

# AN ANALYSIS OF INTERNATIONAL LAW, NATIONAL LEGISLATION, JUDGEMENTS, AND INSTITUTIONS AS THEY INTERRELATE WITH TERRITORIES AND AREAS CONSERVED BY INDIGENOUS PEOPLES AND LOCAL COMMUNITIES

REPORT NO. 8

CANADA



Stockholm Resilience Centre  
Research for Governance of Social-Ecological Systems



KALPAVRIKSH



Environmental  
Action Group

**NATURAL JUSTICE**

**The ICCA  
Consortium**

“Land is the foundation of the lives and cultures of Indigenous peoples all over the world... Without access to and respect for their rights over their lands, territories and natural resources, the survival of Indigenous peoples’ particular distinct cultures is threatened.”

*Permanent Forum on Indigenous Issues  
Report on the Sixth Session  
25 May 2007*

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**Published by:** Natural Justice in Bangalore and Kalpavriksh in Pune and Delhi

**Date:** September 2012

**Cover Photo:** Charles (Chuck) Commanda, a traditionally trained Algonquin canoe builder, constructs his canoes using traditional materials and techniques along with a few modern aids. © Peigi Wilson

## INTRODUCTION

Across the world, areas with high or important biodiversity are often located within Indigenous peoples' and local communities' conserved territories and areas (ICCAs). Traditional and contemporary systems of stewardship embedded within cultural practices enable the conservation, restoration and connectivity of ecosystems, habitats, and specific species in accordance with indigenous and local worldviews. In spite of the benefits ICCAs have for maintaining the integrity of ecosystems, cultures and human wellbeing, they are under increasing threat. These threats are compounded because very few states adequately and appropriately value, support or recognize ICCAs and the crucial contribution of Indigenous peoples and local communities to their stewardship, governance and maintenance.

In this context, the ICCA Consortium conducted two studies from 2011-2012. The first (the *Legal Review*) analyses the interaction between ICCAs and international and national laws, judgements, and institutional frameworks. The second (the *Recognition Study*) considers various legal, administrative, social, and other ways of recognizing and supporting ICCAs. Both also explored the ways in which Indigenous peoples and local communities are working within international and national legal frameworks to secure their rights and maintain the resilience of their ICCAs. The box below sets out the full body of work.

### 1. Legal Review

- An analysis of international law and jurisprudence relevant to ICCAs
- Regional overviews and 15 country level reports:
  - *Africa*: Kenya, Namibia and Senegal
  - *Americas*: Bolivia, Canada, Chile, Panama, and Suriname
  - *Asia*: India, Iran, Malaysia, the Philippines, and Taiwan
  - *Pacific*: Australia and Fiji

### 2. Recognition Study

- An analysis of the legal and non-legal forms of recognizing and supporting ICCAs
- 19 country level reports:
  - *Africa*: Kenya, Namibia and Senegal
  - *Americas*: Bolivia, Canada, Chile, Costa Rica, Panama, and Suriname
  - *Asia*: India, Iran, the Philippines, and Russia
  - *Europe*: Croatia, Italy, Spain, and United Kingdom (England)
  - *Pacific*: Australia and Fiji

The *Legal Review* and *Recognition Study*, including research methodology, international analysis, and regional and country reports, are available at: [www.iccaconsortium.org](http://www.iccaconsortium.org).

This report is part of the legal review, and focuses on Canada. It is written by Peigi Wilson, Larry McDermott, Natalie Johnston, and Meagan Hamilton.

## **1. COUNTRY, COMMUNITIES AND ICCAS**

### **1.1 Country**

Canada is a vast country, the second largest in the world. It stretches from the Atlantic Ocean in the east to the Pacific Ocean in the west and the Arctic Ocean in the north – a total of 9,984,670 square kilometres (Natural Resources Canada 2009). The border with the United States, which forms the southern boundary is 6,416 kilometres in length. With a population of 34,711,257 (Statistics Canada, 2012a), Canada has one of the planet's lowest population densities. Much of this population lives within 200 kilometres of the American border. The Canadian population is predominately of European origin, followed by South Asian, Chinese, and others from around the world (Statistics Canada, 2010). Combined, the finance, insurance, and real estate sector is the largest part of the Canadian economy, followed by manufacturing, then the combined natural resources sector including mining, oil and gas development, agriculture, fishing, forestry and hunting (Statistics Canada, 2012b). Canada's largest trading partner is the United States, accounting for 70.2% of Canadian goods and services exported (Foreign Affairs and International Trade Canada, 2011).

### **1.2 Communities and Environmental Change**

#### ***1.2.1 Main Indigenous Peoples and Major Types of Local Communities***

The term 'Aboriginal peoples' is used in Canadian law rather than 'Indigenous Peoples' and will be used from time to time throughout this paper when citing Canadian sources.

The Canadian *Constitution Act, 1982* states, "Aboriginal peoples of Canada includes Indian, Inuit and Métis peoples" (section 35).

It is estimated there are approximately 1.17 million Indigenous people in Canada (Statistics Canada, 2010b), but this has never been accurately determined, as many Indigenous people do not participate in the national census (Toronto Star 2008). The largest percentage of Indigenous people lives in the Province of Ontario, followed by British Columbia, Manitoba and Alberta. British Columbia has the highest diversity of Indigenous Peoples. The Canadian population is aging, with the exception being Indigenous communities where almost half their population is under the age of 25 (Statistics Canada, 2011).

There is great diversity amongst the Indigenous Peoples of Canada.

Inuit previously referred to by the term Eskimo, live in the far northern parts of Canada. They have self-government and land claims agreements with Canada, they are the majority population in the new territory of Nunavut, and they are active participants in the Inuit Circumpolar Council.

Indians are now more commonly referred to as First Nation people, but the former term is still used in Canadian law and so both terms will be used throughout this paper. First Nations are not one People, but approximately 60 different nations of Peoples. This includes, among others, the Mi'kmaq, Innu, Atikamekw, Cree, Anishnaabe, Lakota, Blackfoot, Dene, Gwitchin, Nuuchahnulth, and Haida. The greatest diversity of First Nations Peoples is found on the west coast, but First Nation Peoples live throughout Canada, generally south of the tree line. The Canadian Government has split the First Nations into approximately 630 small communities each with their own Chief and Council. A total of 18 First Nations have signed comprehensive land and self-government agreements with the Canadian Government. An additional two First Nations have self-government agreements. Otherwise First Nation governments operate under the colonial provisions of the *Indian Act*.

Non-status Indians are those individuals who self-define as First Nation people and who can often demonstrate direct Indigenous lineage but may be denied legal recognition as such by the Canadian Government for reasons of administrative law. Except for comprehensive agreements, the Canadian Government, through the operation of the *Indian Act* defines who qualifies as an Indian. There have been historic injustices committed in the process of identification of Indigenous people that have denied many Indigenous people their rights. This is particularly the case for Indigenous women, who were excluded for several generations from passing on their inherent rights to their children if they married a non-Indigenous man (see *Sandra Lovelace v. Canada*, 1977 and *Mclvor v. Canada*, 2009).

The Métis People are of mixed Indigenous and European heritage, predominately French fur traders but also British employees of the Hudson's Bay Company. They developed a unique culture and language and established themselves predominately in central and northern Canada prior to claims of British sovereignty. They are considered to be Aboriginal people in Canadian domestic law and as Indigenous Peoples by Canada in international discussions. As a result of historic injustices, the Métis People today have very little land base and lag Inuit and First Nation Peoples in recognition of their inherent Indigenous rights.

Historically Indigenous Peoples were some combination of subsistence-based hunters, gatherers, fishers and farmers. Most, though not all, were nomadic. The Haudenosaunee, who now live in southern Quebec and Ontario and across the border into the United States, were farmers and had semi-permanent village sites, as did the

Haida and other west coast nations that relied on fishing for their primary occupation. The fur trade in the 1700s and 1800s brought great change, bringing Indigenous Peoples into the commercial workforce. Industrialization brought additional change to mechanized agriculture and industrial wage earning in trades such as iron-working, commercial fishing and forestry, and factory work. These trades still dominant today, however, more young Indigenous people are taking up employment in fields such as teaching, engineering, law, science, and business; all of the same professions that exist within contemporary society. However the shift to these professions came much later among the Indigenous population. A myriad of detrimental social conditions has meant the majority of Indigenous people do not gain the education, training, skills, and confidence to obtain higher than entry-level positions, and unemployment is greater than twice the comparable rate for the rest of the Canadian population (Wilson and MacDonald 2010).

The *Convention on Biological Diversity* (CBD) uses the phrase ‘Indigenous and local communities’ in Article 8(j) to describe people who have a traditional sustainable relationship with *in situ* biological diversity and who, by recognition and support of their traditional ways of life can assist in helping to sustain *in situ* biological diversity. This phrase has not been defined, in part because of the political challenges that ensue when trying to confirm a definition. As noted earlier, Canada uses the phrase ‘Aboriginal people’ to include Inuit, Métis and First Nation Peoples and considers all three as Indigenous Peoples for international discussions. The phrase, ‘local communities’ is not used in Canadian law in the context in which it is used in the CBD. The first legal review of ICCA’s in Canada, prepared by the federal Parks Canada Agency states, “There are many community-managed areas that are administered by towns, villages, at a municipal government level, primarily for recreational purposes and as green space. However, these are not the type of areas that are true ICCAs as per the WPC [World Parks Congress] and the CBD, as the community-based government conserves such areas.” (Parks Canada, 2008).

### **1.2.2 How Indigenous Identity is Determined**

There are important distinctions in how Indigenous Peoples in Canada are defined. Legal definitions create parameters of identity for social and political purposes. Traditional Indigenous identity is also rooted in social and political purposes, but considers historic and cultural traditions in addition that are often excluded from legal definitions.

Canada defines Indigenous people via various means. The *Indian Act*, section 6 creates a registry of First Nation individuals, so called ‘status Indians’. This registry has been a source of great distress to many people over the years (Royal Commission on Aboriginal Peoples (RCAP), 1996). It has split families and communities, discriminated against women (*Lovelace v. Canada*, 1977; *Mclvor v. Canada*, 2009) and denied individuals the right of self-determination and nations the right of determining their own citizenship. First Nations people who do not meet the requirements of the *Indian Act* are ‘non-

status Indians'; sometimes recognized by neither the Crown nor their First Nation. They generally have no recognized Indigenous rights and no land.

Various comprehensive agreements signed between Inuit and Canada stipulate that the Inuit define who is an Inuk. The Nunavut Agreement, for example states "the Inuit of the Nunavut Settlement Area will be recognized according to their own understanding of themselves, and that the Inuit shall determine who is an Inuk for the purposes of this Agreement"(Nunavut Agreement, section 35.1.1).

The Supreme Court of Canada set the test for identification of Métis Peoples.

The term "Métis" in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears... A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life. (*R. v. Powley* 2003)

Over the years, Canada has endeavoured to reduce the number of people who identify as Indigenous, in part to reduce the legal financial obligation owed by the Crown to them (RCAP, 1996).

Among Indigenous Peoples, familial ties to a Nation and often a clan group defines communities and citizenship/identity. Among traditional First Nations people, identity is mostly defined by whether you speak your language, attend ceremonies, know your cultural traditions, and work for the good of your Nation. Métis have more flexibility in self-determining citizenship and have created their own criteria for defining who may claim membership.

Within Canadian society, Indigenous people are often only recognized as Indigenous if they are visibly Indigenous, measured by the stereotypical appearance of an Indigenous person in Hollywood movies often based on fictitious historical perspectives. This causes difficulty for Indigenous people given that we are modern people and have been in contact with a majority non-Indigenous population for over 500 years, often inter-mixing. This begs the question whether identity is defined by blood or culture. Indigenous Peoples in Canada are seeking recognition of their right to define for themselves who is a citizen of their nation.

### ***1.2.3 Drivers of Biodiversity Loss and Threats to Cultural and Linguistic Diversity***

Currently the main drivers of biodiversity loss are industrialization, commercial development, urban sprawl, and resource extraction, as a result of Canadian development policy and ongoing disenfranchisement of Indigenous Peoples from their

lands. Landscapes with fragmented habitat lack interconnectivity that reduces the natural range and food sources of many species. Chemicals and other pollutants compromise ecosystem health. In addition, non-indigenous invasive species outcompete indigenous species, which disrupts natural system exchanges of energy and nutrient flows, as well as reducing ecosystem diversity to a few strong non-indigenous species. Environment Canada has stated,

...wild species face a variety of threats, including the loss, fragmentation and degradation of habitat; pollution; overexploitation; and fishery bycatch and incidental loss due to resource harvesting. Wild species also face the indirect effects of human activities such as invasive species, the introduction of new diseases, and climate change. The leading cause of biodiversity loss in Canada and around the world is the loss of habitat to human development (Environment Canada 2011).

There are many Indigenous ceremonial traditions that reinforce values of protecting the natural function of ecosystems. However, these socio-cultural values are being greatly influenced by non-Indigenous society as Indigenous people face rapid language loss and the pressure of assimilation from the constant force of colonization.

Assimilation policies of the past 150 years continue to be the main threat to cultural and linguistic diversity. For example, in most regions of Canada, Indigenous children are required by law to attend public or tribal schools modeled on European education systems with European-style curriculum. Instruction is usually given in English or French, the official languages of Canada. Occasionally, some Indigenous language programming is available but it is usually not contextual learning and so the land-based knowledge inherent in the language is lost. Keepers of traditional cultural knowledge are aging with little opportunity to pass on their knowledge. The number of Indigenous people whose first language is Indigenous is in decline, in part because of residential schools where children were not allowed to speak their Indigenous language. On 24 February 2012, the Truth and Reconciliation Commission issued an interim report on the “history, purpose, operation, and supervision of the residential school system”, finding that these residential schools were an assault on Indigenous children, families, culture, and on self-governing and self-sustaining Indigenous nations (Truth and Reconciliation Commission, 2012) and charged the federal government with “restricting access to federal archives and withholding several key documents on church-run residential schools” (Globe and Mail 2012). The state of Indigenous knowledge was the topic of a regional report for the Convention on Biological Diversity in 2003 (United Nations Environment Programme (UNEP) 2003). The causes of decline of this knowledge were described in a second report in 2007. In addition to colonization and the loss of language, threats included poverty, forced alienation from the land, lower life expectancy and well-being, and various social and economic policies of Canadian governments (UNEP 2007).

#### ***1.2.4 History of and Ongoing Initiatives to Conserve and Sustain Biodiversity***



It was, and to some degree remains, a common ethic of Indigenous Peoples to hold a strong connection to the land. Traditional cultures enhanced biological diversity and their continued exercise facilitate its retention (Wilson, 2007). Practice of these cultures, though interrupted as a result of Canadian government policies, has not been lost altogether and many Indigenous communities and individuals are working hard to retain or restore them (UNEP, 2003). Despite Canadian law – and to the extent possible in the face of invasive colonization – Indigenous Nations continue to govern and manage traditional territories for conservation. There are many excellent examples of this across Canada such as grassroots efforts carried out in daily life as part of cultural observance, or conservation projects on species at risk in collaboration with the Government of Canada. For example, the Yukon River Inter-Tribal Watershed Council created an inter-Indigenous nation agreement and process to restore the Yukon River (Yukon River Inter-Tribal Watershed Council 2011). The Committee on the Status of Endangered Wildlife in Canada Aboriginal Traditional Knowledge Subcommittee (COSEWIC ATK SC) and the National Aboriginal Council on Species at Risk (NACOSAR) are collaborative efforts among all nationally represented Indigenous groups, that strive to ensure inclusion of traditional knowledge in species assessment and recovery processes.



**A healthy specimen of black bear © Sandra Lucas**

Unfortunately, there are also conflicts between Indigenous Peoples and governments, the private sector, and civil society groups, including environmental non-government organizations, about conservation. This is addressed in Part 8 below.

### **1.3 Indigenous Peoples Conserved Territories and Areas (ICCAs)**

#### **1.3.1 Range and Diversity of ICCAs**

The Canadian Government has imposed a land governance and management regime that generally excludes Indigenous Peoples. Canada has also imposed laws that decide who Indigenous people are as Peoples. An overview of the regime will provide context for the legal review of ICCAs that follows and explain why this is a complicated issue in Canada.

Under the Canadian *Constitution Act, 1982* governance of Indigenous Peoples is the responsibility of the federal government. Section 35, “recognizes and affirms the existing Aboriginal and treaty rights of Aboriginal Peoples”. Treaty rights include those that currently exist by way of land claim agreements or which may be acquired in the future. Aboriginal title is considered a ‘sui generis’ interest in land, which may only be transferred to the Crown via treaty (*Calder et al. vs. Attorney General of British Colombia*, 1973).

In practice, however, the legal regime governing Indigenous Peoples and their lands accords only limited respect for the rights of Indigenous Peoples to self-determination, self-government, or land and resources. The Crown denies Indigenous Peoples these rights and has instead pursued a policy of colonialism and assimilation for centuries. The Special Rapporteur on human rights and fundamental freedoms of Indigenous Peoples, Ms. Tonya Gonnella Frichner, describes this as the Doctrine of Discovery.

[It] has been institutionalized in law and policy, on national and international levels, and lies at the root of the violations of indigenous peoples’ human rights, both individual and collective. This has resulted in state claims to and the mass appropriation of the lands, territories, and resources of indigenous peoples. Both the Doctrine of Discovery and a holistic structure that we term the Framework of Dominance have resulted in centuries of virtually unlimited resource extraction from the traditional territories of indigenous peoples. This, in turn, has resulted in the dispossession and impoverishment of indigenous peoples, and the host of problems that they face today on a daily basis (United Nations Economic and Social Council Permanent Forum on Indigenous Issues, 2010).

The legal regime for Inuit, Métis and First Nation Peoples are different and accord different Peoples different levels of respect for their Indigenous rights.

As a result of historic injustice, few Métis communities hold land as a collective inherent

right and only one Métis group holds rights under a comprehensive agreement for land and self-government (RCAP 1996). Non-status First Nation communities and individuals struggle to win recognition as Indigenous rights holders by the Crown, often having been excluded from recognition as a means to reduce the financial burden on the Crown associated with respecting Indigenous rights (RCAP, 1996).

In contrast, all Inuit have negotiated comprehensive agreements for land and self-government. These agreements are constitutionally protected. They represent the highest limits of the Crown's respect for Indigenous rights as expressed in *Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Inherent Rights Policy). Agreements negotiated under this policy spell out details regarding land title, as well as the division of authority on issues of taxation, administration of justice, and fiscal relations, as well as fisheries, environment, migratory birds, and cultural artifacts and heritage (Department of Aboriginal Affairs and Northern Development (AAND) 2010a).

First Nation Peoples are generally in between the Métis and Inuit. For the majority of First Nation Peoples the Crown is only prepared to recognize limited authority to govern or manage lands. Under the provisions of the federal *Indian Act*, little has changed since it was first imposed in 1876. Rights of self-government are limited to delegated authority to manage minor issues within the boundaries of reserve lands. Reserve lands are small parcels of land allocated to First Nation Peoples from their original vast traditional territories. Some First Nations, in addition to the limited rights accorded by the *Indian Act*, have expanded delegated authority to manage reserve lands, including environmental assessment and protection, and manage natural resources of reserve lands under the provisions of the *First Nations Lands Management Act*. In all other respects they remain under the provisions of the *Indian Act*.

The answer to the question whether there are ICCA's in Canada depends on whom one asks. According to the Canadian Government there are no terrestrial, riparian or marine ICCA's in Canada, although some comprehensive agreements allow for voluntary set asides of land for protection by Indigenous People to be governed according to standards established by Canada (ICCA 2008). The federal government and the provinces and territories have created protected areas, including national, provincial and territorial parks, protected areas, conservation areas, wildlife protection areas, historic rivers, green spaces, etc. While generally these areas are reserved for strict conservation and low impact recreation, some may also be used for private settlement, commercial activities and even industry. All other lands are considered open to development. Thus a protected area may sit side by side an activity that is highly detrimental to the protected area, such as a marine protected area that has oil tankers passing through it on a regular basis. While some Indigenous Peoples may have affirmed rights to pursue traditional activities in protected areas via the operation of comprehensive agreements or decisions of the Supreme Court of Canada (see *R. v*

*Sundown; R.v Sioui*), as a general rule, Indigenous Peoples are not considered to be an integral part of the landscape and essential to the continued well-being of the land.

From a traditional Indigenous perspective, all of Canada is a protected area, worthy of our respect, and any use we make of it must honour our obligations to care for the land.

From the perspective of many Indigenous Peoples, the perspective taken by the Canadian state is illogical and irrational. It is an example of the imbalance of power relations that prevents Indigenous Peoples from perpetuating the very cultural knowledge that ensures an intimate knowledge of ecology. Traditionally Indigenous Peoples generally see themselves as part of the land. Indigenous Peoples helped create and continue to sustain the biological diversity that the Canadian state wishes to protect. It is a common

Indigenous perspective that all lands must be treated with respect because all things are connected. It is not possible to draw a line on the map and ask all the animals, water, air, and fire to respect these boundaries so that some areas may be protected and others used up for short-term profit.

ICCAs have been characterized for the purposes of this study as a well-defined site, governed by a well-defined Indigenous People or local community whose cultural values promote conservation. While Indigenous Peoples in Canada are well-defined with a traditionally close and profound relation with an equally well-defined traditional territory, and traditional Indigenous cultural values promoted conservation, by virtue of the fact that the Canadian state generally does not recognize Indigenous rights to self-government over land and resources, Indigenous Peoples are constrained from exercising their traditional cultures and are not the primary decision makers regarding the management of protected sites or species. From the perspective of the Canadian government, this means there are no ICCAs in Canada. For many traditional Indigenous Peoples, Canada's perspective is little hindrance to the ongoing care for the land exercised by Indigenous Peoples since time immemorial. While driven underground, Indigenous Peoples continue to govern their traditional territories via community-level institutions and in keeping with traditional Indigenous laws.

Indigenous lands are traditionally conserved for their ecological, social, spiritual, and life sustaining values. The recognition of Indigenous Peoples rights to conserve their lands is an important political value. There is great diversity of landscape that is represented in lands conserved by Indigenous Peoples in Canada, though the connection with the land is unique to each People. Some territory might be conserved as a sacred site, another area as a calving ground for important food animals, yet another area for its production of medicinal herbs, it is generally recognized by Indigenous Peoples that all these uses of land and the lands themselves are inherently connected to each other and the people of the land and so are not necessarily categorized in the same manner as conserved lands are under Canadian law.

As noted earlier, outside of the constitutionally defined Indigenous Peoples, there are no 'local communities' recognized in Canadian law whose traditional cultural values promote conservation of indigenous biological diversity, even though there are some non-Indigenous people and organizations that undertake work to conserve lands. These non-Indigenous people and organizations, though they may not always have the degree of support they desire from government, are part of the majority represented through the Canadian democratically elected government. They have full political capacity to influence government and generally their values are reflected in the existing conservation laws and policies in operation in Canada as described in more depth below.

### ***1.3.1 How do Indigenous Peoples Govern and Manage ICCAs?***

Viewing humanity and the land as a seamless whole recognizes that the people and the land depend upon one another for their mutual wellbeing. Thus Indigenous laws about how one interacts with the land focus on striking a balance between use and conservation.

Many Indigenous Peoples in Canada continue to exercise traditional systems of governance and continue to observe traditional laws about managing their interactions with the land, despite limitations imposed by Canadian law. For most Indigenous Peoples these traditional laws and systems of governance are based on a concept of interconnectedness. The Algonquin speak of 'ginawaydaganuk' (McDermott and Wilson 2010) or 'web of life' and the Nuu-chah-nulth speak of 'Hisuk ish ts'awalk' or 'oneness' (Atleo, undated). In many traditional Indigenous cosmologies, the connection between the land and humanity is seamless. "Their notion of self does not end with their flesh, but continues with the reach of their senses into the land itself. Their notion of the space is more than vision: it includes the other non-visual senses. Thus they can speak of the land as their flesh; they are the environments." (Henderson 2000). John Borrows, an Indigenous legal scholar has described Anishnabek laws of 'bimeekumaugaewin', which are contained in creation stories and describe lessons of governing and managing human interactions with the land and the consequences of failing to fulfill responsibilities (Borrows, 2003).

### ***1.3.3 What are the Main Threats and Key Issues to Indigenous Peoples' Local Governance of Land and Resources***

While the symptoms are many – lack of education, lack of decent housing, lack of employment, loss of language, higher suicide rates, higher incarceration rates, earlier death - there is really only one underlying threat to Indigenous Peoples' governance of their traditional territories – the lack of Canadian political will to respect their rights (UNEP 2007). The imposition of colonial rule on Indigenous Peoples has constrained local Indigenous governance of traditional territories and natural resources. Ignorance, racism, and disregard for the rule of law fuel fundamental disrespect for the rights of Indigenous Peoples (RCAP 1996; UNEP 2007). Despite the Constitutional amendment in



1982 recognizing and affirming Aboriginal and treaty rights and Canada's reluctant adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* in 2010, the Canadian state continues to pursue a doctrine of assimilation and colonization.



**Gathering spruce roots © Plenty Canada**

An example is found in the federal parks legislation. Representatives of Indigenous Peoples made presentations to the Parliamentary Standing Committee on Canadian Heritage when the *National Parks Act* and the *Canada National Marine Conservation Areas Act* were under consideration by the House of Commons (House of Commons 2001; House of Commons 2000). In both these instances, one of the key concerns was the failure of the legislation to appropriately recognize Aboriginal title to lands under consideration for protected area status. Both pieces of legislation assume the Crown holds clear title to the lands under consideration. Where the Crown holds title, for example under treaty, a national park or marine conservation area may be established. If a Court finds, however that the Indigenous Peoples continue to hold Aboriginal title then a park reserve or marine conservation reserve may be established. The legislation further stipulates that in order for the territory under consideration to receive the reserve designation, the Indigenous Peoples of that territory must agree to the negotiation of a comprehensive claim. This requires agreement on the part of the Indigenous Peoples to accept to negotiate under the Inherent Rights Policy, which, according to Indigenous Peoples has serious flaws, including, among other things, the obligation on Indigenous Peoples to extinguish their title (Borrows 2001). This is contrary to the provisions of the common law as described in the *Delgamuukw* decision.

It places Indigenous Peoples in the centre of a conundrum – to protect the lands they must give up title to them or risk further development and encroachment on their capacity to sustain their cultures, which only further undermines the capacity to sustain biological diversity, one of the key objectives of creating the protected area in the first place.

### **1.3.4 Main Initiatives to Address Threats to ICCAs**

For Indigenous Peoples, recognition of their rightful place as a third order of government with shared responsibility for land use decisions is the key issue for conservation.

There are signs that things are changing, but only slowly and haltingly. Over the past 10 years, federal, provincial and territorial governments have improved their awareness and understanding of Indigenous Peoples. Ontario, for example, created a Ministry of Aboriginal Affairs in 2007. British Columbia has entered into an accord for a new relationship with Indigenous Peoples (British Columbia 2008). Major comprehensive agreements to settle land claims and confirm self-government have been concluded and more are being negotiated. Canada has declared June Aboriginal History month, apologized for Residential Schools, and more non-Indigenous students are learning about Indigenous Peoples in the classroom. Relationship-building and educational efforts help improve awareness, understanding, cooperation, and respect for Indigenous philosophies about conservation.

Parks Canada and their provincial and territorial counterparts are reaching out more to the Indigenous community. Parks Canada created an Aboriginal Affairs Secretariat in 1999 (Parks Canada 2011a). An Aboriginal Consultative Committee was established in 2001 (Parks Canada 2011b). Composed of First Nation, Inuit and Métis Peoples and employees of Parks Canada it meets three times a year. These are not co-management or co-governance mechanisms; they are to provide advice and feedback.

The federal, provincial and territorial governments are creating some management agreements with Indigenous Peoples regarding specific parks. This is particularly the case in the northern part of the country where comprehensive agreements have been negotiated. The Inuit at Torngat, for example, identified this area as a sacred place and recommended its protection when they were negotiating their land claim agreement (Nunatsiavut Government 2009). Now protected as a national park, Torngat management includes the Inuit. Inuit are involved in monitoring and assessment of the park and are employed at the park for a variety of positions. This allows the Inuit to continue to engage with their traditional landscape, teaching their youth and other people about the land and to practice their traditions. Torngat will be discussed at greater length in Part X below.

## **2. LAND, FRESHWATER AND MARINE LAWS AND POLICIES**

## **2.1 Legislation Relevant to Recognition or not of Indigenous Territories and Forms of Tenure**

The first law respecting recognition of Indigenous nations and their inherent rights to land was the *Royal Proclamation of 1763*. It was issued by the British Crown and became Canadian law when Canada imported British common law to govern the country. The proclamation requires a treaty between the Crown and the Indigenous nation prior to settlement on Indigenous territories. Historic treaties were subsequently signed in parts of Canada, but this law was often honoured in the breach (*R. v. Sparrow*; RCAP 1996).

The *Constitution Act* adopted in 1867 divided most lands and water between the federal and provincial governments. The Crown in right of the Provinces holds the bulk of the lands, with the Crown in right of Canada retaining lands in the territories, and for defense, federal parks, and canals. The federal government owns the coastal waters and the seabed and had jurisdiction over marine and inland fisheries. Small parcels of land were put aside as reserve lands for some First Nation Peoples. The federal government governs these lands under the provisions of the *Indian Act* described above. No land was set-aside specifically for Inuit, and with the exception of the Alberta Métis Settlements, which is a small provincially negotiated land allocation, Métis in Canada have been denied a designated land base. The provincial governments have the exclusive power to manage and sell lands belonging to the provinces as well as governance of property rights outside of lands reserved for Indians.

Most lands in Canada are held under fee simple, except for First Nation reserve lands and Crown lands. A fee simple right in land gives the holder full rights to use, sell, and bequeath the land within the limits of government regulation. Reserve lands are held communally for the use and benefit of First Nation Peoples (*Indian Act*). Comprehensive agreements set out forms of title for Indigenous lands, generally in fee simple. The Nisga'a Agreement for example states that:

On the effective date, the Nisga'a Nation owns Nisga'a Lands in fee simple, being the largest estate known in law. This estate is not subject to any condition, proviso, restriction, exception, or reservation set out in the *Land Act*, or any comparable limitation under any federal or provincial law. No estate or interest in Nisga'a Lands can be expropriated except as permitted by, and in accordance with, this Agreement. (Nisga'a Final Agreement 1999, Chapter 3, paragraph 3).

## **2.2 Rights over Sub-soil Resources**

Indigenous Peoples rights to sub-soil resources vary across Canada. Some hold rights to sub-soil resources under comprehensive agreements. First Nation Peoples hold rights to sub-soil resources on reserves, except in British Columbia (*Indian Mining Regulations*, section 3). The mineral rights must be surrendered to the Crown in trust for the First



Nation if the resources are to be exploited. The Crown holds fiduciary duty to the First Nation to exploit the minerals in a manner that benefits the band (*Ermineskin Indian Band and Nation v. Canada*, 2009).

Lands that remain subject to Aboriginal title presumably also include subsurface rights, but this is generally not honoured.

### **2.3 State Agency Responsible for Developing and Managing Land and Water Laws**

The federal government has exclusive authority to legislate directly with respect to Indigenous lands. The federal Department of Aboriginal Affairs and Northern Development (AAND) is mandated to govern and manage First Nation lands. The mandates of many other federal departments also necessitate their involvement in Indigenous interests, including the Department of Fisheries and Oceans, Department of Agriculture, Department of Natural Resources, the Department of the Environment, Parks Canada Agency, Department of Health, and others. There is generally a 'stove pipe' approach to addressing departmental mandates making it challenging for cross-departmental cooperation on Indigenous issues.

The provinces have exclusive jurisdiction with respect to property rights outside of reserve lands or Indigenous lands held under comprehensive agreements. This includes *de facto* rights to determine tenure rights on lands that remain under Aboriginal title.

### **2.4 Is Collective Aboriginal Title Recognized; and is it Public or Private Tenure?**

Indigenous people hold rights to land not as individuals but as part of a collective right. Ownership vests in the Indigenous Nation. Reserve lands are held communally for the benefit of the First Nation. Comprehensive agreements recognize the communal authority over lands by a particular Indigenous People, but the lands under the treaty may be held privately.

### **2.5 To What Extent do Land and Water Laws Permit the Use of Customary Law for Local Governance?**

Self-government agreements and comprehensive claims provide opportunities for the use of customary law within the limits of the agreements. The *Indian Act* extends delegated authority to First Nation Band Councils, which provides some room for customary law. Otherwise, it is a presumption in Canadian law and policy as currently applied that Indigenous Peoples do not have any authority to govern lands, freshwater or the marine environment on the basis of customary laws or procedures.

The only possible exception to this is within the context of the government of the Territory of Nunavut, Canada's newest territory. The Inuit of Nunavut have a comprehensive agreement that includes rights to self-government, but these rights are

less than those delegated by the federal government to a territory. Inuit people are the dominant population in Nunavut and thus, by virtue of democratic governance, the Inuit of Nunavut have the opportunity to exercise customary law in areas that are restricted under the comprehensive agreement. The Inuit are taking up these opportunities. For example, the territorial government of Nunavut requires the application of Inuit knowledge (*Qaujimajatuqangi*) for the governance of the environment in Nunavut. “*Avatittinnik Kamatsiarniq*, the Inuit *Qaujimajatuqangit* principle of Environmental Stewardship, emphasizes the key relationship between people and the natural world” (Nunavut Department of Environment, undated).

## **2.6 Management**

Some federal, provincial and territorial conservation laws make provision for some Indigenous management of Canadian defined conservation lands. According to Parks Canada, “roughly 68% of all federal Crown lands, are managed through either a formal or informal Aboriginal Cultural advisory relationship” (Parks Canada, 2011c).

The *Canada National Parks Act*, section 10 permits the Minister of Environment to enter into agreements with Indigenous governments and bodies established under land claim agreements for carrying out the purposes of the Act. Section 12 allows the Minister to provide opportunities for Indigenous organizations (which are considered distinct from Indigenous Governments) or bodies established under land claim agreements to participate in developing parks policy and regulations, establishment of parks, formulation of parks management plans, and land use planning and development related to park communities. Section 19 permits the Minister to designate officials of Indigenous governments to serve as law enforcement officers in national parks. Park reserves are national parks that are subject to land claims by Indigenous Peoples and remain reserves until the claims are resolved. Indigenous Peoples are permitted to conduct traditional renewable resource harvesting in Park reserves (section 40).

Under the *Canada National Marine Conservation Areas Act* the Minister may use Indigenous knowledge in administering marine conservation areas or reserves. Section 8(4) is similar to provisions in the *Canada National Parks Act*, which allow the Minister to enter into agreements with Indigenous governments or bodies established under land claim agreements. Sections 9 and 10 permit the Minister to consult with Indigenous organizations, governments and land claim agreement bodies in developing management plans, policy and regulations for the marine conservation area or reserve. Likewise, sections 19 and 19.1 allow the Minister to designate an Indigenous government to supply law enforcement.

Only three provinces explicitly recognize Indigenous participation in conservation areas management, two as a result of comprehensive land claim agreements. The British Columbia *Park Act* section 4.2 allows the Minister to enter into agreements with First Nations in the province to address the exercise of Indigenous rights within a provincial

park in that province or to address issues of management as outlined in section 3 or 6 of the Act. The Quebec *Parks Act* permits the Minister to delegate authority to Indigenous governments or organizations to carry out maintenance, development or construction in a park to maintain or improve the quality of the park (section 6), as well as to operate a business, provide a service or organize activities necessary to the operation of a park (section 8). The Newfoundland and Labrador *Provincial Parks Act* requires the legislation to be read in conjunction with the *Labrador Inuit Land Claims Agreement*. This Agreement, among other things, includes provisions that allow the Inuit to participate in management of a national park.

## **2.7 Provisions in Different Forms of Tenure that Require Conservation or Development**

In the *Delgamuukw* decision, Aboriginal title is described as a *sui generis* interest in land. The court describes two elements to this. First, Aboriginal title encompasses the right for Indigenous people to use the land for a variety of purposes, not just those that were traditional (*Delgamuukw*, 1997, para 117). However, the court also stipulated that to sustain an interest in Aboriginal title the lands may not be used in a manner that is irreconcilable with the nature of the attachment to the land (*Delgamuukw*, 1997 para. 128). The court gave the example that if occupation is determined by its traditional use as a hunting ground then the Indigenous Peoples who claim that land may not use it for strip mining, or turn it into a parking lot if it is land used by an Indigenous People for ceremonial or sacred purposes. (*Delgamuukw*, 1997 para. 128).

It is interesting to note that no such restriction is imposed on non-Indigenous people who might use the land, even prior to treaty. The court notes that:

development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the [province], protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with [reconciliation of the prior occupation of the land by Indigenous Peoples with the assertion of Crown sovereignty] and, in principle, can justify infringement of aboriginal title” (*Delgamuukw*, 1999, para 165).

The court went on to state that the Crown is obliged to consult with the Indigenous People as part of its justification of infringement, including at times the requirement to obtain their consent.

Since the time of contact, through the Fur Trade era, and colonization, non-Indigenous people have viewed lands and resources of Turtle Island as commodities available for exploitation without restraint. This phenomenon has not changed much over the past few centuries. Subsequently, there is often a lingering attitude by those seeking wealth

that land not used for habitation or industrial development is going to waste. It should be noted, however, that many Canadians share Indigenous values of conservation.

Individuals may establish conservation covenants that run with the land and conservation agreements through contract. Finally, some lands are held through various private trusts or through non-profit, non-government organizations. These exist across the country (Canadian Land Trust Alliance, undated).

Within the context of Canadian law there are many different agencies at the federal, provincial and territorial levels that are responsible for the management of Crown lands and licensing activities on private lands.

## **2.8 Specific Aspects of Land and Water Tenure Framework that Hinder Indigenous Conservation and Governance**

Systemic racism is a primary barrier for Indigenous Peoples in Canada and hinders Indigenous conservation and governance. The Royal Commission on Aboriginal Peoples (RCAP) explains:

It is well known that the Aboriginal peoples in whose ancient homelands Canada was created have not had an opportunity to participate in creating Canada's federal union; they seek now a just accommodation within it ... Aboriginal people generally do not see themselves, their cultures, or their values reflected in Canada's public institutions ... Historically, the door has not been open for the just participation of Aboriginal peoples and their representatives in Canada. The Commission heard about misunderstandings concerning the treaties and about federal policies that ignored solemn commitments made in these treaties once the newcomers were settled and assumed control. Federal legislation, we find, has unilaterally defined 'Indians' without regard to the terms of the treaties and without regard to cultural and national differences among Aboriginal peoples. The participation of Aboriginal people as individuals, generally on the margins of society, has not met the standards of justice that Commissioners believe Canadians would wish to uphold ... History also shows how ancient societies in this part of North America were dispossessed of their homelands and made wards of a state that sought to obliterate their cultural and political institutions. History shows too attempts to explain away this dispossession by legally ignoring Aboriginal peoples, in effect declaring the land *terra nullius* — empty of people who mattered. (RCAP, 1996)

First France and Britain who claimed Canada as colonies and then Canada once it began an independent nation relied upon the Doctrine of Discovery to support their claims of sovereignty over Canada and Indigenous Peoples in the territory. The Special Rapporteur reviewed the application of this concept in American law, particularly *Johnson v. M'Intosh* (United Nations Economic and Social Council Permanent Forum on

Indigenous Issues 2010). Canada has relied on this case to justify its sovereignty over Aboriginal lands in several instances (see for example judicial decisions including, *Calder*, *Guerin*, *Wewaykum*, *Mitchell*, *Sparrow*, *Van der Peet*).

Canada has also failed to respect the rule of law with respect to Aboriginal rights and interests. As noted earlier, Canada failed to negotiate treaties in broad swaths of the country as required by the Royal Proclamation and continues to ignore its obligations under this law evidenced by the ongoing occupation and development of lands in Canada that remain under Aboriginal title. Canada and the provinces do not consult on a regular basis, as required by the Canadian common law as defined by the Supreme Court of Canada in various decisions that will be discussed at greater length below. This is an ongoing source of frustration and litigation for many Indigenous Peoples in Canada.

Canada has failed to respect the spirit and intent of treaties signed with Indigenous Peoples (RCAP 1996). Treaties of Peace and Friendship in eastern Canada were long presumed by Canada to include land cession to the Crown (*R. v. Marshall*). It is only relatively recently (the past 30 years) that Canada has bowed to pressure from Indigenous Peoples and the Courts to enter into negotiations with Indigenous Peoples of those territories. There also remain challenges to treaties that explicitly transfer land to the Crown, as many Indigenous Peoples stipulate that the negotiations were not accurately transcribed into English (RCAP 1996).

The federal and provincial governments have also seized lands from First Nations reserves or leased these lands to non-Indigenous peoples for a variety of reasons. For example, in 1919, the federal government issued an Order in Council that allowed them to expropriate any reserve lands that were not being cultivated 'or otherwise properly used'. (RCAP 1996) Approximately 85,000 acres of reserve lands were taken under these provisions, some of this land given for homesteading to non-Indigenous veterans returning from the First World War. Simultaneously, Indigenous veterans were not eligible for that designated land, as it was illegal for them to homestead. Other lands have been expropriated for military bases and parks, among other things.

## **2.9     Infringement of *de jure* or *de facto* Territorial Rights**

Physical occupation of a territory is only one aspect within a holistic worldview. Subsequently, where one resides is intimately linked to traditional knowledge gained in a specific area over time, building spiritual connections to territories, and the value systems that drive communities. The Canadian government has also been responsible for the forced relocation of Indigenous Peoples at different times and places, disrupting or severing this relationship. For example in 1953 and 1956, the federal government moved Inuit families from northern Quebec and Nunavut to the high arctic. The federal government formally apologized for their actions in 2010 (CBC, 2010). A policy of centralizing the Mi'kmaq on two reserves to ease administration and economic burden and facilitate education for Mi'kmaq children was adopted in the 1910's and by 1946

“forced on an uninformed people under threat of enfranchisement and loss of government financial support” (Tobin, 1999). Enfranchisement would strip an Indigenous person of his or her Aboriginal status. Canada apologized in 2008 for the failure of the residential school policy, which was responsible for the seizure and forced assimilation of over 150,000 Aboriginal children from 1870 to 1996. Neglect, sexual and physical abuse, and even death awaited many children at these schools (Government of Canada, 2008; Truth and Reconciliation Commission 2012).

A policy of assimilation has been and remains the law in Canada.

The *Indian Act*, first adopted in 1876 and little changed since, continues to govern most status First Nation – Canadian relations. The provisions of this legislation dictate everything from personal identity, control over status First Nations lands and money, and powers of First Nation governments. In the past this legislation outlawed the practice of sacred ceremonies, required First Nation Peoples to obtain permission from an Indian Agent to leave their reserve, made it illegal for First Nations people to bring claims against the government or even hire a lawyer to defend their interests.

The natural resource transfer agreements of 1930 allocated all federal interests in natural resources in Manitoba, Saskatchewan and Alberta to those provinces (*Alberta Natural Resources Transfer Act*, *Manitoba Natural Resources Transfer Act*, *Saskatchewan Natural Resources Transfer Act*). The transfer was intended to bring those provinces onto the same footing as the original five provinces of confederation. Indigenous Peoples who held rights under treaties to use those lands in traditional fashion were not consulted in the negotiation of the transfer agreements. The constitutional amendment for the transfers gave those provinces authority to limit Indigenous hunting, fishing, and gathering on provincial Crown lands except for food purposes. In the course of the transfer federal government failed to retain control of lands sufficient to meet treaty obligations owed to First Nations. It was not until the 1990s and 2000s that the federal and provincial governments began to address outstanding obligations and put in place a process to transfer millions of acres to First Nations.

The Métis Nation is a separate case. Métis people are a unique culture, neither First Nation, nor Inuit, nor European, but a blend “more than the sum of its elements” (RCAP 1996). They pursued a separate path to nationhood, forming communities that existed beyond the reach of the Crown.

Ancestors of today's Métis Nation people established communities in parts of what is called the Métis Nation homeland in north central North America. The better-known settlements were at Sault Ste. Marie in present-day Ontario, at Red River and White Horse Plains in present-day Manitoba, at Pembina in present-day North Dakota, at Batoche in present-day Saskatchewan, and at St.

Albert in present-day Alberta (RCAP 1996).

In 1816 and again in 1849 the Hudson's Bay Company, which had legal control over the territory granted by the British Crown, endeavoured to restrict the free trade of the Métis. The Métis were able to prevent this each time. In 1869 the Canadian government attempted to open the prairie provinces to European settlers, without consulting the First Nations or Métis Peoples already living there. The Crown sent in surveyors to divide up present day Manitoba in advance of taking possession of the land from the Hudson's Bay Company. The Métis saw this as a threat to their way of life and formed a provisional government lead by Louis Riel to negotiate entry into Canada with the federal government. The agreement reached was to provide 1.4 million acres of land to Métis children "towards the extinguishment of the Indian title to the lands in the province" (RCAP 1996). These, and additional written and verbal promises to the Métis were perceived by them to constitute a treaty with the Crown. But it soon became clear that Canada did not intend to keep those promises. Among other things, the Crown delayed distribution of land, land grants were often far from existing Métis communities, and the use of 'scrip' or written promises of land or money issued by the Crown were easy prey to fraud, including by judges and federal government officials (RCAP 1996). Many Métis people never received any land. The Crown continued to ignore the Métis in its western advance, until 1885. The Métis and First Nations, facing hunger from the loss of the buffalo and additional loss of lands from a flood of immigrants, again sought negotiation with the Crown. When the negotiations failed, the Métis formed another provisional government and established a military force. They clashed with the federal government in the spring of 1885 going down to defeat at Batoche. Louis Riel surrendered and was hanged for treason. Big Bear and Poundmaker, two First Nation leaders that had joined forces with Riel were imprisoned for three years. There has been little redress of the initial complaints of the Métis since. Relations between Canada and the Métis Nation today are managed through the office of the Federal Interlocutor for Métis who is the Minister of the Department of Aboriginal Affairs and Northern Development.

In 2009 at a G20 meeting in Pittsburgh, Prime Minister Harper denied there was any history of colonialism in Canada despite massive evidence to the contrary (Okeefe, 2009). The statement is offensive to Indigenous Peoples, and signals a continued lack of empathy by governing authorities for First Nations, Métis and Inuit Peoples who lived on this land prior to Canadian Confederation in 1867.

### **3. PROTECTED AREAS**

#### ***3.1.1 Laws and Policies that Constitute the Protected Area Framework***

Canada has federal, provincial and territorial laws that govern protected areas.

At the federal level we have the *Canada National Parks Act*, which creates land based

national parks and national reserves. National reserves are areas where Indigenous land claims are outstanding. We also have the *Canada National Marine Conservation Areas Act*, which regulates the creation and management of federal marine protected areas and marine reserves. The *Migratory Birds Convention Act, 1994* governs the designation of migratory bird sanctuaries. The *Canada Wildlife Act* designates national wildlife areas. The *Species at Risk Act* makes possible the designation of critical habitat for certain species at risk of extinction. Critical habitat may be within designated First Nations reserves or elsewhere. Canada also makes an effort to protect heritage rivers, those water bodies that formed an important part of Canada's initial exploration and exploitation by non-Indigenous Peoples.



**Saw-Whet Owl © Sandra Lucas**

In addition, each of the provinces and territories has legislation that governs the creation and management of protected areas. These include provincial and territorial parks, conservation areas, ecological reserves, natural heritage sites, and/or wilderness



areas. Protected areas are defined by the legislation that creates them. Provided below is a list of this legislation:

- British Columbia: *Protected Areas of British Columbia Act, Park Act, Heritage Conservation Act, Ecological Reserve Act, Environment and Land Use Act, Muskwa-Kechika Management Area Act*, and the *Wildlife Act*;
- Alberta: *Alberta Sport, Recreation, Parks and Wildlife Foundation Act, Provincial Parks Act and Provincial Parks Act Amendment, 2006, Recreation Development Act, Travel Alberta Act, Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act, Willmore Wilderness Parks Act*;
- Saskatchewan: *The Grasslands National Parks Act, Parks Act, The Regional Parks Act, 1979*, and *Wanuskewin Heritage Parks Act, 1997*;
- Manitoba: *Provincial Parks Act, The East Side Traditional Lands Planning and Special Protected Areas Act*;
- Ontario: *Provincial Parks and Conservation Reserves Act, 2006*;
- Quebec: *Parks Act, Natural Heritage Conservation Act*;
- New Brunswick: *Parks Act*;
- Nova Scotia: *Beaches Act, Conservation Easements Act, Provincial Parks Act*;
- Newfoundland and Labrador: *Wilderness and Ecological Reserves Act, Provincial Parks Act*;
- North West Territories and Nunavut: *The Territorial Parks Act*; and
- Yukon Territory: *Parks and Land Certainty Act*.

### **3.1.2 Definition of a Protected Area**

Canada recognizes the IUCN definition of protected areas and classifies its protected areas in accordance with the IUCN Protected Areas Categories System. Approximately 85% of Canadian protected areas are considered wilderness areas under this system (Environment Canada, 2011b).

### **3.1.3 Which State Agencies are Mandated to Develop and Implement Protected Area Laws and Policies?**

At the federal level the Parks Canada Agency is responsible for national parks, including marine parks. Environment Canada manages migratory bird sanctuaries and national wildlife areas. The Parks Canada Agency, a division of Environment Canada, is responsible for national parks, including marine parks. The Department of Fisheries and Oceans may also establish marine protected areas under the *Oceans Act*.

Each of the provinces and territories also have various agencies, as follows:

- British Columbia, Ministry of the Environment - B.C. Parks;
- Alberta: Ministry of Tourism, Parks and Recreation;

- Saskatchewan: Ministry of Tourism, Parks, Culture and Sports, Parks Service;
- Manitoba: Ministry of Conservation – Parks and Natural Areas Branch;
- Ontario: Ministry of Natural Resources, Ontario Parks as well as local Conservation Authorities which exist in the southern part of the province;
- Quebec: Ministry of Sustainable Development, Environment and Parks – the Society for the Establishment of Outdoors of Quebec manages parks in southern Quebec, while the Kativik Regional Government manages parks in Nunavik (a territory managed under an Inuit comprehensive agreement);
- New Brunswick: Ministry of Tourism and Parks;
- Nova Scotia: Department of Natural Resources; and
- Newfoundland and Labrador: Department of Environment and Conservation.

#### ***3.1.4 How Well is Element 2 of the Program of Work on Protected Areas Implemented?***

This element of the Protected Areas Program of Work under the Convention on Biological Diversity requires:

Governance, participation, equity and benefit sharing: this includes promoting equity and benefit sharing through increasing the benefits of protected areas for indigenous and local communities; and enhancing the involvement of indigenous and local communities and relevant stakeholders (Secretariat for the Convention on Biological Diversity, 2004).

In 2004, Marc Johnson, Canada's national focal point for protected areas wrote about the implications and opportunities for Canada under this program of work. Challenges noted included no overall vision or strategy for protected areas in Canada, no focus on landscape level maintenance of ecological processes, major land-use decisions are made without regard for biodiversity considerations, and marine areas are under-protected (Johnson 2004). Opportunities include Indigenous Peoples playing a larger role in establishment and maintenance of protected areas and traditional Indigenous knowledge is increasingly used to inform conservation and land use (Johnson 2004).

While this opportunity exists and it is true that Canada, at federal, provincial and territorial levels is making improvements in its relations with Indigenous Peoples respecting protected areas and encouraging the application of Indigenous knowledge, particularly in the north, much remains to be done. Indigenous Peoples have not been able to participate in the governance of protected areas because of lack of support for this by Canada. Indigenous Peoples generally gain little direct or immediate benefit from an area being declared protected, other than some possible employment as guides or enforcement officers. Long term, the possibility of appropriate involvement or use of the areas remains a goal of Indigenous Peoples.

#### ***3.1.5 To What Degree Does the Protected Area Framework Recognize ICCAs or Allow***

### ***for Devolution of Governance***

The Canadian protected areas framework does not recognize ICCAs or allow for devolution of governance of protected areas to Indigenous Peoples. There are isolated instances, however, where the federal and/or provincial and territorial governments have endeavoured to work with Indigenous Peoples to include some Indigenous territories in the protected areas framework and to include Indigenous Peoples in management. For instance, under comprehensive claims, the federal and provincial governments have agreed to recognize Indigenous Peoples' rights in land.

In these cases, the Indigenous People involved may designate lands under their management as protected areas. For example, the Kativik Regional Government manages parks in Nunavik (a territory under an Inuit comprehensive agreement). The federal and provincial governments also worked with the Haida, who have not yet settled their land claims with the Crown to designate Gwaii Haanas as a national park reserve and heritage site. This area is co-governed by the Federal Government and the Council of the Haida Nation (although Canada calls it a co-operative management arrangement). The Gwaii Haanas National Marine Conservation Area Reserve extends ten kilometers offshore of the Gwaii Haanas National Park Reserve and Haida Heritage Site. Gwaii Haanas is discussed at greater length in Section X below.

The creation of new parks has been a point of conflict between Indigenous Peoples and Canada and there are a number of outstanding disputes about the creation of parks on traditional Indigenous territories that remain subject to either Aboriginal title or which were not properly transferred under treaty. In rare cases like the Haida and Inuit, Indigenous Peoples have managed to overcome conflict and are working with Canadian governments to at least co-manage protected areas. Others, such as the Nishnawbe Aski Nation (NAN), the political voice of the Ojibway, Cree and Oji-Cree Nations of northern Ontario continue to protest the creation of protected areas in the traditional territory. They have rejected the recently adopted Ontario provincial law – the *Far North Act* – which calls for the creation of a 225,000 square kilometer protected area in their territory. (Nishnawbe Aski Nation, 2012) This legislation was adopted without their free prior and informed consent. The legislation stops development in their territory and requires the development of land use plans that must receive approval by the provincial government prior to any further development. NAN views this as a tactic to require them to agree to the creation of this protected area before the province will concede to allowing them to develop their lands (Nishnawbe Aski Nation, 2012).

#### ***3.1.6 Constituents and Mandates of Multi-stakeholder Bodies Engaged in Governance or Management of Protected Areas***

Canadian governments have established a number of multi-stakeholder bodies that are engaged in consultation or providing advice on protected areas in Canada at both the national, provincial and territorial level. Governance and management of parks is

generally under the authority of the Crown, so where they exist, stakeholder groups only provide advice. This includes, for example, the Trent Severn Waterway Water Management Advisory Council that is responsible for providing “expert and stakeholder advice on how Parks Canada can best carry out its responsibilities for water management throughout the Trent and Severn River watersheds (Parks Canada, 2011d). Ontario has an Ontario Parks Board with six to eight government appointed members who provide “advice on planning, management and development of the provincial parks system” (Public Appointments Secretariat, 2012,) There are no positions explicitly for Indigenous Peoples on this Board.

Indigenous Peoples in Canada do not consider themselves *stakeholders* in the general use of the word. Indigenous Peoples are *rights holders*, and this is a preferred term. Management planning for the Aulavik National Park involved the Aulavik National Park Management Planning Working Group, which includes Inuit communities, Inuvialuit and cooperative management boards, and various government departments (Parks Canada, 2011e) A Park Advisory Board was established for the Gulf Islands National Park Reserve which includes two elected representatives of local governments, three members of the public and two Parks Canada employees. It provides advice and guidance on park planning and issues of concern to the public (Parks Canada, 2010). In addition, Parks Canada has established two First Nations Cooperative Planning and Management Committees for the Gulf Islands National Park Reserve that were negotiated with Coast Salish First Nations.

### **3.2 ICCAs Within Protected Areas Systems**

#### ***3.2.1 Provisions Which Explicitly Recognize Terrestrial, Riparian or Marine Protected Areas Governed by Indigenous Peoples***

No provisions in Canadian law explicitly recognize terrestrial, riparian or marine protected or conserved areas governed by Indigenous Peoples or local communities. Inuit, Métis and First Nations with comprehensive agreements may have authority to approve or disapprove the creation, disestablishment or amendment of boundaries of protected areas on their lands. This is not the same as governance of these protected areas, which will remain areas for shared management. The federal, provincial or territorial governments may delegate management authority to an Indigenous organization or government.

#### ***3.2.2 If There are Measures That Provide for Indigenous Peoples’ Governance of Land and Natural Resources how are Those in Power Selected?***

Canada is prepared to recognize democratically elected leaders and customary processes for leadership selection under the *Indian Act* and comprehensive or self-government agreements. Under the *Indian Act*, the Minister has authority to disallow the selection of a leader, and the Chief and Band Council only exercise delegated

authority. Self-government and comprehensive agreements stipulate processes for leadership selection. The *Tr'ondëk Hwëch'in Self-Government Agreement*, for example, recognizes traditional decision-making institutions and practices and the desire to integrate those with contemporary forms of government (section 2.1) Leadership selection processes are set out in each of the comprehensive or self-government agreements. The Nisga'a agreement, chapter 2, paragraph 9 applies the *Canadian Charter of Rights and Freedoms* to the Nisga'a government in all matters within its authority. In Nunavut, Inuit are in a slightly different position, as they agreed to the creation of a Nunavut Territory with its own legislative assembly that operates on the same principles of other legislative assemblies in Canada. As the Inuit are presently the largest portion of the population, they have control of this government.

### **3.2.3 *If no Provisions for Governance, are there Provisions for Management?***

There are provisions for the co-management or delegated management of protected areas under federal legislation. The federal *Parks Act* and the *Canada Marine Conservation Areas Act* both provide for the possibility of Indigenous Peoples' participation in protected areas management. Each case must be negotiated separately. Comprehensive agreements and some self-government agreements provide for Indigenous participation in management of protected areas located on these Peoples' traditional territories.

Provincial legislation in British Columbia allows for First Nations participation in protected areas management. The province has entered into a *Collaborative Management Agreement for Provincial Parks* with the Doig River First Nations, Prophet River First Nation and West Moberly First Nation to establish collaborative management, defined as, "the process set out in [the *Collaborative Management Agreement*] whereby Treaty 8 First Nations and British Columbia agree to engage in a Spirit of Shared Decision Making, with the goal of seeking an outcome that accommodates rather than compromises their respective interests" (British Columbia 2009). This agreement applies to 57 provincial parks, protected areas and ecological reserves. The Treaty Eight – British Columbia Parks Management Board consists of two representatives of BC Parks and two representatives of the six Treaty Eight First Nations for a total of four members (British Columbia 2009).

### **3.2.4 *If there are no Provisions for Governance or Management, are there Intentions to Move in that Direction?***

Indigenous Peoples in Canada are generally seeking greater inclusion in decision-making in all facets of their lives, including in the creation, management and governance of protected areas. Canadian Courts and the Royal Commission on Aboriginal Peoples have recommended reconciliation between Indigenous Peoples and the Crown through consultation, negotiation, and accommodation. Consultation, as required by law, is the bare minimum standard that should be met prior to developing protected areas

legislation or policy and in designating areas for protection. In addition, Indigenous Peoples are seeking recognition of their perspectives about their place within the environment. For example, Indigenous Peoples consider themselves an integral part of the environment, not separate and apart from it. So, rather than be excluded from protected areas Indigenous Peoples believe it is necessary need to continue to access these areas so that there continues to be a positive influence on the retention of biological diversity and associated traditional knowledge. Indigenous Peoples continue to assert the need to view all lands and waters as precious, not just some lands and waters.

### ***3.2.5 In General How are Protected Areas that Contain ICCAs monitored and assessed?***

For Indigenous Peoples the process of monitoring and assessing the health of the land was conducted on a daily basis in the process of going through one's routine: walking the land, hunting or gathering, drinking the water, tasting the fish or meat, judging the thickness of a hide, listening to and observing the natural world around. Traditionally Indigenous Peoples live on the land in a fashion that is much more intimate than do most other Canadians. The knowledge of the land from time immemorial is captured in traditional cultures and languages. The practice of them generates deeper awareness and understanding. It is an intergenerational and on-going process of gathering and sharing information that forms the basis of traditional Indigenous monitoring and assessment processes. It is a way of living harmoniously and respectfully on the land.

The federal, provincial and territorial governments have positive laws and policies about how to conduct monitoring and assessment of the environment. The *Canada National Parks Act* requires Parks Canada to maintain or restore the ecological integrity of the park (section 8(2)). Ecological integrity is defined as "a condition that is determined to be characteristic of its natural region and likely to persist, including abiotic components and the composition and abundance of native species and biological communities, rates of change and supporting processes" (section 2).

Parks Canada monitors the park to assess changes in the ecological integrity. They examine biodiversity, ecosystem functions, and stressors such as climate, pollutants, and human land-use patterns. Local reports are prepared by the Park superintendents, and then collated bio-regionally and nationally (Parks Canada 2009).

Provincial and territorial parks and protected areas are similarly monitored and assessed, the assessments forming the basis of management plans. Manitoba, for example, monitors species health (Manitoba, undated). Quebec developed an Ecological Integrity Monitoring Program in 2004, which, like the federal government monitors changes in ecological integrity (Quebec, 2004).

## **3.3 Sacred Natural Sites as a Specific Type of ICCA**

### **3.3.1 Legislation that Contains Specific Provisions for Indigenous Peoples' Governance of Sacred Natural Sites**

A common perspective among Indigenous Peoples in Canada is that most elements of the environment have spirit and are therefore sacred. Sacred sites, for the purposes of this paper include, such things as gathering places, places of power, pictographs, petroforms, medicine wheels, hot springs, and culturally modified trees. For example:

First Nations people of the [Clayoquot] Sound had highly particularized understandings of sacred sites...that is inclusive, recognizing food harvesting sites, material harvesting sites, ceremonial and religious sites, medicine sites, traditional historical sites, cultural land forms, transportation sites, sites with supernatural occurrences, habitation sites, recreational sites, cross cultural interaction sites, and suggested for inclusion traditional land management sites, and education and training sites ... This more differentiated view of "sacred sites", ... of Nuuchah-nulth [First Nations], reflects the lack of split between spirituality and governance. For indigenous people generally such a split may not have occurred. The sacred may thus still be intimately involved with the profane. Over millennia, this may have insured a partnership with "Nature" in which cultural logics were/are embodied as sacred practices and behavioral strategies enhancing the abundance of the landscape by promoting diversity and sustainability in a territory. (Atleo undated)

Indigenous Peoples in Canada have been subject to religious and cultural assimilation sponsored by both European religious organizations and the state. In 1884 an amendment to the *Indian Act* was instituted to outlaw Indigenous religious practices such as sun dance and potlatch. The right of freedom of religion was not returned to First Nation Peoples until 1951. Residential schools were a particularly insidious means of assimilation, removing children from their home for often for years at time, cutting them off from their traditional cultures, languages, diets, manner of dress, and practice of traditional religions (Truth and Reconciliation Commission 2012). The last residential school closed in 1998.

Against a backdrop of religious intolerance, Indigenous Peoples in Canada have had little capacity to prevent the desecration and destruction of their sacred sites. Countless sites have been destroyed over the years by such things as development, mining, forestry activities, farming, or souvenir collectors. There are too many instances to report here. Three well-publicized conflicts were at Gustafsen Lake, Oka, and Ipperwash. The first involved access to a traditional site for sun dance, the other two involved disputes about burial sites.

The only legislation that specifically recognizes the rights of Aboriginal Peoples to govern sacred sites are self-government or comprehensive agreements which include

provisions for self-government and land. These are constitutionally protected documents. The comprehensive agreements designate particular lands as lands set aside for an Indigenous nation, with some lands specifically under their sole governing authority. The relevant Indigenous government would have governing authority over sacred sites on those lands.

Arguably, the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of religion could include recognition of the obligation on the Crown to protect sacred sites and access to them by Indigenous Peoples, but this is not current policy and has never been tested in the courts or acknowledged by the Crown.

### **3.3.2 How are those in Power Selected?**

As noted above, only the Inuit, some First Nations, and one Métis community have comprehensive claims that recognize limited rights of self-government. The provisions of each of the agreements stipulate the means by which people in power are selected.

### **3.3.3 Are there provisions for the Management of Sacred Natural Sites?**

Outside of comprehensive or self-government agreements, there are some provisions to allow co-management of sacred sites. For example, in 2010, the Brokenhead Ojibway Nation reached a tentative deal with the Province of Manitoba to develop a co-management agreement for petroform sites that are within the boundaries of Whiteshell Provincial Park. These sites were selected by the community under the Treaty Land Entitlement process to compensate for the failure of the Crown to allocate the agreed land area to the First Nations when the treaties were signed. (Winnipeg Free Press 2010) As another example, Parks Canada has recognized and worked with the Déline to co-manage Saoyú-?ehdacho a National Historic Site in Northwest Territories (Northwest Territories Protected Areas Strategy, 2011).

### **3.3.4 Are there Indications of Intention to Move Towards Legally Recognizing or Supporting Indigenous Peoples' Governance of Sacred Natural Sites; How Might They be Included in Legislation; Is this Recognition Desired by Indigenous Peoples?**

There has been no express intention by Canada to move towards legally recognizing or supporting community governance of sacred sites outside of comprehensive agreements and then only on land solely owned by the Indigenous nation as defined by the agreement. Recent proposed amendments to the Canadian environmental law regime suggest that the federal government is moving to reduce opportunities to protect the land. These amendments will limit the capacity of Indigenous Peoples to prevent destruction of their sacred spaces. For example, the federal government has introduced changes to the *Canadian Environmental Assessment Act*, the *National Energy Board Act* the *Navigable Waters Protection Act*, the *Species at Risk Act*, and the



*Canadian Oil and Gas Operations Act* to exempt oil pipelines from various environmental requirements and democratic processes, (Green Party of Canada, 2012). This will have a direct negative affect on First Nations in British Columbia that have expressed opposition to a new oil pipeline development in their territory in part to protect their sacred sites. There are signs of willingness to work with Indigenous Peoples to co-manage sacred sites on a case-by-case basis, although much more needs to be done to educate the Canadian public and politicians of Indigenous cosmologies and rights.

The Supreme Court of Canada and the Royal Commission on Aboriginal Peoples have given good advice on how to recognize and accommodate the rights of Indigenous Peoples. They have recommended a process of reconciliation. Indigenous Peoples are seeking this recognition as a matter of course.

### **3.4 Other Protected Area-related Designations**

Canada has 15 Biosphere Reserves (Canadian Biosphere Reserves Association 2007), 13 World Heritage Sites (Environment Canada, 2012) and 37 Ramsar sites, 17 of which are national wildlife areas or migratory bird sanctuaries (Environment Canada, 2011c). The management process involved with these sites fails to seek the free, prior and informed consent of Indigenous Peoples, nor their full and effective participation, or provide benefit-sharing and capacity building, and fails to have full respect for cultural and spiritual values of Indigenous people. Also, decision-making processes in regards to the management of these lands, do not usually engage Indigenous people. The most extensive engagement of Indigenous peoples that does occur in connection to these lands largely involves inviting Spiritual leaders to lead opening ceremonies with cultural customs or as an attempt to attract tourists.

Generally speaking, Indigenous Peoples are not consulted or otherwise engaged in defining these sites. Canada does not pursue a policy of free, prior and informed consent, merely consultation to a degree determined on a case-by-case basis. Lands outside of comprehensive agreements or reserves are generally perceived by the Canadian state to be its own to do with as it wishes without regard for Aboriginal title or treaties.

There have been some positive initiatives in addition to the myriad failures. In Manitoba for example, a collection of five First Nations – the Bloodvien, Little Grand Rapids, Paiingassi, Pikangikum, and Poplar River First Nations – agreed among themselves to make an application for a World Heritage Site on the eastern side of Lake Winnipeg. They signed an Accord amongst themselves in 2002 to work together to protect their traditional homelands beyond the boundaries of their Indian Reserves. This area, called *Pimachiowin Aki* (the land that gives life) is approximately 40,000 square kilometers, covering part of Ontario and Manitoba.

This is a remote territory; travel is by boat or plane in the summer and ice roads in the winter. It is critical habitat for woodland caribou and is a culturally significant site for the Anishinaabeg of the region. The communities conducted economic studies, cultural studies, ecosystem and landscape studies, and interviews with Elders to support their application (Pimachiowin Aki, 2012). They have recorded burial sites, ancient campsites, rock paintings, and traditional trap lines. These are sacred sites in their own right and as places for the spirits of the Anishinaabeg ancestors. The Elders speak of the sacred obligation to the Creator to care for the land for the future (Pimachiowin Aki, 2012).



**Grasses in a beaver meadow © Sandra Lucas**

Eventually, the provinces of Ontario and Manitoba came on board with the idea. Manitoba has passed unique legislation, *The East Side Traditional Lands Planning and Special Protected Areas Act*, which is intended to enable Indigenous communities to engage in land use and resource management in designated areas of Crown land that they have traditionally used and to designate areas of Crown land with special protection from development. It is expected that this legislation will facilitate the retention of Indigenous knowledge, practices and innovations as well as help preserve *in situ* biological diversity. The application for designation as a World Heritage Site was submitted by Canada in 2012.

### **3.5 Trends and Recommendations**

Recently there have been disturbing signs that the federal government intends to reduce environmental protections. There have been cut backs in funding and staff in federal environmental departments and amendments to the environmental assessment process to speed approvals of resource based projects. In addition, changes to other federal legislation have reduced protection for fresh water with more changes planned to reduce protection of fish habitat (Winnipeg Free Press, 2012a). The National Chief of the Assembly of First Nations has written to the Minister of Natural Resources calling these changes “unlawful and unconstitutional” (Aboriginal Peoples Television Network, 2012).

There is no express intention of the federal government at this time to recognize rights to self-government beyond those expressed in comprehensive agreements and the Inherent Rights Policy. This policy provides that environmental protection, conservation and management are shared areas of jurisdiction between Indigenous Nations, and Canadian governments, with Canadian legislation taking precedence in case of conflict. There is a growing awareness within some governments of the need to include Indigenous Peoples in environmental protection, conservation, management and assessment. But these are developed on a case-by-case basis. There is no standard approach across the country.

There are many individual recommendations for improving protected areas laws and policies and improving their implementation to more appropriately and effectively recognize and support ICCAs. They fall generally under two headings – jurisdiction and capacity.

#### Jurisdiction:

- Better recognize the inherent rights of Indigenous Peoples, including rights to land and self-government;
- Move away from colonialist cultural hegemony and embrace reconciliation of our cultures, laws, and worldviews;
- Show greater regard for Indigenous epistemologies including acknowledge that humanity is part of the landscape, that all lands and the people are connected, and that we must treat all of the land with respect and care for future generations;
- Engage Indigenous governments in land use decision making processes that allow Indigenous Peoples to achieve their aspirations and move away from unilateral decision making or cursory consultation;
- Develop partnerships between Indigenous and Canadian governments for co-governance of protected areas;
- Adopt the provisions of the *United Nations Declaration on the Rights of Indigenous Peoples*, particularly Articles 12, 29, and 32.

Capacity:

To be effective participants in protected areas governance and management Indigenous Peoples also require:

- financial support;
- education, training, and capacity building;
- tools and equipment;
- research capacity; and
- translation services.

#### **4. NATURAL RESOURCES, ENVIRONMENTAL AND CULTURAL LAWS AND POLICIES**

##### **4.1 Natural Resources and Environment**

###### ***4.1.1 How do Natural Resource and Environment Laws Help or Hinder Indigenous Peoples' Ways of Life and Local Governance***

Generally speaking, Canadian laws, at the federal, provincial and territorial level hinder the capacity and opportunity for the majority of Indigenous Peoples to pursue their traditional ways of life, govern their people or implement traditional laws governing their interaction with the non-human world. Exceptions to this are Indigenous Peoples – the Inuit, a handful of First Nations such as the Cree, Nisga'a, and Gitskan, and one Métis community – who have managed to secure comprehensive agreements with the Canadian state.

Interference in Indigenous Peoples ways of life and local governance is found in both law and policy at the federal and provincial level. It begins with a failure to fully implement the Constitution, which recognizes and affirms the rights of Indigenous Peoples. Systemic racism inherent in Canadian law is in part to blame for this interference, as is the racist and colonialist perspective of many non-Indigenous Canadians about relations with Indigenous Peoples. The Royal Commission on Aboriginal Peoples documented this, stating, "We [Canadians] retain, in our conception of Canada's origins and make-up, the remnants of colonial attitudes of superiority that do violence to the Aboriginal peoples to whom they are directed" (RCAP 1996). Combined with a failure to respect the Constitution and provisions of the common law that require consultation with Indigenous Peoples there is little effort on the part of the Canadian state to appropriately accommodate the rights of Indigenous Peoples. The Crown regularly ignores the obligation to consult or finds it convenient to observe the process (the consultation) but not the outcome (the accommodation). The federal and provincial governments appear to prefer litigation to negotiation as they inevitably defend their positions in court.

As noted earlier, there is a division of powers between the federal and provincial

governments, with the federal government holding authority to address Indigenous issues and manage Indigenous Peoples' lands and the provinces holding authority to regulate development and natural resources extraction. This bifurcation of authority complicates relations between Indigenous Peoples and the Crown.

The provinces have benefitted from the failure of the federal government to fulfill its fiduciary duty to protect the rights of Indigenous Peoples or to respect their legitimate claims to land. One method the federal government has used repeatedly to facilitate national or regional ambitions of development or to reduce bureaucratic burden has been the removal and relocation of Indigenous Peoples (RCAP 1996). Relocations continue to take place today, for example in mining, hydro-electric or oil and gas development or by providing such restricted services and financial support to First Nation Peoples as to drive them off reserves and be assimilated into the Canadian majority. The effects of the relocations have been to sever the relationship between Indigenous Peoples and their traditional lands causing economic, social, cultural, and spiritual distress (RCAP 1996).

#### ***4.1.2 Which State Agency is Mandated to Develop and Implement these Laws and Policies***

The environment is not an identified head of power in the Canadian Constitution. It is interpreted to instead fall under the jurisdiction of both the federal government and the provinces. The provinces and the federal government have jurisdiction for different elements of the environment and natural resources, and there are multiple agencies at both the federal, provincial and territorial levels whose mandate directly or indirectly touches on these issues. The federal government is responsible for national issues and the provinces for issues of a more regional nature. Hence, the federal government has legislation for protection of species at risk on federal lands and the provinces have legislation to address species at risk on provincial lands. The federal government has responsibility for oceans, navigable waters and fisheries, but the provinces have authority to control the supply of drinking water, licensing industrial, commercial and agricultural uses of water, managing wastewater, and issuing fishing licenses. The federal government has sole authority to legislate on Indigenous issues or Indigenous lands and holds the fiduciary responsibility to protect Indigenous Peoples' rights, but the provinces, through their various heads of authority such as regulation of mining or forestry activities, have the capacity to affect Indigenous Peoples' rights and interests indirectly.

#### ***4.1.3 If there are Provisions for Indigenous Governance of Land or Natural Resources how are People in Power Selected?***

The only laws that provide some self-government authority to Indigenous Peoples in Canada are comprehensive or self-government agreements. Leadership selection processes are spelled out in each agreement, negotiated on a case-by-case basis.

Indigenous law can be the basis of decision-making under these agreements with respect to “matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources” (AAND, 2010). It is federal policy, however, that Canadian law takes precedence over Indigenous laws in the case of environmental protection, assessment or pollution.

#### ***4.1.4 If there are no Provisions for Governance are there Provisions for Management of Land or Natural Resources?***

First Nations operating under the provisions of the *Indian Act* hold limited delegated authority to manage some environmental issues on reserve and to make some decisions regarding natural resources on reserve. Those First Nations operating under the *First Nations Land Management Act* have some expanded authority, but this too is delegated authority from the federal government.

#### ***4.1.5 How might these Laws be Better Implemented or Reformed to Better Support Indigenous Peoples?***

First and foremost, Canada must muster the necessary political will to develop a new relationship with Indigenous Peoples. Substantial legal reform is required to meet the Constitutional and common law obligations owed to Indigenous Peoples in Canada. The Courts and a Royal Commission have called for reconciliation between Indigenous Peoples and the Crown. Greater effort must be made on the part of the Crown to move this agenda forward. This includes reconciliation of Indigenous and Canadian laws about environmental protection and conservation and development of natural resources.

Co-governance and co-management structures must be negotiated and implemented. This means establishing government-to-government and nation-to-nation relations between Canada and Indigenous Peoples. Métis, Inuit and First Nation Peoples continue to press for educational, economic, social, political and legal reform.

### **4.2 Traditional Knowledge, Intangible Heritage and Culture**

#### ***4.2.1 Laws and Policies that Contain Provisions Relating to Indigenous Knowledge that are Relevant to ICCAs***

Some federal, provincial and territorial laws contain provisions that encourage the incorporation of Indigenous knowledge in the decision-making process. The federal *Species at Risk Act*, the *Canadian Environmental Protection Act, 1999*, and the *Canadian Environmental Assessment Act* all contain such provisions. None of the federal protected area legislation references Indigenous knowledge.

The Nunavut government requires the application of Inuit knowledge

(*Qaujimajatuqangi*) for the governance of the environment in Nunavut. “*Avatittinnik Kamatsiarniq*, the Inuit *Qaujimajatuqangit* principle of Environmental Stewardship, emphasizes the key relationship between people and the natural world” (Nunavut Department of Environment, undated).

Various comprehensive agreements also contain provisions that permit the application of Indigenous knowledge.

#### ***4.2.2 To what Extent do these Provisions Allow for Self-determination or Customary Governance of Land and Resources***

Only comprehensive agreements allow for self-determination, local and/or customary decision-making and governance systems and access to or tenure over territories, areas and natural resources. As noted earlier, the majority of Indigenous Peoples in Canada do not have these types of agreements.

#### ***4.2.3 Which State Agencies are Mandated to Develop and Implement these Laws and Policies?***

Many different federal and provincial agencies have a mandate to develop and implement laws respecting Indigenous knowledge, intangible heritage and culture. This includes, at the federal level, Heritage Canada, Environment Canada, AAND, Canadian Environmental Assessment Agency, Parks Canada, and Natural Resources Canada.

### **5. Human Rights**

#### ***5.1.1 Human Rights Laws or Policies that Support or Hinder ICCAs***

Under the provisions of section 25 of the *Constitution Act, 1982*, Indigenous Peoples enjoy the same rights contained in the *Canadian Charter of Rights and Freedoms* (the Charter) as are extended to other Canadians. These include rights of freedom of religion, mobility, life, liberty and security of the person, and equality rights. The Charter applies across the country. Provinces and territories also have human rights legislation or policy.

Note that the only language rights in Canada are the right to use English or French. Indigenous languages are not recognized as official languages of the Canadian state, except for Inuktitut, which is one of the official languages of Nunavut and the Inuit comprehensive agreements.

Often Indigenous Peoples are subject to rights of procedural equality, such as equal rights to employment or education. However, these processes do not help to address long-standing inequalities that cannot be ameliorated without addressing substantive equality. Therefore, while non-Indigenous children attend modern schools with viable classrooms, computers, an array of recreation equipment and well-stocked libraries,

many Indigenous children attend schools that make the education process virtually impossible (Globe and Mail 2011).

In addition to the Charter, the federal government adopted the *Canadian Human Rights Act* and established a Canadian Human Rights Commission. Knowing full well that the *Indian Act* was discriminatory legislation the federal government excluded the application of the *Canadian Human Rights Act* to decisions made under the *Indian Act*. In 2008 the *Canadian Human Rights Act* became applicable to decisions under the *Indian Act* and to decisions of First Nation governments on reserve since June 2011. A significant legal challenge was brought by the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations in 2012 alleging the government is consistently underfunding child-welfare services on reserves, leading to poverty, poor housing, substance abuse, and a vast over-representation of Indigenous children in state care. The Court found that Canadian Human Rights Tribunal had erred in its findings that it could not compare the status of Indigenous children in federal state care with Indigenous children under provincial state care because they were two different orders of government that had ultimate responsibility. The Court ordered a reconsideration of the case by a newly constituted Canadian Human Rights Tribunal (*Canadian Human Rights Commission v. Attorney General of Canada* 2012).

The *Indian Act* hinders rights to self-determination as well as rights to self-government of First Nation Peoples. A wide range of other laws and policies at the federal, provincial and territorial level hinder Indigenous Peoples' way of life, exercise of traditional cultures, connection to their traditional territories, and governance. These include a myriad of laws from agriculture that favours European crops and methods, mining, forestry and oil and gas extraction laws that scar the land and chase away indigenous fauna, and health, education, and social welfare laws that leave Indigenous Peoples behind. The Canadian state was built upon a fundamental denial of the human rights of Indigenous Peoples, and its continuing policies of colonialism and assimilation perpetuate this abuse (RCAP 1996; Truth and Reconciliation Commission 2012).

#### **5.1.2 Which State Agencies have the Mandate to Develop and Implement these Laws?**

Implementation of the Charter, a constitutional document, is a fundamental responsibility of all governments in Canada. Any legislation or policy that operates contrary to the Charter is null and void. In addition to the Charter, there exists legislation at the federal, provincial and territorial levels establishing various Human Rights Boards or Commissions responsible for addressing human rights abuses.

#### **5.1.3 What is the Extent and Effectiveness of Implementation?**



In practice the Canadian state as a whole has neglected its constitutional duties to Indigenous Peoples (RCAP 1996). Human rights boards or commissions have done little to address issues of concern to Indigenous Peoples.

For example, in March 2011, the Canadian Human Rights Tribunal dismissed a complaint by the First Nations Child and Family Caring Society and the Assembly of First Nations about the discrimination against Indigenous children by refusing to provide them with the same level of family services provided to other Canadian children. The Tribunal decided the case on procedural grounds, finding that the Human Rights Act only addresses unequal treatment by the same level of government. By virtue of the constitutional fact that Indigenous children are the responsibility of the federal Crown when under state care and non-Indigenous children are the responsibility of the provinces it is not possible to compare levels of service. This case has been appealed to the Federal Court of Canada, which found the Canadian Human Rights Tribunal erred and ordered a new hearing (*Canadian Human Rights Commission v. Attorney General of Canada*)

In February 2012 Nouredine Amir, vice-chairman of the United Nations Committee on the Elimination of Racial Discrimination, reviewed Canada's report on its treatment of Indigenous Peoples stating, "This problem should not continue the same way as it has in the past ... How long will this be ongoing?" (Winnipeg Free Press, 2012b)

## **6. JUDGEMENTS**

Canada's legal system includes a judiciary. There are federal and provincial courts. Provincial courts are generally the court of first instance except for issues of federal administration which are heard by the Federal Court and the Federal Court of Appeal. Each province or territory has an Appeals Court. Appeals from provincial, territorial or federal courts maybe heard by the Supreme Court of Canada, the court of final appeal. Provincial and territorial decisions apply solely within the political boundaries of the province or territory. Decisions of the Federal and Supreme Courts are applicable nationally. Each of these courts has the authority to strike down federal or provincial legislation that infringes the constitution.

There has been a great deal of litigation involving Indigenous issues since Canadian confederation, most of it since the Constitution was amended in 1982 to recognize Indigenous rights. The earlier cases did not involve Indigenous Peoples as litigants, interveners, witnesses, or friends of the court. They were not perceived to have an interest in the litigation, despite the fact the decisions could have profound affect on their rights, wellbeing, or ways of life. Today, Indigenous Peoples have pursued litigation as a means to establish their rights and have met with mixed results.

This review of jurisprudence will be divided into cases that address land rights, rights to natural resources, and rights of self-determination and self-government, as well as

treatment of Indigenous conservation and environmental governance. Finally consideration will be given to consultation, a procedural mechanism described by the courts as a means to recognize and accommodate Indigenous rights.

## **6.1 General Case Law**

### **6.1.1 Land Rights – Aboriginal Title**

One of the first decisions affecting Indigenous land rights is *The St. Catherines Milling and Lumber Company v. R.* The Privy Council of Great Britain decided the case in 1887, before Canada had its own court of final appeal. One of the critical issues this case revolved around was who owned Indigenous lands subject to treaty – the federal Crown or the provincial Crown. The Privy Council, who had no experience of Canada or Indigenous Peoples, decided these lands belonged to the province. Had the lands been deemed federal lands, they could have been considered ‘lands reserved for Indians’ under section 91(24) of the Constitution, thus possibly guaranteeing Indigenous Peoples sufficient lands to maintain their cultural traditions. The Council applied a strict interpretation to these words, however, finding that they meant solely the small parcels of land set aside for First Nation Peoples. Off reserve, Indigenous Peoples were deemed to possess only ‘a right of occupancy’ or ‘usufructory right’ to treaty lands. By siding with the provinces, the Privy Council handed them greater opportunity to exercise their authority to govern land, natural resources, hydro electric development, and municipal settlements and thus tremendous capacity to undermine Indigenous well-being, cultural expression, and ways of life. Technically, under the Canadian Constitution, the federal government has an obligation to protect the interests of Indigenous Peoples, including from interference by the Provinces. However, history has demonstrated that the federal and provincial governments were generally like-minded respecting development and neither paid much heed to the rights of Indigenous Peoples (RCAP 1996). The implications of this decision have been profound for Indigenous Peoples in Ontario where the case was centered, and across the country.

It was almost a century later before another case involving Indigenous Peoples’ rights to land came to court. Not because Indigenous Peoples did not have grievances with the Crown. Many Indigenous nations across the country kept up a stream of correspondence with the Crown complaining about breaches of the law and their treaty or inherent rights, and they began to develop their own political organizations to advocate for these rights (RCAP 1996).

The Nisga’a Nation took the opportunity provided by the 1950’s removal from the *Indian Act* of the prohibition against First Nation Peoples to litigate or hire legal counsel to bring a suit for recognition of their Aboriginal title to their traditional territory. In *Calder v. Attorney General of Canada*, the Nisga’a argued that the Royal Proclamation of 1763 applied to them and that it requires a treaty with Indigenous Peoples prior to non-Indigenous Peoples using or settling on Indigenous lands. The majority of the Supreme

Court of Canada held that the Royal Proclamation was good law but did not apply to the Nisga'a, because Nisga'a territory in British Columbia was not within the geographic scope of the Proclamation at the time of its drafting. Further, any Aboriginal interest that might exist otherwise was duly extinguished by operation of Canadian sovereign authority. The court split four to three on this judgment, the dissent finding that the Royal Proclamation did apply, and that Indigenous Peoples continued to hold pre-existing rights of possession as a burden on the title of the Crown in the absence of explicit regulation to extinguish it. Where there was agreement in the Court, however, was that Indigenous Peoples could hold rights to land that survived settlement by non-Indigenous people, thus spurring action by the Crown to address Indigenous Peoples' land claims beyond existing treaty boundaries (Hurley, 2001). The Nisga'a pursued negotiations with Canada under the new comprehensive claims policy and in 1999 signed a comprehensive agreement with Canada respecting their rights to land and self-government (*Nisga'a Agreement*).

The adoption of the amendments to the Constitution in 1982 provided additional opportunities. In *Delgamuukw v. British Columbia*, 1997, the Gitsan and Wetsuwetan Nations claimed Aboriginal title to 58,000 square kilometers in British Columbia. British Columbia argued that the First Nations had no rights or interest in the land or at best could only seek compensation from the Crown. The court found in favour of the First Nations. The court held, among other things, that Aboriginal title is a 'sui generis', or unique, interest in land, and the link between Indigenous Peoples and their lands is an element of it. Aboriginal title "encompasses the right to use the land held pursuant to the title for a variety of purposes, which need not be aspects of those aboriginal practices, cultures and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the groups' attachment to that land" (*Delgamuukw* para 117). Section 35 of the Constitution protects this right. The Court established the test for proof of Aboriginal title, and stated, "aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law...it crystallized at the time sovereignty was asserted" (*Delgamuukw* para 145). In the end, the court decided that the case had to go back to trial, in part because of the evidentiary burden on Indigenous Peoples and the obligation on the courts to allow evidence based on oral history. The Gitsan and Wetsuwetan are pursuing negotiation with the Crown but have not concluded comprehensive agreements (Ministry of Aboriginal Relations and Reconciliation, undated).

Issues regarding Aboriginal title continue to be litigated in the courts. In *Tsilhqot'in Nation v. British Columbia*, 2007, the Tsilhqot'in Nation brought an action for recognition of their Aboriginal title in the Supreme Court of British Columbia. At the root of their challenge was the failure of the province to consult and accommodate their Aboriginal title when issuing forestry licenses in their territory. The court sat for almost 350 days of trial. In the end, the court was unable to make a final decision regarding the boundaries of the territory but did agree that the claim for Aboriginal title had been

proven. The court held that the province does not have jurisdiction to extinguish Aboriginal title and a grant of fee simple to a third party does not extinguish it. In addition, the court held that lands held under Aboriginal title were not 'Crown' lands as defined by the provincial forestry legislation and therefore the *Forestry Act* had no force or effect on Tsilhqot'in territory. The Court found the *Forestry Act*,

is silent with respect to Aboriginal title and rights. The Chief Forester interpreted this silence as a direction to him to ignore any actual or claimed Aboriginal title or rights when determining the AAC [allowable annual cut]. The AAC is based on the assumption that all areas contribute to the timber supply within the [forestry boundary] until the issue of Aboriginal title is finally resolved" (Tsilhqot'in para 1125)...

Over the years, British Columbia has either denied the existence of Aboriginal title and rights or established policy that Aboriginal title and rights could only be addressed or considered at treaty negotiations. At all material times, British Columbia has refused to acknowledge title and rights during the process of consultation. Consequently, the pleas of the Tsilhqot'in people have been ignored. (Tsilhqot'in para 1136)

The court cited the failure to adequately consult with and accommodate the interests of the Tsilhqot'in regarding forestry in their traditional territory. Conversely, the Court had praise for the consultation process as it relates to the development of provincial parks in the region.

[T]here was good communication between Tsilhqot'in people with officials in the Ministry of Lands, Parks and Housing. Here the two groups were able to reach a consensus on the establishment and management of Ts'il?os Provincial Park, without prejudice to the rights and title claims of Xeni Gwet'in and Tsilhqot'in people in the park area. The joint management model of this Provincial Park has been such a success that it has been extended to the management of Nuntzi Provincial Park in the northeastern portion of Tachelach'ed.

This decision applies only in British Columbia, but it raises the important issue of what the Crown can do on lands held under Aboriginal title prior to treaty and without consultation. The *Tsilhqot'in* decision was appealed and the British Columbia Court of Appeal confirmed rights to pursue traditional activities in the contested area, but did not confirm title to the land (*William v. British Columbia*, 2012).

### **6.1.2 Land Rights – Treaties**

Only some land in Canada remains under Aboriginal title, including much of British Columbia, the Atlantic Provinces, and parts of central Ontario, Quebec and the territories. Most of the rest of the country is now subject to treaty. These treaties

include so-called 'historic treaties' – those signed before and shortly after Canadian confederation, and so-called 'modern treaties' or comprehensive agreements, of which the *James Bay Cree and Northern Quebec Agreement* is the first example, signed in 1975.

The interpretation of treaties and the rights contained therein has been a source of friction between Indigenous Peoples and the Canadian Government. Generally speaking, the conflicts tend to revolve around a failure of the Crown to meet its commitments and a fundamental failure of understanding between Indigenous Peoples and the Crown about what was being given and what was being received. Most often these cases relate to the exercise of rights, as opposed to claims for land, and so will be discussed under the section on rights to natural resources. That said, as recently as January 2012, the George Gordon First Nation launched a suit against the Province of Saskatchewan and the federal government for misconduct in the process of settling treaty land entitlements for the First Nation. The land in the territory is rich in potash and oil, but the First Nation claims the resources are being stripped away prior to settling land claims (First Nations Drum, 2012).

One case of particular note with respect to treaties is *R.v Badger*, 1996, where the principles of treaty interpretation were first set out by the Supreme Court of Canada. In this case, several Cree men from Alberta were hunting for food on private lands within their treaty territory – Treaty 8. They were charged under the provincial *Wildlife Act* with hunting out of season and hunting without a license. The case focused on the interpretation of Treaty 8, the application of the *Natural Resources Transfer Agreement, 1930*, and the application of Provincial law. Treaty 8 stipulates as follows,

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

The Court looked at the record of the treaty negotiations and found that the Cree entered into the treaty on the guarantee that they would be able to hunt and fish and earn a living as they had in the past. In determining the impact of the *Natural Resources Transfer Agreement, 1930*, on the treaty, the Court set out principles of interpretation of treaties.

First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred... Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a

manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned...Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed...Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights [citations deleted]. (*Badger*, 1996, para. 41).

The court further held that,

Treaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians. In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement (*Badger*, 1996, para 52).

The *Natural Resources Transfer Agreement, 1930*, was found to have modified the rights of the treaty people to hunt and fish. While previously the Indigenous Peoples had the right to hunt for any purpose, it was now limited to hunting for food only. Note that the Court had no problem with this unilateral amendment to the terms of the treaty, negotiated between the province and the federal government without the involvement of the other treaty parties – the Indigenous Peoples. Two of the men were found guilty. One because he was hunting a quarter of a mile from a farm house, the second because he was hunting on agricultural land, albeit in winter after the crop had been cleared, the land was posted no trespassing, and near some run down barns. This was found to be “visible, incompatible use” (*Badger*, 1996, para. 65). The third man was sent back to trial to determine if there were any other impediment to his right to hunt imposed by government regulation.

### **6.1.3 Land Rights – Fiduciary Duty**

In *Guerin v. R* the court was asked to consider the fiduciary duty owed to Indigenous Peoples with respect to their lands. This case revolved around a lease of land from the Musqueam First Nation to a third party for the purpose of establishing a golf course in downtown Vancouver. The Court held that there was a fiduciary relationship between the Crown and the First Nation, “rooted in the concept of aboriginal, native or Indian title”. An Indigenous nation may only surrender land to the Crown and cannot transfer any interest in land, including a lease, to a third party. Hence, the Crown must intercede to accommodate the transfer. The Crown holds a duty to act on behalf of Indigenous

Peoples viz-a-viz third parties, and has an obligation to exercise its discretion in a manner that reflects its fiduciary duty. The Court found that the Crown had breached this duty. The First Nation expected to receive a fair return on its land, but the Crown ignored the instructions of the First Nation and negotiated less than favourable returns.

...the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal. (*Guerin* pgs 388-389)

There are many instances where the Crown has not met its fiduciary obligation – its duty of ‘utmost loyalty’ to Indigenous Peoples (RCAP 1996). In part this may be a result of the inherent conflict of interest that exists between the sovereignty of the Crown and its fiduciary obligations to Indigenous Peoples.

#### **6.1.4 Rights to Natural Resources**

The rights of Indigenous Peoples to exercise their traditional ways of life, such as hunting, fishing, or harvesting timber, have been the subject of much litigation in Canada, too many cases to consider in detail here. Below are a number of key decisions that relate to limits on these activities including conservation and activities in protected areas. A number of these cases were important for additional reasons, which will be highlighted as well.

*R v Sparrow*, 1990 was the Supreme Court of Canada's first opportunity to interpret the application of section 35 (1) of the *Constitution Act, 1982*. It established a four-part framework for proving an “existing aboriginal right,” within the meaning of s 35 (1) and the justification required of the Crown to infringe those rights. Of critical importance was the recognition by the Court that Aboriginal rights take priority, except in cases of conservation and that consultation is generally required to prove the Crown is justified in limiting Indigenous rights.

Mr. Sparrow, a Musqueam from Vancouver British Columbia, was charged under the British Columbia provincial fisheries legislation for fishing with a drift net longer than that permitted

by the terms of its Indian food-fishing license. He did not contest this charge but instead pled he had committed no offence by virtue of the fact that he was exercising an existing Aboriginal right, and accordingly, the provincial regulatory provision could not apply to him. The provinces have authority to regulate the fishery according to the federal *Fisheries Act*. The Court was therefore required to determine whether the federal government's power to regulate fishing under section 91(12) of the Constitution Act 1867, was now limited by s 35 (1). The specific question was whether the net length restriction within the Musqueam food fishing license, issued pursuant to the British Columbian fishing regulations, was inconsistent with s 35 (1). The Supreme Court explored the effect of granting constitutional protection to Aboriginal and treaty rights.

In interpreting the meaning of "existing aboriginal rights," it noted:

- Rights to which s 35 (1) applies are those that were in existence when the *Constitution Act, 1982* came into effect;
- An existing right cannot be read so as to incorporate the specific manner in which it was regulated before 1982; and
- The phrase must be interpreted flexibly, so as to permit the evolution of such rights over time.

The SCC set out a four-part test to determine:

1. If there was proof a right existed;
2. Whether the right had been explicitly extinguished;
3. Has there been a prima facie infringement of the Indigenous right; and
4. Whether the Crown could justify infringement of the right.

In the first part of the test the onus is on the Indigenous person to establish an Aboriginal or treaty right. The Aboriginal right alleged was said to be one exercised by the Musqueam from time immemorial and before European settlement. The Court accepted expert evidence that emphasized both the role of salmon in the system of beliefs of the Salish people, and the attitude of caution and respect towards salmon that resulted in their effective conservation. Further, that the Musqueam had lived in the area as an organized society long before the coming of European settlers and that the taking of salmon was an integral part of their lives and remains so to this day. The Court found there was evidence of sufficient continuity of the right.

In the second part of the test, the burden shifts to the Crown to establish extinguishment of the right. This step requires the Crown to establish extinguishment on a clear and plain standard. That is, that the legislation in question must betray a clear and plain intention to extinguish the right (*Sparrow* p. 26). The Crown maintained the Musqueam's aboriginal right to fish had been extinguished by regulations under the *Fisheries Act*. The Court examined the history of the regulation of fisheries in British Columbia and noted that the right of First Nations to fish had become increasingly regulated. However, it found that the fact of the right having been "controlled in great detail by the Regulations" did not amount to extinguishment. Further, it found no clear and plain intention to extinguish the Aboriginal right to fish within



the *Fisheries Act* or its accompanying regulations. As such the Crown failed to discharge its burden of proof, confirming that the Musqueam have an existing aboriginal right to fish in the area where Mr. Sparrow was charged.

The Court noted that the effect of granting constitutional protection to Aboriginal and treaty rights through the operation of section 35 (1) of the *Constitution Act, 1982*, was to:

- Provide a solid constitutional base upon which subsequent negotiations can occur;
- Afford Aboriginal people constitutional protection against Provincial legislative power; and
- Give to individuals the ability to question sovereign claims, and to the courts, jurisdiction to determine these disputes between individuals and the State, and to strike down offending legislation as inapplicable to Aboriginal people (*Sparrow* p. 33).

The Court interpreted the words “recognized and affirmed” within s 35 and noted, amongst other things:

- Rights that are recognized and affirmed are not absolute (*Sparrow* p. 36);
- Laws or regulations affecting aboriginal rights are not automatically of no force and effect by the operation of s 52(1) of the *Constitution Act, 1982* that the Constitution is the supreme law of the land, “and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”, though such legislation will nonetheless be valid if it meets the test for justifying an interference with a right recognized and affirmed by s 35 (1);
- Regulation affecting aboriginal rights must be enacted according to a valid objective;
- Giving aboriginal rights constitutional status gives them a priority over commercial or recreational fishing by non-Indigenous people, but after conservation purposes (*Sparrow* p. 37).

The third step shifts the burden back to the claimant to establish that the legislation in question has the effect of interfering with an existing aboriginal right. This requires examining the characteristics of the right at stake. There are two principles that guide this analysis. First, the Courts must be careful to avoid the application of traditional common law concepts of property to Aboriginal rights, which are *sui generis*. Second, it is crucial to be sensitive to the Aboriginal perspective on the meaning of the rights at stake. Determining whether fishing rights have been interfered with such as to constitute a prima facie infringement of s 35 (1) requires asking first, is the limitation unreasonable? Second, does the regulation impose undue hardship? Finally, does the regulation deny to the holders of the right, their preferred means of exercising that right?

The fourth and final element of the framework addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. It is the Crown’s burden to establish justification for regulation of the right. Within this inquiry two questions must be answered. First, is there a valid legislative objective? This sees the Court inquiring into whether Parliament’s objective in authorizing the Department to enact regulations regarding fisheries

is valid. The Court noted for example, that an objective aimed at preserving s 35 (1) rights by conserving and managing a natural resource, is valid. Second, if a valid legislative objective is found, the Court must consider whether the honour of the Crown, which is always at stake in dealings with Aboriginal peoples, has been upheld, particularly in light of the special trust relationship and the responsibility of the government viz-a-viz aboriginal peoples. In applying this test, the Court acknowledges that the constitutional recognition and affirmation of aboriginal rights may yield conflict with the interests of others given the limited nature of the resource, but as a constitutional right, *priority* must be given to the exercise of the Indigenous right after valid conservation measures have been implemented.



**Wildflowers © Sandra Lucas**

As part of this “analysis of justification” further questions must be considered, including: has there been as little infringement as possible in order to effect the desired result; in a situation of expropriation, is fair compensation available; and has the aboriginal group in question been consulted with respect to the conservation measures being implemented? As we will see, the requirement for consultation sent a spark through Indigenous – Canadian relations, resulting in new federal policy, new processes for engagement between the parties, and further litigation.

The Court ordered a re-trial so as to enable findings of fact according to the tests it had set out. This was never heard.

Three cases, *R v. N.T.C. Smokehouse Ltd.*, *R. v. Gladstone* and *R. v. Van der Peet*, collectively referred to as the *Van der Peet* trilogy, decided in 1996, all revolved around whether there exists an inherent Aboriginal right to sell fish. In these decisions, the Supreme Court of Canada described a test for determining what constitutes an Aboriginal right that would be protected under section 35 of the Constitution. In short, the Court found that the right must be “an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right” (*Van der peet* 1996 para. 46). The court held in all three cases that the accused had no right to fish for commercial purposes and no right to sell, barter, or trade fish, because the majority found on the facts that these had not been part of the traditions of these communities. The dissent decisions, particularly those of Justice McLachlin, provide some insight with the problems with these decisions. In each case, McLachlin characterized the Aboriginal right as an historic use of the resource. She found on the facts that trade and barter of fish was a common practice among each of the Indigenous Peoples affected by the decision and that commercial sale of fish or sale, barter or trading of fish on a non-commercial basis were merely modern extensions of those practices. In particular was the concern that the ‘priority interest’ of Indigenous Peoples described in *Sparrow*, was down graded to an interest that does not conflict with non-Indigenous use; that the interests of the majority non-Indigenous people were being allowed to trump minority Indigenous rights. In *Van der Peet* she wrote that the majority decision was, among other things, “indeterminante and ultimately more political than legal” (*Van der Peet* 1996 para. 302). Her concern was taken up by the judge in *Tsilhqot’in*, where he states,

The result [of *Gladstone* and *Van der Peet*] is that the interests of the broader Canadian community, as opposed to the constitutionally entrenched rights of Aboriginal peoples, are to be foremost in the consideration of the Court. In that type of analysis, reconciliation does not focus on the historical injustices suffered by Aboriginal peoples. *It is reconciliation on terms imposed by the needs of the colonizer* [emphasis in the original] (*Tsilhqot’in* 2007, para 1350).

McLachlin also made notable remarks regarding reconciliation in her dissent. A “morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives’ of the ‘two vastly dissimilar legal cultures’ of European and aboriginal cultures” (*Van der Peet* 1996 para 310). The Courts could assist with defining the rights, but it is up to the parties to negotiate how those rights will be accommodated.

Another fishing case, this time on the east coast of Canada, generated a violent response by non-Indigenous Peoples and the highly unusual situation of the Supreme Court of Canada issuing a ‘clarification’ of its decision. In *R. v. Marshall* (1999a) a Mi’kmaq was accused of fishing for eels out of season, without a license, and selling eels without a license. The accused argued that treaty rights allowed this activity. The Court held in this case the treaty clearly anticipated some commercial activity by the Mi’kmaq. The court concluded that this allowed them a right to trade for sustenance or a ‘moderate livelihood’. Following the release of this decision, non-Indigenous fishers

from New Brunswick, also in Mi'kmaq territory, objected to the suggestion that Indigenous Peoples could fish out of season thus potentially threatening the lobster stock and undermining their commercial interests. They destroyed thousands of Mi'kmaq lobster traps and damaged three Mi'kmaq fish processing plants. Three months later, the Court responded to a request for a re-hearing and a stay of its decision brought by the West Nova Fishermen's Coalition, a group of non-Indigenous fishers (*R. v. Marshall* 1999b). While the court dismissed the application, it took the opportunity to clarify its earlier decision. This is unprecedented in Canada jurisprudence. The court wrote that licensing restrictions and closed seasons could be imposed on Indigenous Peoples provided they were justified infringements of their rights. Also of note, these decisions recognized that the treaties in the eastern maritime provinces did not relate to land, but were instead peace agreements. As such, although this was not specifically litigated in these cases, the Mi'kmaq, Malliset and Passamaquoddy Peoples of this region continue to hold Aboriginal title to the lands. This has spurred negotiations between the Mi'kmaq of Nova Scotia, the Province of Nova Scotia and federal Crowns of a *Mi'kmaq – Nova Scotia – Canada Framework Agreement* and *Terms of Reference for a Mi'kmaq-Nova Scotia- Canada Consultation Process* (AAND, 2010b).

In a number of cases including *R v. Sparrow*, *R. v. Gladstone*, *R. v. Nikal*, *Kruger and al. v. The Queen*, and *R. v. Marshall*, the Supreme Court has confirmed that protection of the land is integral to the retention of Indigenous cultures. They have stipulated that conservation is an interest that stands prior to the rights of Indigenous Peoples. While this maybe laudable, there is concern among a number of legal commentators that the ethic of conservation is being used to defeat Indigenous rights (Chapeskie 1992, Goldenburg 2002).

Goldenburg, a legal scholar identifies four ways in which the courts have used conservation to deny Indigenous rights.

First, the courts have provided little guidance on the point at which conservation concerns override Indigenous rights. Without such clarification, the value of 'conservation' as a yardstick for determining infringement is called into question. Is it enough for the government to suggest there might be a conservation problem to justify infringement, or must there be actual proof of a causal connection between conservation objectives and the exercise of an Aboriginal right? Second, where the courts have invoked concerns about conservation, they have facilitated economic gain at the expense of First Nation interests, enhanced the rights of [non-Indigenous people], and restricted Indigenous access to a resource. Third, arguments about environmental conservation are being used to justify racism and paternalism. Fourth, Indigenous peoples are incapable of environmental management (cited from Wilson 2007, p. 78-79).

It is proposed here that the question is not so much whether lands and resources need to be conserved, rather who is to be involved in making that determination. It cannot be the Canadian government alone, but instead must be an issue for consultation, accommodation and reconciliation.

In *R. v. Sioui*, four Wendat were charged with cutting trees, making a fire and camping in a Quebec provincial park, contrary to provincial regulation. They relied on the 1760 treaty between the British and the Wendat allowing them the 'free Exercise of the Religion, their Customs, and Liberty of trading with the English' (*Sioui*). The Court found the agreement to be a treaty for use of the territory, despite the fact it did not specify the territorial boundaries of this right. As per section 88 of the *Indian Act*, the provinces have no authority to deny Indigenous Peoples' their treaty rights, thus making it illegal for the province to deny access to the parklands for the express purpose of exercising treaty rights. In addition, the court found that the exercise of these rights did not run counter to the purpose to which the Crown was putting the land – a park.

*R. v. Sundown*, 1999, addressed a similar situation. In this case, John Sundown, a Cree from Treaty 6 territory in Saskatchewan, was charged by the province for constructing a cabin in a provincial park, contrary to provincial legislation. Sundown had constructed the cabin for the purpose of facilitating his hunting trips in the park. Treaty 6 permits the continued exercise of rights to hunt and fish on treaty lands 'not required or taken up for settlement' by non-Indigenous Peoples. The federal government unilaterally amended Treaty 6 when it transferred natural resources to Saskatchewan under the *Natural Resources Transfer Agreement*. Under the provisions of the provincial legislation, Indigenous Peoples were permitted to exercise their treaty rights to hunt in the park. The Supreme Court of Canada found that the construction of the cabin was "reasonably incidental to the right to hunt". The province has no right, therefore, to restrict the construction and use of the cabin by members of the First Nation.

#### **6.1.5 Rights to Self-determination and Self-government**

The right to self-determination by Indigenous Peoples has never been the central issue of litigation in the Canadian courts. It was an issue in the *Reference re Secession of Quebec*, 1998. The Court found,

Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted: the

continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities (*Reference re Secession of Quebec*, headnotes).

The determination of citizenship as a member of an Indigenous nation, as a related element of self-determination, has been litigated however. As described above, the Inuit have the right to determine their own citizenship under comprehensive agreements, as do some First Nations and one Métis community. Indians are defined by the federal government under the provisions of the *Indian Act*. This has been litigated in Canada and internationally in the *Mclvor* and *Lovelace* decisions respectively.

*Sandra Lovelace v. Canada* was heard by the United Nations Human Rights Committee in 1981. Ms. Lovelace filed suit after being deemed by Canada to be no longer status Indian, because she had married a non-Indigenous man. At the time the *Indian Act* discriminated on the basis of sex. If a status Indian woman married a non-Indigenous man, she and her children lost status rights including access to federal programs for Indigenous people in education and housing, the right to live on a reserve, and traditional hunting and fishing rights. Conversely, if a First Nations man married a non-Indigenous woman, she was deemed to be status Indian and eligible to receive these rights, as were her children, at least until the age of 21. The result of these provisions has been to split families over the years. The UN Human Rights Committee found that the provisions were violations of the *International Convention on Civil and Political Rights*, to which Canada had been a member since 1976. The *Indian Act* was amended to some degree in 1985 to address this. It established a system to reinstate status to women who had lost status since marrying a non-Indigenous man. But, children of mixed blood could not pass on their status unless their children resulted from a union with someone else who held Indian status, the so-called “second generation cut-off”. In *Mclvor v. Canada (Registrar, Indian and Northern Affairs)*, 2009, the British Columbia Court of Appeal found that these amendments to *Indian Act* also violated the Canadian *Charter of Rights and Freedoms*, on the basis of sex. The consequences of the offending legislation are complex, but the Court found that women and their children who had lost status under the pre-1985 amendment and reinstated were in a different situation following the 1985 amendments than were men. The Court struck down the offending

provision giving the federal government one year to make amendments. In 2011, the federal government passed *The Gender Equity in Indian Registration Act*.

Citizenship in the Métis nation was tested in *R. v. Powley*, 2003. Steve Powley and his son shot a bull moose and transported it to their home. Lacking a valid outdoor card issued by the Ontario Ministry of Natural Resources authorizing such action under the provincial regulations, Powley was promptly charged with unlawfully hunting moose and knowingly possessing game hunted in contravention of Provincial legislation. Powley did not defend the charges but argued that as Métis, he and his son enjoyed an aboriginal right to hunt food in the in the Sault Ste Marie area that the Ontario Government could not infringe without proper justification. The Supreme Court of Canada was required to determine whether members of the Métis community in and around Sault Ste Marie, Ontario enjoy a constitutionally protected right to hunt for food under s 35 of the *Constitution Act*, 1982, and within this inquiry, whether provisions of the provincial regulations which prohibit hunting moose without a license, unconstitutionally infringe such an aboriginal right.

In the course of this the Court had to determine whether Powley and his son were Métis. To answer this question, the Court took the *Van der Peet* integrality test for establishing Aboriginal rights as a template, and modified it to account for the important differences between Indian and Métis claims, so as to appreciate the distinct history and post contact ethno-genesis of the Métis people. To encapsulate the distinctness of the Métis people from the Indians and Inuit also protected by s 35 (1)), the Court identified the Métis as distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life and recognizable group identity, separate from their Indian or Inuit or European forbears. Moreover, that “*what distinguishes the Métis people from everyone else, is that they associate themselves with a culture that is distinctly Métis (Powley , para. 23).*” The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The Court accepted the trial judge’s findings of fact that a distinctive Métis community emerged in the Upper Great Lakes region in the mid 17<sup>th</sup> Century and peaked around 1850. The Court observed that in addition to demographic evidence, proof of shared customs, traditions and collective identity is required to demonstrate the existence of a Métis community that can support a claim to site specific aboriginal rights. Further, the existence of an identifiable Métis community must be demonstrated with some degree of *continuity and stability* in order to support a site-specific Aboriginal rights claim.

Aboriginal rights are communal rights. They must be *grounded in* the existence of a historic and present community, and they *may only be exercised by virtue of* an individual’s ancestrally based membership in the present community. The Court accepted expert evidence of the continued existence of a Métis community in and around Sault Ste Marie, despite the displacement of many of the community’s members in the aftermath of the 1850 treaties. The advent of European control over this area interfered with, but did not eliminate, the Sault Ste Marie Métis community and its

traditional practices. They continued to live in the region and gain their livelihood from the resources of the land and waters.

The Court looks to three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s 35, specifically:

- Self identification as a Métis;
- Ancestral connection to a historic Métis community; and
- Acceptance by the modern community, whose continuity with the historic community provides the legal foundation of the right being claimed.

To accommodate the unique status of the Métis as an aboriginal people with post contact origins, the Court adapted the pre-contact approach in *Van der Peet*, to a post-contact but pre-control test that identifies the time when Europeans effectively established political and legal control in a particular area. This focuses on the period after a particular Métis community arose and before it came under the effective control of European laws and customs. As long as the practice grounding the right is distinctive and integral to the *pre-control* Métis community, it satisfies this prong of the test. The Court found that hunting for food was an important feature of the Sault Ste Marie community, and the practice has been continuous to the present.

The Court found infringement of the aboriginal right to hunt for food owing to Ontario's failure to recognize any Métis right to hunt for food or any special access rights to natural resources for the Métis whatsoever, coupled with the consequent application of the challenged provisions to the Powleys. The Ontario government advanced the justification that the regulations were required for conservation purposes. The Court rejected this justification owing to the lack of evidence to substantiate a need to conserve the moose population. It concluded "Ontario's blanket denial of any Metis right to hunt for food" could not be justified (*Powley* para.48).

Canada has acknowledged a limited right of self-government of Indigenous Peoples under the Inherent Rights Policy described earlier. Self-government agreements have been concluded with all Inuit, some Métis, and some First Nation Peoples. Few cases on this particular issue have come before the courts. Two are worthy of note.

In *R. v. Pamejewan* the Supreme Court of Canada considered whether the accused held a right to self-government that includes a right to regulate gambling, specifically bingo games, on reserve. The accused argued they held a right to self-government that was not extinguished by provincial legislation regulating high stakes gambling. The court relied on *Van der Peet* regarding the definition of Indigenous rights, specifically it must be 'an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right'. The Court found that there was no evidence of an historic practice of gambling or regulation of gambling by the Anishnabek Nation of which the accused were members. It therefore did not have to consider whether they



held a right to self-government, but would apply the same test to make this determination.

In 2000, in *Campbell, et al v. The Attorney General of British Columbia, the Attorney General of Canada and the Nisga'a Nation*, three members of the Legislative Assembly of the Province of British Columbia challenged the constitutionality of the *Nisga'a Final Agreement*. They argued that it granted jurisdiction to the Nisga'a Nation powers that had been exhaustively divided between the provinces and federal government as per section 91 and 92 of the Constitution. In the course of examining the claim, the British Columbia Supreme Court considered whether section 35 of the Constitution protected the right to self-government. It found that 'at least a limited right to self-government, or a limited degree of legislative authority, had remained with aboriginal peoples after the assertion of sovereignty and after Confederation (*Campbell* para. 86). The court stated that the "right to aboriginal title 'in its full form', including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is ... constitutionally guaranteed by Section 35 (*Campbell* para. 137)." The Nisga'a final agreement, or comprehensive self-government and land claim treaty, was therefore constitutionally valid. This case only went as far as the British Columbia Supreme Court and therefore is only legally applicable in British Columbia, but is generally considered to be good law for the rest of the country.

It is interesting to note that Mr. Campbell went on to become Premier of the Province of British Columbia. He negotiated a *New Relationship* document with the BC Indian Chiefs' Council, the BC First Nations Chiefs, and the First Nations Summit in 2005. Among other things, it commits to a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights. "Our shared vision includes respect for our respective laws and responsibilities. Through this new relationship, we commit to reconciliation of Aboriginal and Crown titles and jurisdictions" (British Columbia, 2005).

#### **6.1.6 Duty to Consult**

The duty to consult has emerged as a legal tool that may be employed to seek protection of Indigenous rights to culture, ways of life, and protection of land.

The notion arose in the *Sparrow* decision discussed above when the court identified the means to test the constitutionality of a provision affecting Indigenous rights. The fourth limb of the test is the requirement to justify the infringement as to as small a degree as possible. The Supreme Court of Canada indicated that a consideration relevant to this inquiry is whether "the aboriginal group in question has been consulted with respect to...the measures being implemented" (*Sparrow* at p. 1119). *Delgamuukw* confirmed and expanded on the duty to consult in the context of a claim for Aboriginal title to land or resources. The court suggested that duty varied with the circumstances.

In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions...this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples...In most cases it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands (*Delgamuukw* para. 168).

The authors know of no instance that the Crown has sought the consent of an Indigenous nation about hunting or fishing regulations outside of a comprehensive claim. In addition, the judge stated that in his opinion, agriculture, forestry, mining, infrastructure and hydro electric development, general economic development, settlement of non-Indigenous people and the protection of the environment were all valid activities that could justify infringing Indigenous rights to title (*Delgamuukw* para. 165), even if Indigenous Peoples were consulted.

In 2004, the Supreme Court of Canada was tasked with forging the general framework of the duty to consult in the case of *Haida Nation v. British Columbia (Minister of Forests)*. The Haida brought the suit to challenge provincial forestry licensing practices in their territory. The Haida have claimed sovereignty over Haida Gwaii and were concerned that the resources of their territory would be stripped before they settled their claim against the Canadian government. The province argued it had no duty to consult until the Haida had proved their land claim. The court concluded that the Crown “cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests”(*Haida* at para 27). In deciding how to accommodate these types of situations, the court expanded on the duty to consult as follows:

- The Government’s duty to consult is grounded in the honour of the Crown, which is always at stake in dealing with Indigenous Peoples, and must be exercised generously;
- Section 35 of the Constitution is a promise made to Indigenous Peoples that their rights will be protected, realized through a process of honourable negotiation;
- Different circumstances warrant different levels of consultation depending on the seriousness of the potential adverse affect on the right and the strength of the Indigenous claim to the right;
- This ranges from a duty to do little more than provide notice of the intention of the Crown to take an action to the requirement of full consent as stipulated in *Delgamuukw* but does not amount to a veto;
- The duty to consult arises when “The Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it (*Haida* para 35);

- The Crown must be reasonable in its exercise of the duty and correct in law in determining when to execute the duty to consult and the scope of the duty;
- Both the federal and provincial governments have a duty to consult;
- Corporations may also have statutory duties to consult with Indigenous Peoples, but the government cannot delegate its duty to consult to a third party.

The purpose of consultation is to facilitate the accommodation of Indigenous rights. Consultation must genuinely attempt to address the concerns of Indigenous peoples about the impact on their rights. Indigenous Peoples may not frustrate efforts by the Crown to consult in good faith. Consultation and accommodation are a means available to the parties to facilitate reconciliation. Ultimately, the court held that the Crown had not met its duty to consult and accommodate in this instance.

At the same time, the Supreme Court of Canada issued its decision in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*. This case arose as a result of an application by a mining company to re-open a mine in North Western British Columbia in a pristine area at the confluence of the Taku and Tulsequah Rivers. Members of the Taku River Tlingit First Nation objected to the proponent's plans to build a 160 km access road from the mine through a portion of their traditional territory. The Taku have no treaty with Canada and presumably continue to hold Aboriginal title to the lands. In this case, there had been some consultation, through the operation of the environmental assessment process. The Taku had representatives participating in the process. The environmental assessment committee decided that there were no environmental threats posed by the road and thus approved the mine's reopening and the construction of the road. The Taku objected to this conclusion. They argued that their Indigenous rights were not given due consideration in the process, and in fact, there is no requirement in the environmental assessment process to consider Indigenous rights although Indigenous Peoples must be invited to participate. The Court held they had been adequately consulted on their rights and accommodated, despite the fact during the assessment process it had been made clear that Taku rights had to be considered elsewhere. There would be further opportunities, the court promised, in the course of finalizing plans for the road for consultation and accommodation.

In both the *Haida* and *Taku* decisions that court was dealing with lands held under Aboriginal title. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* the First Nation sued the federal government for its failure to consult with respect to impacts on treaty rights and lands. At issue in this case was the construction of a new road through Wood Buffalo National Park. The Mikisew hold treaty rights under Treaty 8 to continue to hunt in the park and in fact their reserve is within its boundaries. They feared the road would hinder the exercise of their rights. The court found that the duty to consult continues on treaty lands and with respect to treaty rights. The Crown did not

properly fulfill its obligations to consult on the facts of the case and failed to substantially address the concerns of the Mikisew Cree.

These three cases form the backbone of the consultation decisions. In establishing the duty to consult, the courts have provided Indigenous Peoples with a mechanism to encourage greater respect for their rights. There have been a plethora of cases since, including *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010, which held that the duty to consult did not apply to past actions taken prior to the establishment of duty to consult; compensation may be more appropriate. However, the courts prefer to enforce the process of consultation and leave it to the Crown and Indigenous Peoples to negotiate an appropriate accommodation. Considering the existing power imbalance between the Crown and Indigenous Peoples this may not result in a just result for Indigenous Peoples.

6.1(ii) discuss any major precedents set and how they may be affecting or used by other communities to leverage their own causes

As described above, cases such as *Calder*, *Sparrow*, *Delgamuukw*, and *Haida* have been significant decisions affecting the interpretation and application of Indigenous rights. While there are concerns about the suitability of some of these decisions, they have been used to leverage recognition of various Indigenous rights in multiple scenarios; each case helping to build a better understanding of the guarantees of section 35 of the Constitution. They have generally spurred positive action by governments towards greater recognition of and respect for the rights of Indigenous Peoples. These and similar Indigenous law cases are relied upon regularly in similar actions and in advocacy for rights. Litigation of the failure to consult is a particularly active cause of action.

6.1 (iii) Are there any cases from other countries that have been used domestically to leverage Indigenous causes

The *Lovelace* decision at the United Nations Human Rights Tribunal has been discussed above, but there are some decisions from the United States and Australia that have been used by the Canadian courts to describe circumstances for Indigenous Peoples in Canada.

The Supreme Court of Canada has cited *Mabo v. Queensland [No. 2]* in the *Van der Peet* decision. In *Mabo* the Australian Supreme Court writes, “Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory (*Van der Peet* para. 40)”.

A series of decisions by United States Chief Justice Marshall have been referenced with approval in Canadian jurisprudence regarding rights to land and self-government. The decisions in *Cherokee Nation v. Georgia*, *Johnson v. McIntosh*, and *Worcester v. Georgia* were cited in *Van der Peet* to this effect. The Supreme Court of Canada quotes the

American jurist where he declared Indigenous Nations were “distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws” (*Van der Peet* at p. 37). The Canadian court in *Van der Peet* went on to find that section 35 of the Constitution recognizes “the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions...(Van der Peet at p.44)”. In *R. v. Sioui*, the Supreme Court of Canada cites *Worcester v. State of Georgia* when considering whether a treaty existed between Great Britain and the Wendat Nation. Chief Justice Marshall wrote, Great Britain “considered [Indigenous Nations] as nations capable of maintaining relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged [Emphasis deleted]”. Chief Justice Lamar of Canada wrote, “The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible” (*Sioui*). It is interesting to note that Tonya Frichner, Special Rapporteur, in her preliminary study of the Doctrine of Discovery considers *Johnson v. McIntosh*. Ms. Frichner writes,

In the *Johnson v. M’Intosh* ruling, the USA Supreme Court claimed that the original rights of American Indians, “to complete sovereignty, as independent nations,” had been “necessarily diminished” by the right of discovery. This “right” of “discovery,” said the Court, was confined to countries “unknown to Christian people.” The Supreme Court claimed, in other words, that Christian people locating lands in the Americas that until then had been “unknown to Christian people” had ended the right of American Indian nations to be free and independent. On the basis of the above language, the United States Supreme Court used the Doctrine of Discovery to prevent the application of the first principle of international law to American Indian nations and their traditional territories: “The authority of a nation within its own territory is absolute and exclusive.” To give themselves unfettered access to the lands, territories, and resources of indigenous peoples, the Christian States of Europe, and later state actors considered this principle only applicable to themselves [references deleted] (United Nations Special Rapporteur, 2010).

## 6.2 Comment

As noted above, these decisions have fostered greater respect for the rights of Indigenous Peoples and encouraged governments to work more cooperatively with Indigenous peoples. The *Calder* decision was particularly significant, because it confirmed that Aboriginal title continued to exist and encouraged the federal and provincial governments to enter into negotiations with Indigenous nations to resolve outstanding claims and negotiate comprehensive agreements. The *Sparrow* decision was equally important because of the reference to consultation as a mechanism to

justify government infringement of an Indigenous right. The *Haida*, *Taku*, and *Mikisew* decisions reinforced this. The *Lovelace* and *McGivor* cases addressed gender issues that both resulted in legislative amendment and improved outcomes for Indigenous women.



**Middle Mouth, Naiscoot River on the shores of Georgian Bay © Sandra Lucas**

In addition to these important cases on Indigenous rights, there are also a number of other cases and inquiries that have helped to promote greater respect. This includes the *Ipperwash Inquiry* that among other things, investigated the racism expressed by the military and the Ontario Provincial Police and possibly the Premier of Ontario towards First Nations people and has helped to resolve a long standing conflict. The class action suit brought by survivors of the residential schools against the federal government and various religious organizations, resulted in an agreement for monetary compensation, additional health funding, a public apology by the Prime Minister in the House of Commons, and the establishment of the Truth and Reconciliation Commission. An Aboriginal Justice Inquiry of Manitoba was established to examine charges of systemic racism, finding “The justice system has failed Manitoba’s Aboriginal people on a massive scale (Aboriginal Justice Inquiry of Manitoba, 1999, p. 1) leading to greater awareness of the challenges facing Aboriginal peoples. In 2003, the Saskatchewan government held an inquiry into the death of Neil Stonechild, who was found dead of hypothermia in a field outside of Saskatoon after having last been seen in police custody. Although the

inquiry found that the police investigation was insufficient to demonstrate a link, it did find that the local police expressed an attitude of “self-protection and defense” that continued despite “the suspicious deaths of a number of Aboriginal persons and the abduction of an Aboriginal man (Commission of Inquiry, 2004, p. 212). This too has brought systemic racism to light.

There are encouraging signs that things are improving for Indigenous Peoples in Canada, in part as a result of developments in the common law. In particular, decisions around Aboriginal title, access to resources and territory, rights to self-government and the emerging right to consultation are of interest as they relate to respect for ICCAs. Generally speaking, these decisions have been helpful in establishing credibility for the claims of Indigenous Peoples and developing processes for securing their respect. Much remains contentious however and additional litigation is to be expected.

## **7. IMPLEMENTATION**

### **7.1 Identify and Comment on Key Factors that Contribute to or Undermine Effective Implementation of Supportive Provisions**

In answer to this question, it is important to bear in mind that there are few supportive provisions for Indigenous Peoples in Canada to identify, govern, manage, or maintain a traditional relationship with protected areas. For non-status First Nation Peoples, there are no provisions that support self-government, self-determination, or land rights. The *Indian Act*, which governs status First Nation Peoples does not include provisions for self-government or self-determination and only very limited rights to land. Only a handful of First Nation Peoples hold self-government agreements as well as agreements for land rights and are no longer governed by the *Indian Act*. Inuit have limited rights of self-government and land rights under constitutionally protected comprehensive agreements. The Métis have very limited rights to land and limited opportunities for co-management. The very fact that supportive provisions are so few is a key factor in undermining the potential for Indigenous Peoples’ governance of protected areas.

That said, there are some very important potentially supportive provisions. These include the Constitution, the common law, and government-to-government constitutionally protected comprehensive and self-government agreements. They all contain provisions that demand respect for the legal rights of Indigenous Peoples. There are also some provisions in federal, provincial and territorial legislation that support at least co-management of protected areas, examples of which have been described earlier. Canada has progressed in its relations with Indigenous Peoples. There is greater

awareness of the rights of Indigenous Peoples and greater respect for these rights. It is not suggested here that Canada is not respecting any rights at all. To the contrary, and there are some excellent examples of Indigenous Peoples and other Canadians working together.

Generally speaking, however, Canada lacks the political will and vision to fully respect these rights, and denies Indigenous Peoples access to and use of resources or a fair share of the wealth.

For example, the *Royal Proclamation, 1763*, which requires treaties prior to settlement, has been ignored for centuries resulting in the wholesale settlement and development of vast territories that remain under Aboriginal title. This includes the provinces of Nova Scotia, Prince Edward Island, New Brunswick and parts of Quebec, as well as much of British Columbia.

In addition, Canada has ignored treaty rights established under most historic treaties, has adopted interpretations of these treaties most favourable to Canada's position, and reneged on commitments to land, financial support, and access to resources (RCAP 1996). Canada presumes these treaties transferred all interests in land to the Crown. First Nation Peoples were under the impression that they were agreeing to share the land when the treaties were negotiated (RCAP 1996). Some treaties have been amended unilaterally by Canada.

Canada has also reneged on its fiduciary responsibility to Indigenous Peoples. Canada made Indigenous Peoples legal wards of the state and then proceeded to ignore its responsibilities for those it controlled.

At times the courts have challenged Canada's interpretation of its legal obligations, but as we have seen above, has also at times adopted perverse opinions that contribute to the retention of the status quo.

The disparity in economic well-being and various social well-being indicators are evidence of the failure to share the wealth. The budget of the Department of Indian and Northern Affairs has been capped at a 2% growth rate per annum since 1997 compared to the average 6% rate that applies to other departments. At present this does not even keep up with inflation. Indigenous Peoples generally earn less money (Wilson and MacDonald, 2010). While Canada is one of the wealthiest nations, First Nations Peoples living on reserves live in third world conditions (CTV News, 2011).

## **7.2 Provide Specific Recommendations to the Relevant Agencies and Indigenous Peoples about how they could Improve Implementation of Supportive Laws and Policies**



Until respect for the rights of Indigenous Peoples becomes a priority for the Canadian Government backed by a fair share of the resources of this land, Indigenous Peoples will be unable to effectively govern their lands for conservation. Indigenous Peoples and other Canadians must engage with the political process in order to create the will necessary for implementation. This can be through partisan or public advocacy processes. We must demand adherence to the rule of law and funding at levels necessary to meet legal commitments as a first priority.

Canada currently sees the obligation to obtain the free, prior and informed consent of Indigenous Peoples to pursue activities on their lands as constituting a veto power over the decision-making authority of the Crown. They need to move from this position to one that recognizes Indigenous Peoples as

Reconciliation is the only way forward. The federal government and many provinces and territories have consultation policies, but their implementation remains inconsistent. Canada must move beyond

consultation as simply a process or a hoop to leap through on the way to making whatever decision they were going to in the first case. Instead, consultation must be considered a mechanism for generating dialogue for reconciliation. Serious efforts to accommodate the rights of Indigenous Peoples must be pursued.

We can only reach the objective of reconciliation by being conciliatory towards each other in our processes. A rebalance of power and resources is required; things not easily given up by those who have them. The Royal Commission on Aboriginal Peoples has described positive ways forward based on principles of respect, sharing, recognition and responsibility.

Reconciliation is both a process and an objective.

More specifically, there are many things that Indigenous Peoples and various government agencies could do to improve the development and implementation of laws and policies that support Indigenous governance and management of protected areas. Many of these have been alluded to elsewhere in the paper. This includes:

- Ensuring the full integration of Court decisions in a meaningful way in law and policy;
- Increase and improve means for Indigenous Peoples to participate in the governance by recognizing the governments of Indigenous Peoples as a legitimate third order of governance in Canada;
- Reduce the dependency on federal funding for Indigenous Peoples by establishing own-source revenues streams for Indigenous Peoples and by establishing equalization payments to Indigenous Peoples;
- Reduce the degree of competition that often exists in federal or provincial funding processes which require Indigenous Peoples to compete with each other and which has the affect of restricting cooperation between Indigenous Peoples

- to address common concerns;
- Industry must do more to support credible research, culturally based in Indigenous epistemology, which will, in the long run, reduce friction between industry and Indigenous Peoples;
- Need greater capacity to share research and case studies between Indigenous Peoples and organizations and with the broader Canadian audience to ensure that best practices are identified and used by others;
- Need for additional resources to support the integration of western science and Indigenous knowledge;
- Government research and policy must respect Indigenous knowledge and greater efforts must be made to integrate Indigenous knowledge in law and policy and include Indigenous knowledge holders in its development;
- Federal, provincial and territorial government departments and agencies must work better together to enhance cooperation and must stop passing responsibility for the inclusion of Indigenous Peoples and their values in government decision making;
- Indigenous Peoples need to take advantage of opportunities that exist to promote their world views, share their perspectives, participate in protected areas management and governance, and take up rights of self-government despite opposition that may result from other levels of government;
- Canada must work harder to ensure respect for and implementation of the various international instruments that exist to support respect for Indigenous Peoples;
- Capacity building efforts must be enhanced, including to support Indigenous Peoples' participation in protected areas management and governance, and to support greater awareness and respect for Indigenous Peoples and cultural values by non-Indigenous Peoples.

## **8. RESISTANCE AND ENGAGEMENT**

### **8.1 How are Indigenous Peoples Engaging with or Resisting Laws and Policies to Secure Local Governance and Conservation of their Land and Natural Resources?**

What began as a cooperative relationship in the early years of first contact became increasingly acrimonious over time. For the most part, occupation of Canada has been achieved non-violently, but violence has flared from time to time.

In recent history, the 1990's were the most violent, although protests continue today through out the country.

Today relations between Indigenous Peoples and the Canadian Government range from cooperative engagement to protest marches to litigation.

Many observers are concerned that a rise in conflict is inevitable in the face of continuing negligence (RCAP 1996; Hume 2006;).

## **8.2 Describe the Main Conflicts Between Indigenous Peoples and the Private Sector, Conservation Groups and/or Government Agencies**

From time to time, Indigenous Peoples find themselves in disputes with developers, resource companies, government officials, environmental organizations, and private landowners. Often these disputes revolve around protection of the environment or sacred sites.

In 1995, at Gustafsen Lake on unceded Secwepemc territory, protesters defied their exclusion from a traditional sun dance site by a rancher who had been given the land under fee simple title by the British Columbia Government. The protesters erected a fence to keep the cattle of the rancher off the site. The rancher attacked the camp established by the protesters and then called the Royal Canadian Mounted Police to remove them. A 31-day stand off between the police and the protesters ensued. 14 Indigenous people were convicted and sentenced from six months to 8 years in jail. One fled to the United States where he was granted political asylum.

In another violent confrontation at Oka, Quebec, the Mohawk took action to protest the proposed development of a golf course by the town on a traditional burial site. The claim by the Mohawk dated back to 1717 when the governor of New France granted the lands which included the cemetery to the Sulpician Fathers Seminary, which was supposed to hold the lands in trust for the Mohawk, but which granted itself sole ownership rights. The seminary sold the lands in 1936 over the protests of the Mohawk. The federal government rejected the land claim by the Mohawk in 1986 for failing to meet the federal government's legal criteria. In 1990 the Mohawk occupied the proposed golf course and the provincial and federal governments intervened with force. At one point the governments closed all access to food or medical supplies to the occupiers, causing the International Red Cross to issue a statement of condemnation of the government. As the protest escalated, sympathetic Mohawk communities blocked local bridges, one police officer was killed, and Mohawk people were subjected to racial hatred. The federal government eventually bought the land from the municipality of Oka, ending the construction of the golf course, but refused to return it to the Mohawk. The Mohawk eventually ended their occupancy after almost 80 days.

Violence also erupted at Burnt Church, New Brunswick, in 1999, following the decision of the Supreme Court of Canada to recognize Indigenous rights to a limited commercial fishery in the Atlantic Provinces. Local non-Indigenous fishermen were furious with the decision and took it upon themselves to limit the capacity of the Mi'kmaq to pursue a commercial lobster fishery by damaging or destroying lobster traps and vandalizing three native fish processing plants (CBCNews 2004) The federal government arrested

Mi'kmaq fishers seized lobster traps at Burnt Church the following year when the federal government decided they were catching too many lobster (CBCNews 2004). Eventually a deal was reached between the First Nations and the federal government.

In 2007 there were protests in Ontario over mining activities. The Algonquin were protesting uranium exploration in their unceded territory and an Ojibway community was protesting platinum mining in its traditional territory without consultation. Some of the leaders of these protests were jailed, but in an unusual turn of events, were released following an appeal by the Ontario Government of the sentences.

The list of protests that have or are occurring across the country is long and discouraging. There have been protests against developers, such as that at Caledonia, Ontario. There were protests against the 2010 winter Olympics by some First Nation activists. The Coast Salish protested destruction of a sacred site by surveyors. Yet, Indigenous peoples have demonstrated, time and again, their patience and perseverance in the face of rampant disregard for their rights.

### **8.3 Describe any Broad Social Movements or Trends Among Indigenous Peoples in Response to Key Laws or Policies that Affect Them**

Once it became legal, Indigenous Peoples have actively pursued development of their own political organizations. This includes the creation of national Indigenous organizations including:

- Assembly of First Nations;
- Métis National Council;
- Inuit Tapiriit Kanatami;
- Congress of Aboriginal Peoples;
- Native Women's Association of Canada;
- Métis National Council of Women; and
- Pauktuutit.

There are also numerous regional and local political organizations as well as single issue advocacy groups that are working to promote greater respect for Indigenous rights, too many to list here.

As Indigenous Peoples, like other Canadians, leave rural areas for the cities, an urban Aboriginal perspective is emerging that is not necessarily reflected in these bodies.

Indigenous Peoples are joining the professional ranks of Canada, training as teachers, lawyers, accountants, journalists, business people, and medical professionals, allowing them to better serve their people. They are using the courts, participating in political debate, and using the arts and electronic media to advocate for their rights. In 2006,

First Nation people formed the First Peoples National Party of Canada as a political voice for Indigenous Canadians (FPNP 2008). They have run individual candidates in a number of ridings across the country but have yet to see anyone elected. In 2011, Romeo Saganash, a Cree lawyer and Member of Parliament for northern Quebec became the first Indigenous Person to compete for the leadership of a national political party. The Aboriginal Peoples Television Network went national in 1999 with programming about and for Indigenous Peoples.

For all the positive trends, the sad reality is that the effect of 400 years of assimilation policy is having an affect in Canada as Indigenous Peoples are losing their cultures, languages, laws, traditional teachings, and ways of life. Reversing this trend is essential for the survival of Indigenous culture and the biological diversity it has nurtured since time immemorial.

8.1 (iv) In general to what extent are Indigenous Peoples aware of and actively responding to laws and policies that affect them

Indigenous Peoples are struggling to retain their traditions, cultures and languages. Many are politically active, advocating for their rights. The many national and regional Indigenous organizations are leading this effort, and there are many direct representations to the Canadian governments by Indigenous nations. Some Indigenous Peoples are pursuing litigation. Others are negotiating comprehensive claims, for settlement of specific land claims, or greater powers of self-government. Indigenous people from Canada have played an active role at the United Nations, participating in negotiation of the *United Nations Declaration on the Rights of Indigenous Peoples*, and in ongoing work under the *Convention on Biological Diversity*, the World Intellectual Property Organization, the *United Nations Framework Convention on Climate Change* among others.

One of the key challenges is lack of adequate education for Indigenous Peoples. Many Indigenous Peoples have the equivalent of 8 years of education and literacy skills tend to be low (Ontario Native Literacy Coalition 2012). This has the effect of keeping some Indigenous Peoples ignorant of their rights, unable to advocate effectively for services or equal treatment, undermining effective communication, and frustrating capacity building.

#### **8.4 Are there any Legal Empowerment and/or Advocacy Initiatives and how Effective are they?**

Indigenous Peoples are actively pursuing many different initiatives to achieve their rights. In addition to the strong presence of national Indigenous advocacy organizations, there are many smaller groups pursuing Indigenous rights. It is not possible to list them all here, but they include:

- The National Aboriginal Forestry Association;
- First Nations Child and Family Caring Society of Canada;
- National Aboriginal Health Organization;
- Native Women's Association of Canada;
- First Nations Confederacy of Cultural Education Centres;
- First Nations Fishery Council;
- Inuit Circumpolar Council;
- Métis Nation Veterans;
- National Aboriginal Achievement Foundation;
- National Association of Native Friendship Centres; and
- National Inuit Youth Council.

Collectively these organizations have been very successful in highlighting the needs of Indigenous Peoples, providing support to Indigenous Peoples in addressing various concerns, helping to educate government, the private sector and civil society about Indigenous Peoples, and building the capacity of Indigenous Peoples to meet their own needs. Much work remains to be done, however, before Indigenous Peoples see themselves reflected as a matter of course in the mosaic of Canadian society.

### **8.5 Are some Indigenous Peoples 'Managing' Better than Others and if so why?**

The cause and effect of Indigenous well-being has been the subject of many studies over the years, offering at times little more insight than the authors' own bias (see for example Flanagan, 2000).

It is difficult and somewhat unfair to compare the experiences of Indigenous Peoples. The Inuit, for example, might be perceived to be better off because of their finalization of comprehensive agreements, yet they continue to have one of the highest suicide rates in the country and even the world (Health Canada, 2006). Métis people tend to do better economically and have better education outcomes than Inuit or First Nation Peoples, but they have been denied rights of self-government and a land base. Some First Nations have done well economically, while others do not have the financial capacity to provide schools for their children, clean drinking water, or safe homes. All Indigenous Peoples have suffered individually and collectively under the Canadian system. Their survival in the face of it is due to their strength and determination.

## **9. LEGAL AND POLICY REFORM**

### **9.1 What Institutional, Legal or Policy Reforms do you Feel are Necessary to Better Enable Indigenous Peoples to Govern their ICCAs?**

Broadly speaking Indigenous Peoples in Canada are seeking reconciliation between themselves and the other people of Canada. RCAP has recommended four principles for

reconciliation – mutual recognition, mutual respect, sharing, and mutual responsibility. The Assembly of First Nations, the Métis National Council, and the Inuit Tapairiit Kanatami, the three largest national Indigenous organizations in Canada, as well as other Indigenous organizations, including the Congress of Aboriginal Peoples and the Native Women's Association of Canada, and many non-Indigenous organizations, including religious organizations have all endorsed the report of RCAP. The national Aboriginal organizations have detailed recommendations for responding to RCAP, which can be found on their various websites, provided in Annex A. Further detail can also be found on websites for regional and local Indigenous governments, organizations, and institutions.

More specifically, Canada needs to invest change in institutional, legal and policy reform to support Indigenous Peoples' governance of ICCAs. This includes among other things:

- Greater respect for the moral and legal obligations in international law including the *United Nations Declaration on the Rights of Indigenous Peoples*;
- Greater respect for the wampum belts and other treaties between Indigenous Peoples and the Canadian Government;
- Greater respect for cultural diversity while meeting the commitments to share the land;
- Greater respect for the constitutional obligations owed by the Crown to Indigenous Peoples specifically;
- Negotiate agreements between Indigenous Peoples and the Canadian Government to establish co-governing structures for protected areas where these do not already exist;
- Provide greater financial and other capacity building support to Indigenous Peoples to facilitate their effective involvement in governance of ICCAs.

## **9.2 Specifically, What Changes Could be Made to the Existing Legal or Policy Frameworks to Ensure Appropriate Legal Recognition and Support of ICCAs?**

Within the specific context of ICCA's, reconciliation:

- Begins with careful study and analysis of Canadian and Indigenous laws respecting conservation and development and agreeing on a new framework for sustainable development for the country as a whole that respects the rights of Indigenous Peoples and the interests of other Canadians;
- Includes new ways to work together, preferably by establishing co-governance and co-management arrangements;
- Requires consultations across the country with the Indigenous rights holders about the current location and management of existing protected areas with a view to seeking ways and means to accommodate Indigenous Peoples' rights;
- Entails a review of existing federal, provincial, territorial legislation, regulations

and policies to incorporate greater respect for the rights and perspectives of Indigenous Peoples;

- Calls for the free, prior and informed consent of Indigenous Peoples for the creation of new protected areas;
- Must involve amendment to existing legislation to, among other things, delink the Inherent Rights Policy and comprehensive claims negotiations from the establishment of new parks.

Arnie Narcisse, Chair of the B.C. Aboriginal Fisheries Commission wrote to the Parliamentary Standing Committee on Canadian Heritage reviewing the Canada Marine Conservation Areas Act, stating,

First nations have always practiced conservation. Our very existence as nations and peoples depends on the continued existence of the marine ecosystems. We would not exist without the seas and aquatic resources that were once bountiful on this coast. In your rush to protect some of the last remaining areas on the coast, you must consider and respect our place in the environment. Many of you who espouse the virtues of biodiversity seem to overlook the place that our peoples and our cultures have in the fabric of life. We have lived as part of these same areas or ecosystems that you are now trying to protect since time immemorial. Therefore, you must also protect our place in those areas and ecosystems. Also, many of the areas being considered for protection represent some of our last opportunities to regain self-reliance. Protection of these areas is now necessary only because your cultures try to consume and develop everything that is in sight. Now that there is only a little bit left, you decide to protect it. First nations must not be made to suffer the burden of conservation, when the system of overuse and over-harvest was not of our making. (House of Commons, 2001)

## **9.2 By Whom and How Would these Reforms be Implemented?**

The obvious players are the Crown and Indigenous Peoples, but industry, civil society, and non-governmental organizations all have a role to play.

The only way forward is through negotiated settlements, based on the rule of law, with respect for Indigenous Peoples rights, the interests of other Canadians, in celebration of our diversity, and for the betterment of the land and our children's children.

## **10. CASE STUDIES**

Three cases studies will be presented here. They cover the breadth of the country. Two of them are relatively positive arrangements. The third is a tragic case representing the worst in Canada—Indigenous relations. They represent three different land title arrangements, a key element in treatment by the Crown.



The first is Torngat Mountains National Park. It is in north-eastern Canada, traditional territory of the Inuit. The Inuit have a comprehensive agreement with Canada that informs Canada – Inuit relations respecting the park. The second is Haida Gwaii, traditional territory of the Haida on the northwest coast of Canada. This land remains under Aboriginal title. There is no treaty or comprehensive agreement between the Haida and Canada. The third and final case study will be Ipperwash Provincial Park in southern Ontario. This land is subject to treaty and the First Nations on whose traditional territory this park is located are governed under the provisions of the *Indian Act*.

### **10.1 Tongait KakKasuangita SilakKijapvinga or Torngat Mountains National Park**

This park came about as a result of comprehensive agreements with the Labrador Inuit and the Nunavik Inuit. The Labrador Inuit settled a comprehensive claim with Canada and the Government of Newfoundland and Labrador that took effect in 2005. It took 30 years to complete. Approximately 7,000 Inuit benefit from that agreement. The *Labrador Inuit Land Claims Agreement* and the *Nunavik Inuit Land Claims Agreement* are treaties within the meaning of section 25 and 36 of the Constitution Act, 1982 giving them constitutional protection.

The *Labrador Inuit Land Claims Agreement* establishes the Labrador Inuit Settlement Area, of which 15,800 square kilometers are Inuit-owned lands (Government of Newfoundland and Labrador, 2005). Settlement lands are co-managed by the Inuit and the province or federal government. Inuit owned lands are held under fee simple by the Labrador Inuit and are generally subject to sole Inuit jurisdiction. Inuit owned lands may be alienated, but only by the Nunatsiavut Government and only to the Province or Canada. The Inuit have ownership of 25% of subsurface resources (Labrador Inuit Land Claim Agreement Chapter 4.4). Inuit have rights in water on, in, under or flowing through or adjacent to Labrador Inuit lands and the right vests in the Nunatsiavut Government for the use and benefit of Inuit (Labrador Inuit Land Claim Agreement Chapter 5.3) Inuit also have the right to use water in the Inuit Settlement Lands for personal, family, and domestic purposes as well as in association with hunting or fishing activities or for transportation during hunting without a water use permit (Labrador Inuit Land Claim Agreement Chapter 5.2.3). Canada retains sovereign rights to the adjacent ocean and the province retains its jurisdiction as well (Labrador Inuit Land Claim Agreement Chapter 6.2.1). The Inuit do have rights to be consulted about proposed activities or the establishment of a marine protected area in the adjacent ocean (Labrador Inuit Land Claim Agreement Chapter 6.3 and 6.4). Major developments can only proceed upon concluding an Inuit Impacts and Benefits Agreement (Labrador Inuit Land Claim Agreement Chapter 6.7).

Being a comprehensive agreement it also includes self-government provisions within the pre-established limits of the Inherent Rights Policy. Among other things, the

agreement addresses citizenship, economic development, taxation, fiscal financing agreements and dispute resolution. It also contains chapters on land use planning, environmental assessment, wildlife and plants, fisheries and archaeology, Inuit cultural materials, Inuit burial sites and human remains.

The agreement establishes the Nunatsiavut Government, calls for the establishment of a Labrador Inuit Constitution, and sets out the authority of the Nunatsiavut Government (Labrador Inuit Land Claim Agreement Chapter 17). This includes laws with respect to education, health, housing, marriage and family relations, culture and language, local matters such as curfews, public libraries, municipal parks, social, family, youth and children's services, and administration of Labrador Inuit lands. Inuit laws generally prevail in these cases if there is a conflict with a federal or provincial law of general application, but the agreement lists instances where this is not the case. The Nunatsiavut Government may make laws respecting environmental protection but federal or provincial laws take precedence if there is a conflict (Labrador Inuit Land Claim Agreement Chapter 17).

The Nunatsiavut Government is considered a regional Inuit government within the Province of Newfoundland and Labrador. An elected Nunatsiavut Assembly was established as a consensus form of parliamentary democracy. The five Inuit communities of the region also have their own local community governments. The local community *AngajukKak* (chief executive officer and mayor of an Inuit community) represents the community at the Nunatsiavut Assembly. (Nunatsiavut Government, 2009)

The Labrador Inuit Constitution unlike the Canadian Constitution contains environmental guarantees. It stipulates,

Every Labrador Inuk has the right to an environment that is not harmful to his or her health or well being and to have the environment protected for the benefit of present and future generations through reasonable Inuit laws and other measures that:

- (a) prevent pollution and ecological degradation;
  - (b) promote conservation; and
  - (c) secure ecologically sustainable development and use of renewable and non-renewable resources while promoting justifiable economic and social development of Labrador Inuit,
- and every Labrador Inuk has a responsibility to use and enjoy Nunatsiavut and its environment and renewable and non-renewable resources with care and respect, without waste or greed and as a steward for future generations of Labrador Inuit. (section 2.4.20)

The *Nunavik Inuit Land Claims Agreement* was signed in 2006. It too is a comprehensive agreement with both land and self-government provisions. It contains many similar

provisions as the *Labrador Inuit Land Claims Agreement*. There is overlap between the lands of the Nunvik Inuit and the Labrador Inuit, Nunavut Inuit and the Cree of Eeyou Istchee.

*Torngait* is an Inuktitut word for 'place of spirits' (Parks Canada, 2011f) or home to *Torngarsoak* who takes the form of a huge polar bear in Inuit cosmology (Parks Canada, 2011f) It forms the northern most tip of Labrador. The mountain peaks are the highest in Canada west of the Rocky Mountains. Fjords and remnant glaciers line the coast. Polar bear, caribou, wolves, whales, and seals are found in the territory. It contains some of the world's oldest geological formations.

Torngat Mountains National Park is located within the Labrador Inuit Settlement Area and the Nunavik overlap area, but does not form part of the Inuit owned lands. The Government of Canada undertook to establish the park or reserve as a part of the comprehensive agreement. It is governed under the provisions of the *Canada National Parks Act*. (Labrador Inuit Land Claim Agreement Chapter 9) The creation of any additional national parks in the settlement will be subject to consultation with the Inuit and a parks impacts and benefits agreement. The *Labrador Inuit Land Claim Agreement* stipulates the following with respect to Inuit rights and interests in a national park or marine conservation area:

- Inuit rights are generally not affected excepted as specifically provided for in the agreement;
- Federal laws of general application prevail to the extent of a conflict with Inuit laws;
- Any co-operative management board shall be advisory only and the Minister may accept or reject its advice;
- There is to be no commercial harvest of plants, wildlife or fish in the park except trapping furbearing animals;
- Inuit may take some carving stone;
- Canada will consult on archaeological activity; and
- Canada or the province will consult before establishing, discontinuing, changing level of protection or redrawing boundaries of the protected area in the Inuit Settlement Area and the Nunatisavut Government will consult with them with respect to protected areas on Inuit lands (Labrador Inuit Land Claim Agreement Chapter 9).

Additional conditions are contained in the *Labrador Inuit Park Impacts and Benefits Agreement for the Torngat Mountains National Park Reserve of Canada* and the *Memorandum of Agreement for a National Park Reserve of Canada and a National Park of Canada in the Torngat Mountains* (Parks Canada, 2011g). Among other things, the Park Impacts and Benefits Agreement establishes a framework for co-management of the park. In addition, in light of the traditional use of the same territory by the Nunavik Inuit (Inuit from the Quebec side of the Labrador-Quebec border) an *Agreement*

*Relating to the Nunavik Inuit/Labrador Inuit Overlap Area* was signed between the Labrador Inuit and the Nunavik Inuit. This agreement contains commitments to share equally the resources, benefits and management of the park. Parks Canada signed a *Nunavik Inuit Park Impacts and Benefits Agreement for the Torngat Mountains National Park of Canada* in 2006.

Torngat Mountains National Park Reserve was established in 2005 and became a Park when the *Nunavik Inuit Land Claim Agreement* took legal effect in 2008. It is Canada's newest National Park (Parks Canada, 2011g) and is 9,700 square kilometers in size. It borders the Quebec Parc National Kuururjuaq for a combined total of 14,160 square kilometers stretching from the Labrador Sea to the Ungava Bay.

The Park Impact and Benefit Agreements provide for the creation of a co-operative management regime for the Park. It includes seven members, two from each of Parks Canada, the Nunatsiut Government and Makivik Corporation representing the Nunavik Inuit. An independent chair is appointed by consensus of the three parties. As of 2010, all members of the board including the chair were Inuit, though representing different organizations (Parks Canada, 2011g). In addition there is a Torngat Wildlife and Plant Co-management Board and a Torngat Joint Fisheries Board.

The 2010 Management Plan has three primary management directions:

- Building on the role of the Torngat Mountains as a traditional gathering place for the Inuit by celebrating the park as an Inuit homeland and delivering programming that reflects Inuit culture;
- Continuing to develop Inuit - Parks Canada relations; and
- Increasing Canada's understanding of the Inuit's special connection to the Torngat Mountains.

Parks Canada relies on Inuit knowledge of the region to inform research and management of the Park (Parks Canada, 2010). Inuit use and occupation of the park is considered a key indicator of the park's vitality (Parks Canada, 2010).

## **10.2 Gwaii Haanas National Park Reserve, Haida Heritage Site and Gwaii Haana National Marine Conservation Area Reserve**

Haida Gwaii is home to the Haida People, located on the northwest coast of the Province of British Columbia, approximately 720 kilometers north of Vancouver. The Haida People are a sovereign nation and hold Aboriginal title to their territory. They have no treaty with Canada regarding either land or self-government. This distinguishes the Haida situation from that of the Labrador and Nunivik Inuit at Torngat.

Haida people have occupied Haida Gwaii since time immemorial. Our traditional territory encompasses parts of southern Alaska, the archipelago of Haida Gwaii

and its surrounding waters. Our pre-contact population was in the tens of thousands in several dozen towns dispersed throughout the islands. During the time of contact our population fell to about 600, this was due to introduced disease including measles, typhoid and smallpox.

Today, Haida people make up half of the 5000 people living on the islands. Haida reside throughout the islands but are concentrated in two main centres, Old Massett at the north end of Graham Island and Skidegate at the south end. Besides these two communities there are many 2000 more Haida scattered throughout the world (Council of the Haida Nation, undated)

The House of Assembly is the legislative body for the Haida Nation. The Council of the Haida Nation reports on actions taken to implement the resolutions of the House of Assembly when it meets once a year for four days in October. Members of the Haida Nation are welcome to participate in the discussions of the Assembly but only the Council of the Haida Nation votes. A Hereditary Chiefs Council, consisting of Potlatched Hereditary Chiefs of Haida Gwaii provides advice and guidance on Haida cultural issues. Hereditary Chiefs sit on various committees of the Council of the Haida Nation and on the negotiation and litigation teams. In addition, the Old Massett Village Council and the Skidegate Band Council are responsible for the welfare of their local communities. These various bodies are established under the Constitution of the Haida Nation.

The Haida Nation and Canada have very different ideas about sovereignty, title and ownership of Haida Gwaii. Canada has asserted sovereignty and legislative jurisdiction over the Haida People and their lands since British Columbia joined the Canadian federation in 1871. The Haida Nation, conversely,

“Sees the Archipelago as Haida Lands, subject to the collective and individual rights of the Haida citizens, the sovereignty of the Hereditary Chiefs, and jurisdiction of the Council of the Haida Nation. The Haida Nation owns these lands and waters by virtue of heredity, subject to the laws of the Constitution of the Haida Nation, and the legislative jurisdiction of the Haida House of Assembly (Gwaii Haana Agreement, 1993).

In 2004, the Haida won a significant victory on the right to consultation that has become a landmark case on the issue. It was discussed in full above.

Where Canada and the Haida Nation do agree is on the need to protect Gwaii Haanas. In 1993, the Council of the Haida Nation and the Government of Canada signed the Gwaii Haanas Agreement stating their mutual commitment to the protection of Gwaii Haanas as a natural and cultural treasure. Canada was creating a park reserve; the Haida Nation, alternatively,

designated and managed the Archipelago as the ‘Gwaii Haanas Heritage Site’, and thereby will maintain the area in its natural state while continuing their traditional way of life as they have for countless generations. In this way the Haida Nation will sustain the continuity of their culture while allowing for the enjoyment of visitors. (*Gwaii Haanas Agreement* 1993).

In the agreement, the parties stated their objective of maintaining and using the Archipelago was for the purpose of “protection and preservation of the environment, the Haida culture, and the maintenance of a benchmark for science and human understanding” (*Gwaii Haanas Agreement* 1993 section 3.1) Haida cultural activities and traditional renewable resource harvesting activities may take place but no extraction or harvest for commercial activities other than trapping fur bearing animals and cutting select trees for ceremonial or public artistic purposes (*Gwaii Haanas Agreement* 1993 section 3.2 and 3.3) Specifically these are:

- Travelling into and within the Archipelago;
- Gathering traditional Haida foods;
- Gathering of plants for medicinal or ceremonial purposes;
- Cutting of select trees for ceremonial or artistic purposes;
- Hunting land mammals and trapping fur-bearing animals;
- Fishing for freshwater and anadromous fish;
- Conducting, teaching or demonstrating ceremonies of traditional, spiritual or religious significance;
- Seeking cultural and spiritual inspiration; and
- Use of shelter and facilities essential to the pursuit of these activities (*Gwaii Haanas Agreement* 1993 section 6.1)

An Archipelago Management Board was established to undertake the planning, operation and management of the area. This includes:

- Developing a joint policy statement and management plan;
- Haida cultural activities and renewable resource harvesting;
- Identification of spiritual-cultural significance;
- Communications with other departments or agencies about activities affecting the Archipelago;
- Guidelines for the care and protection of the Archipelago such as permits for tour operators, or access and use by fishermen;
- Annual work plans including staffing requirements, budgets and expenditures by both parties;
- Procedures for emergencies that threaten public safety, natural resources or cultural features; and
- Strategies for economic and employment opportunities for Haida individuals and organizations (*Gwaii Haanas Agreement* 1993 Section 4.3)

Canada and the Haida Nation each have two seats on the four person Board. One representative from each party serve as co-chairs. The Board operates on the basis of consensus, decisions constituting recommendations to their respective governments. Where the Board cannot agree, the matter will be referred to the Council of the Haida Nation and the Government of Canada to negotiate a good faith agreement. They may engage a neutral third party to assist.

The *Gwaii Haanas Marine Agreement* was signed in 2010, representing the common desire of Canada and the Council of the Haida Nation to respect and manage the Gwaii Haanas Marine Area in an ecologically sustainable manner. The duties of the Archipelago Management Board were expanded to include management of the marine area. The membership of the Board was increased to three representatives of each party.

Although Parks Canada construes these agreements as co-operative management, they are in actual fact a type of co-governance arrangement as neither party has relinquished claims to sovereignty. To this degree, Haida Gwaii is an ICCA within the context of the IUCN – at least from the perspective of the Haida Nation.

### **10.3 Ipperwash Provincial Park**

If Torngat and Haida Gwaii are some of the best examples of ICCAs in Canada, formed from negotiated agreements and containing provisions for co-management or co-governance, then the tragic tale of Ipperwash Provincial Park is amongst the worst. In 1995, Dudley George, an unarmed Chippewa was shot and killed by the Ontario Provincial Police as he peacefully protested disrespect for a Chippewa gravesite within the boundaries of Ipperwash Provincial Park. How these lands and the armed forces base adjoining it came to be in the hands of the Ontario Provincial and Federal Governments is a unique but not unusual story in Canada. The Ipperwash Inquiry commissioned by the provincial government almost 10 years later established the facts of the case as follows.

In 1764, two wampum belts, the Great Covenant Chain Belt and the Twenty-Four Nations Belt were offered by the Crown and accepted by the Anishanbek representing treaties to share the land and receive resources from the Crown. Wampum belts were traditionally used by these Indigenous Peoples to establish treaties between themselves and were considered a binding agreement under law. The Huron Tract Treaty was signed in 1827 in which the Chippewas ceded 2.1 million acres to the Crown, retaining less than 1 percent of their land for their exclusive use and occupation. This created the Kettle Point Reserve and Stoney Point Reserve (Ipperwash Inquiry 2007).

The Ipperwash Inquiry, established to investigate the events surrounding the death of Dudley George, found that from 1912 there was pressure from the Indian Agent, the government official with wide administrative powers to manage the reserve and control the inhabitants, on the people at Kettle Point Reserve to relinquish beachfront property. The Indian Agent saw no value in the land for the reserve because it was not fit for

agriculture. In 1927 a vote took place on the reserve to surrender 83 acres. While there is evidence the vote was corrupted by cash bonuses paid to the voters by the non-Indigenous developer seeking the property, the then Department of Indian Affairs upheld the decision. As did the Supreme Court of Canada in 1998 when the Chippewa sued the federal government for the return of the base, though the Court agreed the votes had 'an odour of moral failure about them'. The First Nation received \$85 Cdn. per acre for the property. A year later the same developer and Indian Agent organized a surrender of 377 acres this time from Stony Point First Nation at \$85 per acre. (Ipperwash Inquiry 2007)

The Province of Ontario bought a portion of this property from the new non-Indigenous owners in 1932, and in 1936 Ipperwash Provincial Park was formed. The Chippewa informed the province of a burial ground in the park and asked that it be protected. No action was taken to do so. (Ipperwash Inquiry 2007)

In 1942, the federal government organized another vote of surrender, for all of the Stony Point reserve for use as a military base. The Chippewa voted against the surrender but the Crown proceeded to relocate them from that reserve to share the reserve at Kettle Point First Nation, authorizing appropriation under the *War Measures Act*. The community received \$50,000 Cdn. in compensation. The reserve had shrunk from 5,000 acres at treaty to 2,000 acres 100 years later. Gravesites on these properties were vandalized, some clearly as a result of the military. The military considered returning the land after the end of the Second World War, but this never happened despite regular complaints from the First Nation and inquiries by the Department of Indian and Northern Affairs. (Ipperwash Inquiry 2007)

Frustrated by years of inaction by the military to return the lands, in May 1993, 15 to 30 Chippewa men and women entered the military base and set up camp, after first informing the Ontario Provincial Police of their intention to do so. Chief and Council of Kettle and Stony Point First Nation did not condone the occupation, but they continued to press the government for the return of the land. The occupiers stayed for almost two years until 1995, when the Chippewa protesters expanded their occupation to include Ipperwash Provincial Park. The park was closed for the season when they informed the Provincial Police and occupied the park. The Chief and Council advised the government that they did not have an outstanding land claim for the park.

By now the protesters included men, women and children, young and old. While the federal government had tolerated the occupation of the military base, the Provincial Government acted quickly to have them removed from the park. Two days after the occupation, the Ontario Provincial Police moved in to remove the protesters from the park, in the process of which, Dudley George, unarmed like all the protesters, was shot and killed. (Ipperwash Inquiry 2007)



At the Inquiry, the Commissioner concluded on a number of important matters. For example, he found that the Premier of the Province had uttered racist comments with respect to the protesters, as had the police and military personnel. He found that there was an appearance of inappropriate interference by the government in police operations - a breach of provincial law – even if the Premier and other political officials had not crossed the line. The police had acted with undue haste and the federal government with undue lassitude (Ipperwash Inquiry 2007)

Today, five years after the Ipperwash Inquiry concluded its work and released its report, the Province of Ontario has acted to deregulate Ipperwash Provincial Park (Government of Ontario, 2010). The land must then be transferred to the federal government, who will then consider adding the land to the reserve. It can take many years for an addition to a reserve to make its way through bureaucratic channels. The military base is closed and the federal government is in the process of assessing environmental contamination and the presence of endangered species at the site. They are also negotiating with the First Nations about compensation. The eventual fate of the lands has not yet been decided (AAND, 2010). The Chippewa at Kettle and Stony Point continue to operate under the provisions of the *Indian Act*, but are in the process of moving toward greater self-government under the *First Nations Land Management Act* (Chippewas of Kettle and Stony Point First Nation, 2011).

Throughout this period, from the creation of the park in 1936 until the day of the occupation, there was no process in place to engage the Chippewa in co-management or co-governance of the park. The Chippewa were deemed to have no authority, right or interest in the decision to create the park or participate in its administration. While the park was open, the Chippewa, like any other member of the public had to pay a fee to access the park. There was never any effort to protect the gravesites.

The Commissioner of the Ipperwash Inquiry concluded:

To many Aboriginal people, the shooting of Dudley George was the inevitable result of centuries of discrimination and dispossession. Many Aboriginal peoples also believed that the explanation for killing an unarmed Aboriginal occupier in a peaceful demonstration was rooted in racism. From this perspective, Ipperwash revealed a deep schism in Canada's relationship with its Aboriginal peoples and was symbolic of a long and sad history of government policy that harmed their long-term interests...

Usually, the immediate catalyst for most major occupations and protests is a dispute over a land claim, a burial site, resource development, or harvesting, hunting and fishing rights. The fundamental conflict, however, is about land. Contemporary Aboriginal occupations and protests should therefore be seen as part of the centuries-old tension between Aboriginal peoples and non-Aboriginal peoples over the control, use and ownership of land. The frequency of

occupations and protests in Ontario and Canada is a symptom, if not the result, of our collective and continuing inability to resolve these tensions. (Ippeewash Inquiry, 2007)

## **ANNEX A**

Below are websites for a number of national Indigenous Organizations in Canada. They have developed many positive suggestions for change.

Assembly of First Nations: [www.afn.ca](http://www.afn.ca)

Métis National Council: [www.metisnation.ca](http://www.metisnation.ca)

Inuit Tapiriit Kanatami: [www.itk.ca](http://www.itk.ca)

Congress of Aboriginal Peoples: [www.abo-peoples.org](http://www.abo-peoples.org)

National Association of Friendship Centres: [www.nafc.ca](http://www.nafc.ca)

Native Women's Association of Canada: [www.nwac.ca](http://www.nwac.ca)

Métis National Council of Women: [www.metiswomen.ca](http://www.metiswomen.ca)

Pauktuutit: [www.pauktuutit.ca](http://www.pauktuutit.ca)

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*Alberta Natural Resources Act*, S.C. 1930, c. 3

*Alberta Sport, Recreation, Parks and Wildlife Foundation Act*, RSA 2000, c A-34

*Beaches Act*, RSNS 1989, c 32

*Canadian Human Rights Act*, (R.S.C., 1985, c. H-6)

*Canada National Park Act* (S.C. 2000, c.32)

*Canada National Marine Conservation Areas Act* (S.C. 2002, c. 18)

*Canada Wildlife Act*, (R.S.C., 1985, c. w-9)

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

*Canadian Oil and Gas Operations Act*, R.S.C., 1985, c. O-7.

*Conservation Easements Act*, SNS 2001, c 28

*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, section 35.

*Ecological Reserve Act*, [RSBC 1996] Chapter 103

*Environment and Land Use Act* [RSBC 1996] Chapter 117

*Far North Act, 2010*, S.O. 2010, c. 18

*Gwaii Haana Agreement*, 1993.

*Gwaii Haanas Marine Agreement*, 2010.

*Heritage Conservation Act*, [RSBC 1996] Chapter 187

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*Muskwa-Kechika Management Area Act* [SBC 1998] Chapter 38

*National Energy Board Act*, R.S.C., 1985, c. N-7.

*Navigable Waters Protection Act*, R.S.C., 1985, c. N-22.

*Natural Heritage Conservation Act*, RSQ, c C-61.01

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*Nunavut Land Claims Agreement Act* (S.C. 1993, c. 29).

*Parks Act* [RSBC 1996] Chapter 344.

*Parks Act*, RSNB 2011, c.202

*Parks Act* (R.S.Q., c.P-9)

*Parks Act*, SS 1986, c. P-1.1

*Parks and Land Certainty Act*, RSY 2002, c 165.

*Protected Areas of British Colombia Act*, [SBC 2000] Chapter 17

*Provincial Parks Act* CCSM c P20

*Provincial Parks Act*, RSA 2000, c P-35

*Provincial Parks Act*, RSNL 1990, c P-32

*Provincial Parks Act*, RSNS 1989, c 367

*Provincial Parks Act Amendment, 2006*, SA 2006, c 27

*Provincial Parks and Conservation Reserves Act, 2006*, SO 2006, c 12

*Recreation Development Act*, RSA 2000, c R-8

*Royal Proclamation (1763)*, R.S.C. 1985, App. II, No. 1.

*Saskatchewan Natural Resources Act*, S.C. 1930, c. 41.

*Species at Risk Act*, S.C. 2002, c. 29.

*Territorial Parks Act*, RSNWT 1988, c T-4 (Northwest Territories)

*Territorial Parks Act*, RSNWT (Nu) 1988, c T-4 (Nunavut)

*The East Side Traditional Lands Planning and Special Protected Areas Act*, CCSM c E3

*The Gender Equity in Indian Registration Act*, 2011, c.18.

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