al..* [1979] *3* C.N.L.R.17.47 (F. C. T.D.); *A. G. Ontario* v. *Bear Island Foundation (1985).* 15D.L.R. (4th) 321(Ont. H. C.)

(5) See for example M.R. Freeman. cd.. *Inuit Land Use and Occupancy Project.* Ottawa, 1976 and C. Brice-Bennett. *Our Footprints are Everywhere: Inuit Land Use and Occupancy in Labrador.* Nain, 1977,

(6) Supra, note *4* at *45*.

(7) No authority was cited for this proposition. Why couldn't two aboriginal groups agree on joint occupation? The problem of overlapping claims has been dealt with in the context of comprehensive claim agreements by the negotiation of "overlap agreements". See for example *The Western Arctic Claim: The Inuvialuit Final Agreement.* Ottawa, 1984, Annex A- I at *40* referring to the TFN-COPE Agreement of May [9, 1984. In the recent unreported decision of the B. C.C. A. in *Sparrow v. R.,* December 24. 1986. the court affirmed the existence of an aboriginal right to fish notwithstanding evidence (at 8-9), that the Musqueam Band would not have "occupied its territory to the complete exclusion of others. "

(8) *Calder et al. v. A.G. B. C., [1973] 4* W.W.R. I(S.C.C.).

(9) St. Catherine Milling and Lumber Co. v. *R. (1889). 14* A.C. 46 at 54.55, 58. That the language of usufruct does not take us very far is acknowledged by many commentators and judges. but see in particular Henderson, "Canada's Indian Reserves: The Usufruct in Our Constitution". (1980) 12 Ottawa L. Rev. 167. The obscurity of the term may well explain the lack of elucidation of its character and content. It appears that a usufruct, at least in common

law, derives its meaning from the context in which it is used. Thus *in Amodu Tijani* v. *Secretary, Southern Nigeria, supra*, n. 1. Viscount Haldane, after making some important remarks on the nature of Indian/native title (at 403), went on to comment that that title "is *prima facie* based, not on such individual ownership as English law has made familiar, but on communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference", at 409 to 410. It may therefore encompass far more than hunting, fishing, trapping and gathering rights.

(10) A.G. Quebec v. A.G. Canada, [1921] 1 A.C. *401*

(11) Id., at *408.*

(12) */d.,* at *410;* and see *Smith v. R., [1983] I* S.C. R. 554.

(13) *Guerin et al. v. The Queen (1983), 143* D.L. R. (3d) 416 at 462 (F. C. A.)

*(*14) *Supra*, note *4* at *62* to 63: Mr. Justice Mahoney's opinion is criticized by D.W. Elliot, "*Baker Lake* and the Concept of Aboriginal Title", (1981) 18 Osgoode Hall L.J. at 662 to 663. Further support for the view that a usufructuary interest is a proprietary interest or interest in land can be derived from a series of common law cases dealing with riparian rights. See for example *Embrey v. Owen (1851), 155* E.R. 579. The riparian right to use water is described as the usufruct of the stream, and is one of the incidents of riparian ownership. Interference with this form of usufructuary right may be restrained by an injunction: *id.*. and *John Young Distillery v. Bankier, [1893]* A.C. *69 I; McKie v. KVP Company, [* 1948] *O.* R. 398, [1949] 1 D.L. R. 39 (C. A.); [1949] 4 D.L. R. 497 (S. C.C.). Traditionally, the injunction has been available on proof of interference and without proof of damage.

(15) *Guerin v. R., [1984] 6* W. W. R. *48 I* at *499: see Re Paulette et al. and Registrar of Lund Titles (1975),42* D.L. R. (3d) 8 at 36 (T. D.) and. in the Court of Appeal Moir J.A. (dissenting) (1976), 63 D.L. R. (3d) I at 47 *et seq.*

(16) In *R. v. Isaac (* 1976), 9 A.P. R. 460, MacKeigan C. J.N.S. stated of the Indian land right (preserved on reserves):

> That right, sometimes called "Indian title" is an interest in land akin to a *profit à prendre.* It arose long before 1867 but has not been extinguished as to reserve land and, being still an incident of the reserve land, can be controlled or regulated only by the federal government. This stresses legalistically the perhaps self-evident proposition that hunting by an Indian is traditionally so much a part of his use of his land and its resources as to be for him, peculiarly and specially, integral to that land.

See also the discussion in Moir J.A.'s dissenting opinion in *Re Paulette and Registrar of Lund Titles (1976), 63* D.L. R. (3d) I at 49 to 50 where Moir J.A. refers to objections made to the classification of the interest as a profit.

(17) R. v. Derriksan (1976), 71D.L. R. (3d) 159 (S. C.C.).

(18) *[d.,* at *160.*

(19) Supra, note *4* at 61 to *62.*

(20) [1977]4 W.W. R. 300 at 310(S. C.C.); and see also *R. v. George, [1966]* S.C. R. *267* at *280.*

(21) R. v. Sikyea (1964), 46 W.W. R. 65 at 67 to 68; Treaty 11, and the Migratory Birds Convention Act, and at 74 per Johnson J. A.. "It is I think clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its regulations", aff'd on appeal, [1964] S.C. R. 642. For a comment on treaties which allow for further regulation by their own terms, see Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am. J. Comp. Law 316 at 385 to 386.

(22) *Daniels v. White and R., [1968]* S.C. R. 517: treaty Indian charged with an offence under the Migratory Birds Convention Act. *R. v. Elk, [1979]* 1W.W. R. 514 (Man. C.A.), federal Fisheries Act, aff'd [1980] 4 W.W. R. 671 (S. C.C.).

(23) Cumming and Aalto, "Inuit Hunting Rights in the Northwest Territories", (1973-74), 38 Sask. Bar Rev. 251 at 294.

(24) See Sigereak El-53 v. R., [1966] S.C. R. 645.

(25) Northwest Territories Act, R.S.C. 1970, c. N-22.

(26) [1966] S.C.R. *645* at *652,* per Hall J. Hall J. also held that the area (west coast of Hudson Bay) fell outside the scope and protection of the Royal Proclamation, 1763, since it was within the area of the Hudson Bay Charter, a view which has since been criticized: Narvey "The Royal Proclamation of 7 October 1763, the Common Law and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company", (1973-74) 38 Sask. Law Rev. 123; Kent McNeil, *Native Rights and the Boundaries of Rupert's Lund and the North- Western Territory,* University of Saskatchewan, 1982 at 3; and Slattery, "Land Rights of Indigenous Canadian Peoples", D. Phil. thesis, Oxford, 1979, Part IV.

(27) Pugh "Are Northern Lands Reserved for the Indians'?" (1982),60 Can. Bar. Rev. 36) has persuasively argued that Northern lands encumbered by an unextinguished title should be treated as "lands reserved" within the meaningofs.91(24) and that since this head of jurisdiction is not assigned to the Commissioner in Council, his powers in this area have to be read subject s. 14(I): "Nothing in section 13 shall be construed to give the Commissioner in Council greater powers with respect to any class of subjects described therein than are given to the legislatures of the Provinces of Canada under sections 92 and 95 of the British North America Act, 1867 with respect to similar subjects therein described. " However, this argument cannot be applied to the territorial regulation of hunting rights, since the ambit ofs. 14(1) is explicitly limited bys. 14(2) and (3), quoted in the text. See also s. 18(2) of the Northwest Territories Act which provides that laws of general application shall apply to Inuit "except where otherwise provided. " This territorial equivalent of s.88 of the Indian Act (see *infra*) must surely be read subject to the more specific language ofs. 14.

(28) Indian Act, R.S.C. 1970, c. 1-6, s.88: "Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians *in* the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act. "

(29) Alberta NRTA, R.S.C. 1970, Appendices, s. 12: "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the rights, which the province hereby assures to them of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

(30) *Kruger and Manuel v. R., [1977] 4* W.W.R. 300 (S. C.C.).

(31) *Dick v. R.,* [1986] I W.W.R. 1 (S. C.C.).

(32) *Simon v. R., [1986]* 1C. N.L.R. 153 (S. C.C.).

(33) In *R. v. Sutherland, [1980] 5* W.W.R. 456 (S. C.C.), s.49 of the Manitoba Wildlife Act, which deemed lands to be occupied Crown lands for the purposes of the NRTA, was held to be ultra vires because, inter alia, it singled out Indians for special treatment.

(34) *Cardinal v. A. G. for Alberta, [1973] 6* W. W.R. 205.

(35) *Id.*, at 213, "Legislation of this kind [i.e., game legislation] does not relate to Indians *qua* Indians. "

(36) *Kruger and Manuel, [1977] 4* W.W.R. 300 (S. C. C.)

(37) *Id.,* at 305,

(38) *Dick v. R., [1986]* 1W.W.R. 1 (S. C.C.).

(39) (1983), 41 B. C.L.R. 173 at 184 (B. C. C.A.).

(40) [1986] 1W. W.R. 1 at 12 "I am prepared to assume, without deciding, that Lambert J.A. was right on this point . . . ."

(41) *Id.*, at 12 to *13,*

(42) *Jack and Charlie v. R., [1986]* 1 W.W.R. 21 (S. C.C.).

(43) For the Northwest Territories, see R.S.C. 1970, c. N-22, s. 18(2).

(44) *Dick* v. *R. [* 1986] 1 W. W.R.1 at 6 to 7. Beetz J. also referred to Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967), 45 Can. Bar Rev. 513 at 518-519 and Jordan, "Government, Two-Indians, One" (1978), 16 Osg. Hall L.J. 709 at 719.

(45) *St. Catherine (1889), 14* A.C. 46 (P.C.).

(46) *Id.,* at 60.

(47) *Id.,* at 52.

(48) *Id.,* at 60.

(49) See Pugh, *supra,* note 27 at 46.

(50) (1889), 14 A.C. 46 at 59.

(51) See *R. v. White and Bob (1964), 52* W.W. R. 193 (B. C. C. A.) esp. per Davey J.A. at 198 to 199.

(52) *Supra,* note 1.

(53) In *R. v. White and Bob (1964), 52* W.W. R. 193, Norris J.A. was of the view that the Game Act of British Columbia did not apply to treaty Indians. His judgment was divided into four parts, the first dealing with "aboriginal rights" and the second pointing out that the Royal Proclamation, 1763 was merely "declaratory and confirmatory" of those rights. In the course of his judgment in Part 1, however, Norris J.A. stated (at 216) that "the aboriginal rights of the Indians confirmed by the reservation or condition [in the treaty] did not pass to the province of British Columbia as they were an "interest other than that of the Province in the same''. " Again in Part 2 of his judgment Norris J.A. stated (at 23 1): "The aboriginal rights as to hunting and fishing, affirmed by the proclamation of 1763 and recognized by the treaty . still exist . . . *To the extent that the exercise of the rights need regulation, they come under the provisions of subset. (24) of sec. 91 of the BNA Act, 1867. "* (emphasis supplied) It is not clear which head of s.91(24) is being relied on for this proposition, but in Davey J.A.'s opinion (at 198) it is the "Indians" head of jurisdiction.

(54) *Indian Annuities Case, [1897]* A.C. *199* at *210to211.*

(55) It is only *when* the aboriginal interest has been got in that the province is free to deal with the lands: *id.,* at 205 and *St. Catherine Milling v. R. (1889), 14* A.C. *46* at *59.*

(56) Dem. of Canada v. Province of Ont., [1910] A.C. *637* at *647* per Lord Loreburn; *A. G. Que. v. A. G. Can., [* 1921] A.C. 401 at 411. The most trenchant view to the contrary is Steele J.'s remarkable judgment in *Bear Island (1985), 15* D.L. R. (4th) 321 at 434 to 444. His analysis may be summarized as follows: The province has a beneficial underlying interest in lands encumbered by an aboriginal title (s. 109, and *St. Catherine),* and the province can by legislation deal with and alienate or dispose of its beneficial interest, thereby extinguishing aboriginal rights. There are only two restrictions on this power — first, Ontario could not itself enter into treaties; and second, the provincial legislation relied upon must fall under a head of general provincial legislative competence, e.g. ss.92(5) or (13). This conclusion was supported by reference to cases dealing only with the application of provincial laws to *Indians,* such as *Kruger and Manuel* and s.88 of the Indian Act, for the final proposition (at 443):"a valid provincial law of general application and administrative acts thereunder, both independently and as a function of s.88 of the *Indian Act* operate *de facto* to limit, restrict, exclude or abrogate the exercise of aboriginal rights". For some reason his Lordship did not include the verb "extinguish"in this final comment, although it is the subject of the previous pages. This view can be attacked on several grounds. First, even on the most generous possible view of the matter, any provincial legislation which purported to accomplish the above would have sterilized a matter of federal jurisdiction. Second, Steele J. fails to consider the impact of cases such as *Surrey v. Peace Arch (1970), 74* W.W. R. 380 (apparently approved by the Supreme Court in *Cardinal v. A. G. Alta., [1974] 2* S.C. R. 695 and more recently in *Derrickson v. Derrickson, [1986] 3* W.W.R. 193 (S. C. C.)), which have struck down provincial legislation which relates to the use of lands reserved. Third, his Lordship does not consider that "lands reserved" may

represent a true example of interjurisdictional immunity: see Sanders, "The Application of Provincial Law to Indians and Indian Lands", *Indians and the Law*, Continuing Legal Education Society of British Columbia, Vancouver, 1982.

(57) *St. Catherine's Milling v. R. (1888), 14* A.C. 46 at 59; *Ont. Mining Co. v. Seybold (1900),* 31O.R. *386,* per Boyd C.; *R. v. White and Bob (1964), 52* W.W. R. 193 at 221 to 231.

(58) *R. v. Commanda, [1939] 3* D.L.R. 635, referred to in *R. v. Tennisco (1982), 64* C.C.C. (2d) 318 at 319 (Ont. H. C.) and *R. v. Riley et al., [1984] 2* C. N.L. R. 154 (Ont. H.C.), but the issue discussed here was not raised.

(59) *[d.,* at 638.

(60) *Indian Annuities, [* 1897] A.C. 199.

(61) Id., at 212 quoting with approval King J. in the Supreme Court.

(62) However, the weight of authority is that provincial game legislation could not apply on reserves, and this could only be on the "lands reserved" head of s.9 1(24): *R. v. Rodgers (1923), 40* C.C.C. *51* (Man. C.A.), *R. v. Jim (1915), 22* B.C. R. 106 (conflict with the Indian Act) *contra, R. v. Morley (1932), 46* B.C. R. 28.

(63) [1973] 6 W.W.R. 205 at 214.

(64) *Id.,* at 226 to 227.

(65) [1977] 4 W.W. R. 300 at 303.

(66) *Derrickson v. Derrickson, [1986] 3* W. W.R. 193 (S. C.C.), applied in *Paul v. Paul [1986] 3* W.W. R. 210 (S. C.C.).

(67) D.E. Sanders, "The Application of Provincial Laws to Indians and Indian Lands", in *Indians and the Law*, The Continuing Legal Education Society of British Columbia, Vancouver, 1982 at 35: "The courts have established one area of interjurisdictional immunity for Indian lands. Provincial laws affecting the use of land cannot apply to reserve lands, even in the absence of provisions in the Indian Act or Land by-laws. " The conclusion was based in the main on *Municipality of Surrey v. Peace Arch Enterprises (1970), 74* W. W.R. 380 (B. C. C.A.).

(68) [1986] 3 W.W. R. 193 at 202 to 203.

(69) Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada", in W.S. Tarnopolsky and G.A. Beaudoin, *The Canadian Charter of Rights and Freedoms, 1982,467* to 488 at 478.

(70) McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada", (1982) 4 Supreme Ct. L. Rev. 253 at 256 to 257. See also Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights", (1983) 8 Queen's L.J. 232 at 242 *et seq.*

(71) (1984), 28 Sask. R. 168.

(72) (1984), 32 Sask. R. 237. The *Bear* case has been followed on several occasions: *R. v. Steinhauer (1985), 63* A.R.381 (Q. B.), [1985] 3 C. N.L. R. 187. S. pleaded a s.35 defence to a charge of fishing without a licence under the federal Fisheries Act, per Veit J. at 385: "Section 35 of the Constitution Act, 1982 clearly refers to the protection of Indian rights as of April 17, 1982; the insertion of the word "existing''can only be said to have been deliberately effected to achieve that result. Since there was, on the evidence in this case, no existing right for Treaty No. 6 Indians to fish without a licence on April 17, 1982, s.35 cannot be of assistance to the appellant. " See also *R. v. Netmaker, [1985] 3* C. N.L. R. 181 (Sask. Prov. Ct.); *R. v. Adams,* [1985] 4 C. N.L. R. 123 (Que. S.P.); *A.. Ont. v. Bear 1s. (1985), 15* D.L. R. (4th) 321; *R. v. Hare and Debassige, (1985),9* O.A.C. 161, [1985] 3 C. N.L. R. 139 (Ont. C. A.) (s.35 only has a prospective application and therefore activities made unlawful prior to April 1982 continue to be unlawful); *R. v. Seward et al., [1985] 4* C. N.L. R. 167; *R. v. Nicholas and Beer et al., [1985] 4* C. N.L.R.153 (N. B. Prov. Ct.).

(72a) Unreported judgement of the British Columbia Court of Appeal, December 24, *1986 per curiam* judgement of a five person bench.

(72b) The court referred to the separate opinion of Dickson J in *Jack v. R.* [1980] 1 SCR 294.

(72c) (1970),74WWR481 (BCCA).

(72d) The court in *Sparrow* also noted (at 33) that the doctrine of recognition had been rejected by the Supreme Court 6-O.

(72e) *Sparrow, supra,* note 72a at 24.

(72f) (1976),71 DLR (3d) 159 (SCC).

(72g) *Sparrow, supra,* note 72a at 29.

(72h) In the light of *Nowegijick v. R.* [1983] 1 SCR 29 it was clear that s. 35 was entitled to the same liberal interpretation as the Charter, *id.,* at 29.

(72i) *Sparrow, supra*, note 72a at 34.

(72j) *Id.,* at 34, relying on the Natural Resource Transfer Agreement cases such as *R. v. Wesley [1932] 2* WWR 337 and *R. v. Sutherland 19802* SCR 451.

(72k) *Id.*, at 42; effectively an endorsement of the Dickson J judgement in *Jack v. R. [* 1980] 1 SCR 294.

(721) *Id.,* at 42.

(72m) A point not referred to in *Sparrow*. "Notwithstanding any other provisions of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. "

(73) See Megarry and Wade, *The Law of Real Property,* 4th ed, 1975 at 805 to 88 l; Jackson, *The Law of Easements and Profits, 1978* (most of which is concerned with easements); and Lester, "The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument," Unpublished D. Jur. Dissertation, York University, 1981 at 62 to 69.

(74) When I say that the right to fish or to hunt for game is typically granted as a profit, I am of course stating the traditional English common-law position rather than a prevailing interpretation of, for example, treaty-reserved rights.

(75) [1897] 2 Ch. 96 (C.A.). See also *Holford* v. *Bailey (*1850) *13* Q.B. 428 and *Mason v. Clarke,* [1955] A.C. 778.

(76) *Id.*, at 101.

(77) *Id.*, at 104.

(78) (1985), 66 B. C.L.R. 126 (B. C. C.A.).

(79) The application was made pursuant to s. 10(2), Court of Appeal Act, S.B.C. 1982, c.7.

(80) *R.* v. *Tener*, *[1985] 3* W.W. R. 673 (S. C.C.). The case dealt with the categorization of a Crown-granted mineral interest. While Wilson J.'s judgment at 690 to691 in that case provides a useful analysis of the profit, she does, with respect, misapply the law to the facts of the case before her, because it seems to me that the Crown grant in the case was a grant of the minerals in place — that is, a grant of a corporeal rather than an incorporeal hereditament. The grant under the B.C. Mineral Act was a grant of "all minerals . . under that parcel or lot of land" and was a grant for ever. For our purposes, perhaps the most important point of the case is the proposition that the denial of a permit to the holder of a Crown grant in the nature of a profit, constitutes a derogation from grant and an expropriation which entitled the holder to statutory compensation. The case once again illustrates the importance of establishing a property right.

(81) (1985), 66 B. C.L.R. 126 at 136.

(82) Macfarlane J. A., however, did make the injunction conditional upon the plaintiff filing an undertaking as to the damages suffered by the defendants by reason of their not being able to go ahead with their spraying program. Since the defendants had won at trial and the plaintiffs were effectively taking away the fruits of their victory, the use of an undertaking may be reasonable, certainly far more reasonable than its objectionable use in interim injunction cases based on aboriginal title claims pending trial. See for example *Ominayak et al. v. Noreen Energy Resources et al. (1985), 36* Alta. L.R. (2d) 137 at 146 (Alta. C. A.) and by way of contrast *MacMillan Bloedel Ltd. v. Mullin et al., [1985] 3* W.W. R. 577 at 594 per Seaton J.A. (B. C. C.A.).

(83) The importance of a proprietary basis for a claim is also illustrated by ***Pasco v. Canadian National Railway Co., [1986] 1*** C.N.L.R. 35,69 B.C.L.R. 76(B. C. S. C.) aff'd [1986] 1 C.N.L.R. 34 (B. C. C.A.); leave to appeal to the S.C.C. denied. Pasco, the chief of an Indian band, sought an interim injunction preventing C.N. R. from proceeding with its double-tracking proposal. The relief was sought on the basis that the double-tracking would interfere with (trespass) reserve riparian rights, fishing rights (appurtenant to the reserve) and fishing rights based upon an unextinguished aboriginal title. In giving judgment, Macdonald J. placed no reliance upon the aboriginal title, but did recognize that the alternative proprietary basis of the claim justified the granting of interim relief in the absence of any proof on the part of C.N. R. that it would suffer irreparable damage. Macdonald J. followed the ***Meares Island*** case (***supra***) and considered this to be an inappropriate case to require the band to undertake to pay damages. The case also illustrates the weakness of a reserve-based proprietary interest, since it appeared to be acknowledged on all sides that C.N. R. could ultimately have the interest expropriated, based on powers found in the Railway Act, the Expropriation Act and the Indian Act, 5.35. An explanatory note from the transcript which is included in the B. C.L. R. report (at 86), but not the C.N. L. R., establishes the importance of the fishing rights for the maintenance of the injunction. The extract confirms that the injunction applied to an eight-mile section of the Thompson River. The reserve itself only fronted on a quarter- to half-mile of the river, but the band's "grants of rights of fishing are substantially broader and I was unable and not prepared in any event to delineate between those two specific rights and the eight mile stretch . ."

(84) *Mason v. Clarke, [1955]* A.C. 778 (H. L.).

(85) *Id.,* at 786,

(86) *Id.,* at 794

(87) *Id.*, at 796,

(88) The following draws upon an unpublished paper presented by the author to the Special North American Conference on Impact Assessment in Resource Development, Calgary, September 1985.

(89) ***Willingale*** *v.* ***Maitland*** *(1866-67), 3* L.R. Eq. 103.

(90) *Robertson v.* ***Hartopp*** *(1889), 43* Ch. D. 484.

(91) ***Gearns*** *v. Baker (1875), 10* L.R. Ch. App. 355.

(92) ***Pattisson*** *v.* ***Gilford*** *(1874),* 18 L.R. Eq. 259. It is worth noting that the injunction was refused in the case because the property was being sold with express notice of the shooting rights and there was no indication that the parties intended to build in violation of the shooting rights. See also *R. v. The Judge of the County CourtofSurrev,[19* 10] 2 K.B. 410, where the Court was prepared to consider the possibility that the plaintiff, a gatekeeper, was entitled to take reasonable steps to protect the lands from fire in order to protect his employer's profit interest in the same lands.

(93) ***Peech*** v. *Best,* [1931] 1 K.B.1(Eng. C.A.).

(94) [1931] I K.B. I at 10.

(95) *Id.,* at 14 to 15.

(96) For a review of the scope of non-derogation from grant, see D.W. Elliott, "Non-derogation from Grant" (1964), 80 L.Q. R. 244.

(97) M.J. Russell, "Landlord's Covenant for Quiet Enjoyment", 40 Conv. N.S. 427.

(98) [1931] 1K.B. 1 at 20-21. It is not clear from the report why, but substantial damages were granted in the case in lieu of an injunction.

(99) *Id.*, per Slesser L.JJ. at 21 to 22, who also stated at 23: "The rule that a lessor may not derogate from his grant applies to *profit à prendre* as well as to corporeal hereditaments . . ."

(100) The objections are referred to in Moir J.A.'s dissenting judgment in the Alberta Court of Appeal in *Re Paulette and Registrar of Land Titles (1976), 63* D.L. R. (3d) 1 at 49 to 50, but neither his Lordhsip nor any other member of the court considered the objections further.

(101) Goodman v. Mayor of Saltash (1881-82) 7 App. Cas. 633 esp at 645 to 647, per Lord Selborne L. C., and per Lord Blackburn at 654 to 655.

(102) Lester, *supra*, note 73 at 67, note 20. The doctrine of the lost grant can hardly be applicable to the aboriginal situation. See also the dissenting judgment of Lord Blackburn in *Goodman v. Mayor of Saltash, supra*, note 101 at 660, where he states that "Bodies corporate may as such hold property in their corporate capacity and it is, I think incident to the nature of a corporation that there should be a power in the governing body from time to time to make ordinances for the management of that property. " In *Goodman* itself, the majority of the court held that the appellants (free inhabitants of ancient tenements of Saltash), had the right to take oysters, which was opposable against the presumed grant to the Borough of the oyster fishery. The reasoning of the court required the finding that it was reasonable to assume that the presumed grant to the Borough had to be subject to a condition (in effect a charitable trust) in favour of the class of whom the appellants were members. Neither the appellants nor the respondents were able to show a paper title in this case.

(103) See for example Ld Fitzgerald in *Goodman, supra,* note 101 at 669. The objection based on destruction of the subject matter of the grant ought to apply with even greater force to the public right of fishing, discussed *infra*.

(104) A.G. B.C. v. A. G. for Canada, [1914] A.C. 153.

(105) *Id.,* at 170.

(106) *Id.*, at 170 to 171.

(107) The competent legislature would vary with the body of water. See *id.,* and *A. G. Canada v. A. G. Ontario [1898]* A.C. 700 and *A. G. Canada v. A. G. Quebec, [1921]* A.C. 413, contrasting the proprietary right to fish (associated with ownership of the solum) with the right to legislate.

(108) *Matamajaw Salmon Club v. Duchaine, [1921] 2* A.C. 426.

(109) *Id.*, at *437*.

(1 10) *Id.,* (1985),33 R.P.R. 308 (F. C. A.) leave to appeal to S.C.C. refused (1985),56 N.R. 238.

(1 11) *Boucher v. R. (1982),22* R.P.R. 311 (F. C. T.D.).

(1 12) (1985), 33 R.P. R. 308 at311 per Pratte J., Hugessen J. dissenting.

(1 *13) O'Brien v. Ross, [1984]* C.A. 78 (Que.).

(114) *Id.*, at 81.

(1 *15)* Lester, *supra*, note 73 at 66.

(116) The classification of profit does not adequately embrace all elements of an aboriginal interest or title, such as an aboriginal right of self-government.

(1 17) The *St. Catherine 's Milling* case refers to treaty rights as "the Indian's privilege of hunting and fishing", *supra,* note 57 at 60, and see also *R. v. Sikyea (1964), 46* W. W.R. 65 at 69, *dubitante*, Laskin, J. in *Cardinal, supra,* note 34.

(1 18) Expropriation legislation is normally triggered by the taking of land or an interest therein. See for example: *R. v. Gordon (1980), 19* L.C. R. 29 (N. B. T. D.) and *Progressive Developments (1978) Ltd. and Empire Hotels (1960) Ltd. v. Winnipeg, [1983] 2* W. W.R. 258 (Man. C.A.). It should also be noted that there is no *right* to compensation merely a *presumption* that compensation will be paid as an aid to statutory interpretation. Finally, mere *regulation* of a property interest does not amount to a compensable taking or expropriation. This seems to lie behind the statement of Mr. Justice Dickson in *Kruger and Manuel v. R., [1977] 4* W.W. R. 300 at 302 to 303 and discussed *infra*. But if regulation amounts to a denial of a right or a derogation from a grant. then it may be compensable: *R., v. Tener, [1985] 3* W. W.R. 673 (S. C.C.).

(119) *Id.,* and see also at 3 10; "it has been conclusively decided that such title, (i.e., aboriginal title) as any other, is subject to regulations imposed by validly enacted federal laws. " But see notes 80 and 118 *supra* on the *Tener* case and the point that regulation at some time amounts to a compensable taking.

(120) R. W.M. Dias, cd., *Clerk and Lindsell on Torts,* 15th cd., London, 1982, para. 22-26 to 22-27 and 23-81 to 23-84; and *Allen v. Gulf Oil Refining Ltd., [1981] 1* All E.R. 353 (H.L.).

(121) It is a defence to any tort, including trespass.

(122) *Clerk and Lindsell, supra*, note 120 at 23-81.

(123) The point should be made that *provincial* legislation which grants statutory licences may be ultra vires insofar as it compromises "lands reserved".