Resource Management and Reconciliation:

Co-management for conflict reduction

by

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FOREWORD

This major research paper is in partial satisfaction of the Master in Environmental Studies/Juris Doctorate degree. A major aspect of my Plan of Study (POS) is to investigate natural resource management in the context of reconciliation. This research shows how natural resource management policy affects Indigenous/non-Indigenous relations in Ontario's northern/north-central regions. Moreover, it considers Canadian case law and recent academic literature on reconciliation and treaty interpretation to propose how Indigenous and non-Indigenous governments can work together to reduce conflict and better manage local at-risk species populations.

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ABSTRACT

In North Bay, Ontario, Lake Nipissing walleye exist in a state of crisis. Walleye are a popular target for Indigenous and non-Indigenous people alike; the Nipissing First Nation (NFN) exercise their treaty right to commercially fish in Lake Nipissing, alongside non-Indigenous fishers regulated by Ontario's Ministry of Natural Resources and Forestry (MNRF). Over the past several decades, conflict has developed between these groups over unequal access to the declining common resource, and resource management challenges have arisen where the number of fish taken from the population is unknown. Northern Ontario moose are in a strikingly similar position.

In this paper, I explore the complex interaction of socio-cultural, political, and legal factors implicated in conflicts between Indigenous and non-Indigenous interest groups over declining common resources in northern Ontario. In Part I, I consider and reject the current approach to resource management comprised of MNRF regulation and colonial jurisprudential understanding of treaty rights and reconciliation. Next, I discuss in detail the socio-cultural manifestations of local and regional conflicts over Lake Nipissing walleye and northern Ontario moose. As a foundation for my proposal of an improved approach to resource management, in Part III, I establish Indigenous jurisdiction over environmental matters as a function of Indigenous law – explicitly rejecting Canadian law as a basis for this jurisdiction. Moreover, I recast the notion of "reconciliation" as an exercise in understanding Indigenous interests with reference to Indigenous philosophical traditions and disrupting assertions of Crown sovereignty to recognize Indigenous self-governance. Finally, in Part IV, I propose a set of recommendations for an improved approach to resource management, based on an adaptive co-management model.

Introduction

In northern Ontario, Indigenous peoples exercise their Aboriginal and Treaty rights to hunt and fish alongside non-Indigenous hunting and fishing activities regulated by Ontario's Ministry of Natural Resources and Forestry (MNRF). Over the past several decades, tensions have risen over unequal access to declining common resources, and resource management challenges result when total harvest of a given species from a given landscape or water body is unknown.

These tensions manifest in a number of different forms in North Bay, Ontario, where Lake Nipissing walleye – a popular target species for recreational and commercial fishers alike – have reached critical levels. Recently, a man was declined service for the rental of an ice fishing hut because he was the holder of a First Nation status card. The owner of the ice hut rental business stated publically that First Nations people were not welcome in the huts,[1] before issuing a clumsy apology recanting the prior statement but reiterating that First Nations were expected to fish by white man rules.[2] Similarly, in relation to regulating the harvest of moose in northern Ontario – which have been described recently as being a species on the brink of extinction[3] – one individual suggested that to solve the problem, the Constitution's "shortcomings" in recognizing and affirming Aboriginal and treaty rights were in need of correction to provide the same rights, freedoms, and responsibilities to every Indigenous and non-Indigenous Canadian.[4]

In Part I of this paper I set the context for these conflicts. I explore the MNRF's role as it relates to hunting and non-commercial fishing in the province, as well as the function and purpose of hunting and fishing laws and regulations under MNRF administration. I then discuss Aboriginal

[1] Olivia Stefanovich, "Debate erupts over what's best for Lake Nipissing after contentious ice hut ad" (5 January 2017) *CBC News*, online: http://www.cbc.ca/news/canada/sudbury/lake-nipissing-fishing-practices-tension-1.3923398 [Stefanovich, "Debate erupts"].
[2] Jeff Turl, "UPDATE: Apology issued (Ice hut rental ad draws complaints of racism)" (3 January 2017) *Bay Today*, online: https://www.baytoday.ca/local-news/ice-hut-rental-ad-draws-complaints-of-racism-501933 [Turl].
[3] Erik White, "Northern Ontario First Nation considers hunting limits to protect moose" (29 October 2017) *CBC News*, online: http://www.cbc.ca/news/canada/sudbury/chapleau-moose-hunting-limits-northern-ontario-1.4374646 [White].
[4] Bob Gevaert, "Moose challenge highlights problem with Constitution" (15 February 2017) *Chatham Daily News Opinion Letters*, online: http://www.chathamdailynews.ca/2017/02/15/moose-challenge-highlights-problem-with-constitution [Gevaert].

rights and Treaty rights under the *Constitution Act, 1982* and related jurisprudence, with reference to specific northern Ontario treaties. Finally, I describe the enduring perception in northern Ontario that the provincial government is out of touch with and thus incapable of effectively tending to unique northern Ontario issues, specifically with regard to resource management.

In Part II I explore two case studies that illustrate specific conflicts that currently exist between Indigenous and non-Indigenous hunters and fishers in northern Ontario. Specifically, I discuss the social and legal tensions that exist surrounding the walleye fishery in Lake Nipissing and moose hunting in northern Ontario.

In Part III I lay the groundwork for an improved regulatory approach to resource management in northern Ontario. I briefly consider the legal foundation for provincial jurisdiction over resource management before exploring, in detail, the sources and nature of Indigenous jurisdiction over those same 'resources' as integral components of the larger natural world. Moreover, I consider the emerging academic literature on reconciliation. Here, I draw two main conclusions that act as fundamental parameters for a new path forward. First, that Indigenous jurisdiction to manage natural resources must be established with reference to Indigenous law, as opposed to Canadian law. And second, in order for Indigenous groups and the Crown to mutually re-build their relationship, we must adjust our understanding of constitutional reconciliation to move away from a discussion of "rights" as they are attained or retained in the colonial legal framework.

Finally, in Part IV, I put forth a set of principles to shape an improved regulatory approach to resource management in northern Ontario where Indigenous and non-Indigenous groups have concurrent interests to conserve species but divergent rights to hunt and fish.

In conducting this research, I relied on a variety of primary and secondary sources. I consulted provincial resource management statutes, constitutional law, and case law from the Supreme Court of Canada to determine how Canadian law currently regulates non-Indigenous hunting and fishing activities and perceives Aboriginal and Treaty rights to hunt and fish. Moreover, I

consulted academic literature in political science to learn about the politics of regulatory challenges as they generally occur in northern Ontario. In my discussion of the social and ecological challenges surrounding Lake Nipissing walleye and northern Ontario moose, I relied heavily on articles published in local newspapers to learn the nuances of these challenges and understand local perspectives. In my attempt to craft an improved approach to resource management I analyzed and rejected constitutional law, including statutes and jurisprudence, to make space for Indigenous jurisdiction over natural resources. Instead, I relied on my understanding of Anishinaabe creation stories and Anishinaabe constitutionalism to establish this jurisdiction. Furthermore, I analyzed recent academic literature on treaty interpretation and reconciliation to support my argument for removing the notion of "rights" from reconciliation. Finally, I had two conversations with northern Ontario locals directly involved in managing the Lake Nipissing walleye population. These conversations were *instrumental* to my understanding and critical to my proposed steps toward co-management.

In this paper, I use the term "Indigenous" to describe generally the peoples who have made the area and land now known as "Canada" their home since well before European settlement. I also use the term "Aboriginal" in discussions of colonial law – for example, Aboriginal rights under section 35 of the *Constitution Act, 1982.* Moreover, I use the term "First Nation" to discuss specific Indigenous communities. Finally, I use the term "Indian" only in reference to the *Indian Act.*

1. The Law and Politics of Resource Management

"Reconciliation" is a fundamental and pressing social objective informing the analysis in this research paper. Prime Minister Justin Trudeau has committed to "fully implement the Calls to Action of the Truth and Reconciliation Commission, starting with the implementation of the United Nations Declaration on the Rights of Indigenous Peoples".[5] *The Truth and*

[5] Justin Trudeau, Prime Minister of Canada, "Statement by Prime Minister on release of the Final Report of the Truth and Reconciliation Commission" (15 December 2015), online: <http://www.pm.gc.ca/eng/news/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliationcommission> [Trudeau].

Reconciliation Commission (TRC) defines reconciliation as an ongoing process to establish and maintain mutually respectful relationships between Aboriginal and non-Aboriginal peoples in Canada, and between humans and the natural world.[6] *Elders, whose voices are reproduced by the TRC in its report, emphasize ceremony and storytelling as a means of learning about right relationships with land and the Creator, and as part of moving forward.*[7] *Through this research I intend to make a contribution to the process of reconciliation in Canada.*

Natural resource management law has for decades been at odds with Aboriginal and treaty rights.[8] When this tension is misunderstood simply as creating "different sets of rules for different groups of people", friction increases between non-Indigenous and Indigenous interest groups amounting to hostility as racism hides behind concerns for conservation.[9] In this research paper, I investigate and discuss how natural resources should be managed to reduce conflict and conserve species where First Nations treaty rights and non-Indigenous hunting and fishing interests compete in the context of a wildlife population in crisis. I use the "status-quo" provincial regulatory and governance framework, coupled with the Supreme Court of Canada's interpretation of Aboriginal and Treaty as a starting point to urge the need for change. In the following section, I discuss provincial regulation of fishing and hunting, specifically with regard to Lake Nipissing walleye and moose. More importantly, I discuss the current colonial approach to understanding rights and obligations contained in treaties and argue that this approach is inconsistent with building respectful relationships. Finally, I discuss briefly the pervading sentiment among people in north-central Ontario that policy-makers in the south lack the interest and understanding to deal effectively with unique northern issues, adding an additional layer of complexity to this regulatory issue.

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[6] Truth and Reconciliation Commission of Canada, "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission" (2015) at 6 and 16 online: http://www.myrobust.com/websites/trcinstitution/File/Reports/Executive_Summary_English_Web.pdf

[7] *Ibid* at 17 – 18.

[8] See, for example, *R v Marshall,* [1999] 3 SCR 456, 177 DLR (4th) 513 [*Marshall*]; *R v Marshall,* [1999] 3 SCR 533, 179 DLR (4th) 193 [*Marshall II*]; *R v Gladstone,* [1996] 2 SCR 723, 137 DLR (4th) 648 ; *R v Van der Peet,* [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*]; *R v Sparrow,* [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

[9] Marc Montgomery, "Aboriginal rights vs conservation: Lake Nipissing" (3 October 2017) *Radio Canada International*, online: http://www.rcinet.ca/en/2017/10/03/aboriginal-rights-vs-conservation-lake-nipissing/.

1.1. Legal and Regulatory Framework for Hunting and Fishing in Ontario

The Ministry of Natural Resources and Forestry's role, as it relates to hunting and fishing in Ontario, is to sustainably manage fish and wildlife resources.[10] The Ministry governs hunting and fishing in the province by way of the *Fish and Wildlife Conservation Act, 1997* and regulations under this Act.[11] Under the *Hunting* regulation, a person must possess an outdoors card in order to hunt.[12] An outdoors card is the foundational component of the licence necessary to hunt in the province.[13] An outdoors card must be accompanied by a licence tag specific to the species of wildlife that a person wishes to hunt.[14] Generally, a licence tag, accompanied by an outdoors card, constitutes a hunting licence to hunt the species of wildlife or class of wildlife to which the licence tag is applicable.[15] A game seal is required to hunt moose, deer, elk, black bear, wild turkey, wolf, and coyote.[16] One game seal is required for each animal harvested.[17] The appropriate game seal must be attached to the animal immediately after it is killed, and must remain attached to the animal while it is being transported.[18] Moreover, a validation tag (in addition to an outdoors card, licence tag, and seal) is required to hunt adult moose,[19] antlerless deer,[20] or deer in a controlled area.[21] Finally, a person must hunt species of game wildlife according to the *Open Seasons – Wildlife* regulation.[22] The tables in the *Open Seasons – Wildlife* regulation describe the area, time of year, and time of day during which game wildlife species

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[10] Government of Ontario, "Ministry of Natural Resources and Forestry" (8 June 2016), online: https://www.ontario.ca/page/ministry-natural-resources-and-forestry.
[11] SO 1997, c 41 [*Fish and Wildlife Conservation Act, 1997*]. There are also federal statutes that function to govern fishing and hunting as they relate to federal heads of power under the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*], like the *Fisheries Act* and the *Migratory Birds Convention Act, 1994*, that are outside the scope of this research.
[12] O Reg 665/98, s. 2(1) [*Hunting* regulation].
[13] *Ibid,* s. 2(2).
[14] The *Hunting* regulation, in parts IV through X, puts forth licencing schemes that vary depending on the target species.
[15] *Hunting* regulation, *supra* note, s. 1(1), "licence tag". Subsection 15(1) states that a licence tag is only valid for hunting during the open season for the species for which the licence tag is issued.
[16] *Ibid,* s. 17(1). See also: Government of Ontario, "Hunting licence (Ontario residents)" (17 July 2014), online: https://www.ontario.ca/page/hunting-licence-ontario-residents#section-4 [Hunting licence (Ontario residents)].
[17] Hunting licence (Ontario residents), *ibid.*
[18] *Hunting* regulation*, supra* note, ss. 17(1)(a) and 17(1)(b).
[19] *Ibid,* s. 52(3).
[20] *Ibid,* s. 40(4).
[21] *Ibid,* s. 46(1).
[22] *Ibid,* s. 25(2).

may be hunted, the classes or types of firearm that may be used to hunt them, as well as the daily bag limits, possession limits, and age restrictions for each species of game wildlife.[23]

The *Hunting* regulation limits the number of licences, seals, and validation tags that may be issued by the MNRF and that may be held by any one hunter.[24] While neither the *Fish and Wildlife Conservation Act, 1997* nor the regulations thereunder state within them a specific purpose, the title of the Act, coupled with the Ministry's role to sustainably manage fish and wildlife resources in the province, lend to a reasonable conclusion that the framework for hunting governance created by the Act and regulations is at least partially intended to conserve game species.

When it comes to fishing, the Ministry shares its regulatory role with the federal government. Under section 91(12) of the *Constitution Act, 1867*, the Parliament of Canada has jurisdiction over "sea coast and inland fisheries".[25] But this federal authority "ends where provincial authority over property and civil rights begins".[26] The federal *Ontario Fishery Regulation, 2007,* under the *Fisheries Act* governs fishing in the province of Ontario by "fisheries management zone" (FMZ).[27] FMZs are subdivided zones of the waters of Ontario, as set out in the *Regulation Plans of Fisheries Management Zones,* filed in the Office of the Surveyor General of Ontario. The *Ontario Fishery Regulation, 2007* sets fishing seasons, catch limits, slot sizes, and possession limits per species and licence type in each FMZ. Lake Nipissing is part of FMZ 11 and is "specially designated water" subject to a separate planning process.[28]

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[23] O Reg 670/98 [*Open Seasons – Wildlife* regulation].
[24] For moose, the regulation states that the holder of a licence to hunt moose shall not kill more than one moose (s. 51(1)) and that no person (except an outfitter) shall apply for more than one moose validation tag or possess more than one moose validation tag during the hunt (ss. 10(a) and (b)).
[25] *Constitution Act, 1867, supra* note, s. 91(12).
[26] Leslie A Walden, "A Practical Guide to the *Fisheries Act* and to the *Coastal and Inland Fisheries Protection Act,* (Department of Justice Canada) at 3, online: http://docplayer.net/49130797-A-practical-guide-to-the-fisheries-act-and-to-the-coastal-fisheries-protection-act.html [Walden]. Provinces have jurisdiction over property and civil rights under subsection 92(13) of the *Constitution Act, 1867, ibid.*
[27] SOR/2007-237, ss. 13(1), 15, 16, 19 – 21 [*Ontario Fishery Regulation*]. See Schedule 2 for angling close times per species, and Schedule 3 for angling quotas, size limits, and provincial possession limits per species and licence type in each Fishery Management Zone.
[28] Government of Ontario, "Fisheries management zones" (17 July 2014), online: https://www.ontario.ca/page/fisheries-management-zones. And Government of Ontario, "Fisheries Management Zone 11 (FMZ 11)" (17 July 2014), online: https://www.ontario.ca/page/fisheries-management-zone-11-fmz-11 [FMZ 11].

The federal *Ontario Fishery Regulation, 2007* states that no person shall fish except as authorized under a licence.[29] The province of Ontario issues licences to fish, which consist of an outdoors card accompanied by a sport or conservation validation tag,[30] under the *Fish Licencing* regulation, a regulation made under the *Fish and Wildlife Conservation Act, 1997*.[31]

1.2. Aboriginal Rights and Treaty Rights according to Section 35

Treaty 61, 1850 (*Robinson-Huron*) covers northern Ontario north of North Bay, as far north as Kirkland Lake and as far west as Sault Ste. Marie. Further west, moving along the northern shores of Lake Superior, is *Treaty 60, 1850* (*Robinson-Superior*). And further north, covering much of Ontario from the Québec border to nearly ¾ of the distance west across the province is *Treaty No. 9, 1905 – 1906* (*James Bay* treaty).[32] From a colonial perspective, treaties are legally binding agreements that spell out the rights and responsibilities in relationships between First Nations and federal and provincial governments.[33] With regard to hunting and fishing rights, the Robinson Treaties (the *Robinson-Huron* and *Robinson-Superior* treaties) state that First Nation signatories are to have "the full and free privilege to hunt over the territory now ceded to them and to fish in the waters thereof as they have heretofore been in the habit of doing saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals, or companies of individuals, and occupied by them with the consent of the Provincial Government".[34] The *James Bay Treaty*, signed post-confederation, similarly states that First Nation signatories "shall have the right to pursue their usual vocations of hunting,

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[29] *Ontario Fishery Regulation, supra* note at s. 3(1)(a).
[30] Government of Ontario, *2017 Fishing Ontario: Recreational Fishing Regulations Summary* (December 2016) at 4, online: https://dr6j45jk9xcmk.cloudfront.net/documents/5021/2017-ontario-fishing-regulations-summary-english-1.pdf.
[31] O Reg 664/98, s. 5(1). Subsection 4(1) of the federal *Ontario Fishery Regulation, supra* note, assigns to the provincial Minister to the administrative role of issuing licences.
[32] Ministry of Natural Resources, "First Nations and Treaties" (map, published May 20, 2014), online: https://files.ontario.ca/treaties_map_english.pdf.
[33] Government of Ontario, "Treaties" (October 2016), online: https://www.ontario.ca/page/treaties#section-2.
[34] *Robinson Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Superior Conveying Certain Lands to the Crown,* 7 September 1850 (transcribed copy), online: https://www.aadnc-aandc.gc.ca/eng/1100100028978/1100100028982. *Robinson Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Huron Conveying Certain Lands to the Crown,* 9 September 1850 (transcribed copy), online: https://www.aadnc-aandc.gc.ca/eng/1100100028984/1100100028994.

trapping and fishing throughout the tract surrendered […], subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His 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".[35]

In northern Ontario, non-Indigenous people hunt and fish according to MNRF laws and regulations, and Indigenous people hunt and fish according to rights afforded to them by treaties with the Crown. From the Crown's perspective, resource management challenges arise when the total number of individuals of a given species removed from a landscape or from a given body of water is unknown. Moreover, conflict often ensues when treaty rights are perceived as an unlimited licence to hunt and fish species that pose concern for conservation. Walleye fishing in Lake Nipissing and moose hunting in northern Ontario are discussed in detail in Part II of this paper as examples of these challenges. The current (colonial) constitutional status of treaty rights and the Crown's obligations with regard to these rights – the current legal "status quo" for relations between the Crown and Indigenous peoples – offer a point of departure to crafting an improved approach to resource management, consistent with reconciliation, as this paper purports to do in Part IV.

Section 35 of the *Constitution Act, 1982* recognizes and affirms "existing Aboriginal rights and treaty rights of the Aboriginal peoples of Canada".[36] The Supreme Court of Canada (SCC) in *Sparrow* offered the first judicial interpretation of this provision.[37] In determining whether a restriction on the size of drift nets contained within the Musqueam Indian Band's Indian food fishing licence infringed the Aboriginal right to fish and, more broadly, whether Parliament's power to regulate fishing is limited by section 35(1),[38] the SCC discussed the meaning of "existing" rights that are "recognized and affirmed" under section 35(1) and established the test

[35] *James Bay Treaty – Treaty No. 9,* 1905 (transcribed copy), online: https://www.aadnc-aandc.gc.ca/eng/1100100028863/1100100028864#chp5. See specifically "James Bay Treaty – Treaty No. 9 – Articles".
[36] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].
[37] *Sparrow, supra* note 8.
[38] *Ibid* at 1083. The appellant, a member of the Musqueum Indian Band, was charged under the *Fisheries Act* for fishing with a larger drift net than what was permitted in the Band's Indian food fishing licence. The appellant admitted throughout to the facts that constituted the alleged offence, but argued submitted that he was exercising his Aboriginal right to fish and that the size restriction on drift nets was contrary to section 35(1) of the *Constitution Act, 1982* and therefore invalid.

for extinguishing those rights. The Court found that "existing" means "unextinguished" rather than defined by the regulatory regime in place in 1982 and that existing rights must be interpreted flexibly so as to not be frozen in time.[39] Further the Court said that as a "general guiding principle" to interpreting section 35(1) "the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples"; that is, in accordance with a relationship based on trust and not adversity.[40] Finally, the Court goes on to say that while the Crown's fiduciary duty does restrain the exercise of sovereign power under section 91(24) of the *Constitution Act, 1867*,[41] "[r]ights that are recognized and affirmed are not absolute".[42] On this basis, it sets out a test to identify and justify any government infringement with a recognized Aboriginal right.[43] In keeping with the Crown's fiduciary duty to act honourably in dealings with Aboriginal peoples,[44] the justification analysis asks whether the infringement has been minimized as much as possible, whether fair compensation is available, and whether the Aboriginal group in question has been consulted with respect to the measures being implemented.[45]

Since *Sparrow,* the Supreme Court of Canada (SCC) has attempted to clarify various elements of the test for infringement and justification including, fundamentally, what constitutes an existing Aboriginal or treaty right.[46] The SCC in *R v Marshall* summarized the legal framework for interpreting treaties. Justice Binnie, writing for the majority, found that treaty interpretation must be in keeping with the honour of the Crown,[47] that provisions must be interpreted in a manner which gives meaning and substance to the oral promises made by the Crown during the treaty

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[39] *Ibid* at 1092 – 1093. The Court, at pages 1097 – 1099, is clear that detailed control of the Aboriginal right to fish does not amount of extinguishment and that "the test of extinguishment […] is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right".
[40] *Ibid* at 1108.
[41] Section 91(24) of the *Constitution Act, 1867* gives the federal government the jurisdiction to legislate with respect to "Indians and Lands reserved for the Indians".
[42] *Ibid* at 1109.
[43] *Ibid.* The Court, at 1108 – 1109 says that section 1 of the *Charter* does not apply to section 35(1) but that "this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52(1) of the *Constitution Act, 1982*".
[44] *Ibid* at 1119.
[45] *Ibid* at 1114. The test for identification and justification of an infringement is spelled out in paragraphs 1111 – 1113. The group challenging the government conduct must first make out a *prima facie* case for infringement, then the onus shifts to government to satisfy a two-part test for justification.
[46] The test for determining the existence of an aboriginal right is set out in *R v Van der Peet, supra* note 8.
[47] *Marshall, supra* note 8 at para 52.

negotiations,[48] and that extrinsic evidence can be used in interpreting a treaty, even absent ambiguity, given the principle that treaties must be understood in their cultural and historical context.[49] Moreover, in *R v Marshall; R v Bernard,* the Court made clear that while constitutional protection of treaty rights is not limited to those rights frozen in time, the right in question must be shown to have evolved from a traditional right contemplated at the time the treaty was made.[50]

Fourteen years after *Sparrow,*[51] the SCC in *Haida Nation,* and subsequently in *Mikisew,* determined that the Crown has an obligation to consult and, where necessary, accommodate when it contemplates conduct that might adversely affect a proven or unproven Aboriginal right or title claim, or treaty right.[52] This duty for consultation represents a substantial broadening of the Crown's obligation when compared to the previous state of the law from *Sparrow.*[53] The Court said that the scope of the duty must be determined contextually.[54] In the context of treaty interpretation, the scope of the duty will depend on the specificity of the promises made in the treaty,[55] the seriousness of the potentially adverse effect of the Crown's proposed action on Indigenous People,[56] and the history of dealing and negotiation between the Crown and the First Nation in question.[57] Accommodation may be required where contextual factors point to a broad

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[48] *Ibid.*
[49] *Ibid* at para 81. The Court puts forth a two-step approach to treaty interpretation, at paras 82 – 83. The first step is to examine the words of the treaty clause to identify their facial meaning, any ambiguities, and one or more possible interpretations. Step two the meaning(s) of the clause must be considered against the cultural and historical backdrop to determine which interpretation comes the closest to reflecting the parties' common intention.
[50] 2005 SCC 43 at paras 25 – 26, [2005] 2 SCR 220. See also *Marshall II, supra* note 8 at paras 19 – 20, 179 DLR (4th) 193.
[51] Recall that *Sparrow* limited the Crown's obligation to consult Indigenous Peoples to instances where it sought to justify an infringement of an existing aboriginal or treaty right.
[52] *Haida Nation v British Columbia (Ministry of Forests),* 2004 SCC 73 at paras 35 and 37, 3 SCR 511 [*Haida Nation*] and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras 55 and 57, 3 SCR 388 [*Mikisew*]. *Mikisew* extends the duty to consult to include treaty interpretation.
[53] Lori Sterling and Peter Landmann, "The Duty to Consult Aboriginal Peoples: Government Approaches to Unresolved Issues" in David A. Wright and Adam M. Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) 1 at 2.
[54] *Haida Nation, supra* note 52 at para 40. And *Mikisew, supra* note 52 at para 63.
[55] Where promises are spelled out clearly, less consultation will be required: *Mikisew, supra* note at para 63.
[56] This is relevant to instances of both treaty interpretation and claimed Aboriginal rights or title: *Mikisew, supra* note at para 63 and *Haida Nation, supra* note 52 at para 39.
[57] *Mikisew, supra* note 52. In *Haida Nation,* at paragraphs 43 – 45, the Court discusses the scope of the duty to consult as a spectrum. A weak claim, a limited right, or minor potential infringement may limit the Crown's duty may to giving notice, disclosing information, and discussing issues that are raised in response to notice. A strong

duty and may include steps to avoid irreparable harm or minimize the effects of infringement.[58] The goal of accommodation is to "balance Aboriginal concerns reasonably" against other societal concerns and the potential impact on asserted rights, title, or treaty rights.[59] In *Haida Nation* and in *Mikisew*, the SCC stated that the duty to consult and accommodate is one part of the long process of reconciliation.[60]

This collection of jurisprudence represents an overview of the current colonial approach to understanding rights and obligations contained in treaties. I contend that the Supreme Court's comprehension of reconciliation as articulated implicitly in the jurisprudence outlined above is inconsistent with building respectful relationships with Indigenous peoples and the natural world. In Part III of this paper, I return to the topic of treaty interpretation but do so through the lens of Indigenous law.

1.3. Northern/southern disconnect: perceptions of political alienation

Adding an additional element of complexity to this regulatory issue is the systemic underrepresentation of "northern" issues at Queen's Park and the pervading sentiment among northerners that the provincial government is perpetually uninterested in their concerns.[61] *As a point of clarity, my reference to "northern Ontario" in the following discussion is not to the Far North, which has its own distinct set of interests, but to what may be more accurately described as central or north-central Ontario.*

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claim or significant potential infringement with a high risk of irreparable harm may require "deep consultation, aimed at finding a satisfactory interim solution".

[58] *Haida Nation, supra* note 52 at para 47. *Mikisew, supra* note 52 at para 54 makes clear that accommodation also applies in the context of consultation regarding Crown interference with treaty rights.

[59] *Haida Nation, supra* note 52 at para 50.

[60] *Mikisew, supra* note 52 at para 63 and *Haida Nation, supra* note 52 at para 32 – 33.

[61] David Tabachnick, "The north wants in: Why new ridings in Ontario's most remote region won't curb northern alienation" (August 23, 2017) *TVO,* online: http://tvo.org/article/current-affairs/the-next-ontario/the-north-wants-in-why-new-ridings-in-ontarios-most-remote-region-wont-curb-northern-alienation. See also: "Ontario Hubs: Northern Alienation" (6 October 2017), online video: http://tvo.org/video/programs/the-agenda-with-steve-paikin/ontario-hubs-northern-alienation; Gina Comeau, "Continuity and Change in Northern Ontario" in Cheryl N. Collier and Jonathan Malloy, eds, *The Politics of Northern Ontario* (North York, Ontario: University of Toronto Press, 2017) 175 at 178 [Comeau].

Northern Ontario is formally represented in provincial Parliament by only ten seats.[62] Moreover, unlike the south, northern Ontario is organized regionally by districts, instead of counties; whereas counties act as regional governments that liaise between the province and municipalities, districts do not, making dialogue between northerners and government decision-makers even less likely.[63] Underlying the sentiment of alienation is the heartland-hinterland dynamic that has led to politics of extraction and dependency:[64] resources in the north have historically been exploited to serve the interests of southern Ontario, in turn resulting in the north becoming dependent on the demand from the south.[65]

Examples of northerner concern with provincial resource management policy-making, particularly among non-Indigenous people, are prevalent. One very clear-cut example is the frustration expressed by northern Ontario residents in regard to the on-again/off-again spring bear hunt in areas around Timmins, Thunder Bay, Sudbury, Sault Ste. Marie, and North Bay. The saga began in 1999, when the Minister of Natural Resources under former Ontario Premier Mike Harris abruptly eliminated the spring bear hunt.[66] The decision was met with a storm of controversy, including an application for judicial review as well as civil claims for damages. Applicants for judicial review alleged that the Minister's decision was motived by "sheer political expediency" and was therefore outside his scope of jurisdiction.[67] Specifically, the

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[62] Elections Ontario, "Maps for the 2018 General Election", online: http://www.elections.on.ca/en/voting-in-ontario/electoral-districts/redistribution.html. Northern Ontario is made up of ten electoral districts: Nipissing, Timiskaming – Cochrane, Nickel Belt, Sudbury, Algoma – Manitoulin, Sault Ste. Marie, Thunder Bay – Superior North, Thunder Bay – Atikokan, Timmins – James Bay, and Kenora – Rainy River. View the Elections Ontario map at http://www.elections.on.ca/content/dam/NGW/sitecontent/2017/preo/Ontario%20Electoral%20Districts%20(122).pdf.

[63] Chris Southcott, "Regional Economic Development and Socio-economic Change in Northern Ontario" in Charles Conteh and Bob Segsworth, eds, *Governance in Northern Ontario: Economic Development and Policy Making* (North York: University of Toronto Press, 2013) 16 at 18.

[64] Comeau, *supra* note 61.

[65] David Robinson, "Destiny Delayed? Turning Mineral Wealth into Sustainable Development" in Charles Conteh and Bob Segsworth, eds, *Governance in Northern Ontario: Economic Development and Policy Making* (North York: University of Toronto Press, 2013) 115 at 129.

[66] A Scott-Clark, "Bear attacks spark calls for spring bear hunt" (16 August 2013) *Ontario Out of Doors*, online: https://www.oodmag.com/hunting/bear-attacks-spark-calls-for-spring-hunt/. And Jeremy Appel, "Why the spring bear hunt isn't about public safety" (TVO, 17 November 2015), online: http://tvo.org/article/current-affairs/the-next-ontario/why-the-spring-bear-hunt-isnt-about-public-safety.

[67] *Ontario Federation of Anglers & Hunters et al v Ontario (Ministry of Natural Resources)*, 43 OR (3d) 760, 1999 CanLII 14789 (ON SC). The *vires* argument was based on the Minister's improper use of discretion. The applicants also alleged that the regulation violated sections 2(b) and 7 of the *Canadian Charter of Rights and Freedoms*.

applicants submitted that "the Minister and/or the Premier ordered that the spring bear hunt be cancelled to appease Robert Schad, chairperson of the Schad Foundation [who] threatened to run a targeted campaign against [Mike Harris' Progressive Conservatives] in "swing" electoral ridings if the government did not cancel the spring bear hunt".[68] In the civil suits (one against the Premier, the Minister, and Mr. Schad and the Schad Foundation, and another against the Crown), the plaintiff trade association, whose members provide accommodation, outfitting and guiding services to hunters of black bears in Ontario, claimed $40 million damages in each case for losses arising from the cancellation of the hunt.[69]

When the spring bear hunt was brought back in the form of a limited pilot project in early 2014, it was celebrated among northerners as an appropriate response to unique northern needs. Former Mayor of Sault Ste. Marie Debbie Amaroso congratulated former Minister of Natural Resources David Orazietti "for being responsive" to northern needs.[70] In the same comment, Mayor Amaroso spoke to the tensions between northern and southern perspectives on solving the issue of nuisance bears: "I'm sure you will get some resistance from people down south in the Toronto area but, if they want to trap and relocate, my position has always been to trap and relocate them all to downtown Toronto".[71] In early 2016, the Ministry of Natural Resources and Forestry decided to extend the spring bear hunt pilot project to 2020, and expand it to all Wildlife Management Units that currently have a fall season to hunt black bears and to non-resident hunters.[72] Like the pilot, the decision to expand the spring bear hunt was welcomed by many northerners.[73]

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[68] *Ibid.*
[69] *Ontario Black Bear/Ontario Sportsmen & Resource Users Association v Ontario*, 2000 CanLII 22815 at paras 2 and 26 – 31, 19 Admin LR (3d) 29 (ON SC).
[70] SooToday Staff, "Orazietti announces a two-year limited early bear hunt" (14 November 2013) *Soo Today*, online: https://www.sootoday.com/local-news/orazietti-announces-a-two-year-limited-early-bear-hunt-170335 [SooToday Staff]. See also: Elaine Della-Mattia, "Ontario to allow a limited spring bear hunt" (14 November 2013) *Timmins Times*, online: http://www.timminstimes.com/2013/11/14/ontario-to-allow-a-limited-spring-bear-hunt [Della-Mattia].
[71] SooToday Staff, *ibid*. See also: Della-Mattia, *ibid.*
[72] *Amendment to two regulations under the Fish and Wildlife Conservation Act, 1997 to extend and expand the Black Bear Pilot Project in parts of northern and central Ontario for an additional five years and to regulate the baiting of black bears*, EBR Reg Number 012-5485, Ministry of Natural Resources and Forestry (19 February 2016), online: https://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTI2MzQ1&statusId=MTkyODc1&language=en.
[73] A public poll on Canadian Press article "Ontario expands spring bear hunt pilot project" published online at http://www.nugget.ca/2016/02/20/ontario-expands-spring-bear-hunt-pilot-project by the North Bay Nugget on

Conteh and Segsworth explain that the current governance model, that lacks a "forum or vehicle […] for making regional policy that reflects regional interests" and in which local representatives lack agency, is but one factor that might be blamed for the alienation of northern Ontario.[74] A second factor is the unsustainable resource management policies that have persisted in the regional economy for decades,[75] resulting in the abrogation of treaty rights and the suppression of First Nation communities.[76] Conteh and Segsworth conclude that, northern Ontario would benefit from an updated governance model or regional policy infrastructure to create relevant and coherent policies that properly respond to unique regional concerns.[77]

The following presents two current resource management challenges in northern Ontario to illustrate the effect of the existing governance model and regional policy-making infrastructure on social and ecological conditions in the region.

2. Governance Framework Failure: Resource Management Challenges and Social Conflict

2.1. Lake Nipissing Walleye

Lake Nipissing, located in northeastern Ontario, is the seventh largest lake in the province and creates miles of beautiful sandy shoreline in the City of North Bay and surrounding communities.[78] The lake is an integral component of a larger system of northern lakes and is "one of the most intensive inland fisheries in the province".[79] As such, Lake Nipissing is managed by the province through a separate planning process.[80] Lake Nipissing is a cornerstone

February 20, 2016 asked readers whether they thought the pilot expansion was a good idea. 87% (386 votes) responded "yes" to this question.

[74] Bob Segsworth and Charles Conteh, "Conclusion" in Charles Conteh and Bob Segsworth, eds, *Governance in Northern Ontario: Economic Development and Policy Making* (North York: University of Toronto Press, 2013) 208 at 209. This discussion is in the context of economic underdevelopment in Northern Ontario.

[75] *Ibid* at 211.

[76] *Ibid.*

[77] *Ibid* at 212.

[78] George E. Morgan, "Lake Nipissing Data Review, 1967 to 2011: Final Report – November 2012" (*Ontario Ministry of Natural Resources*, 2013) at 7, online: https://dr6j45jk9xcmk.cloudfront.net/documents/2624/stdprod-109410.pdf [Morgan].

[79] FMZ 11, *supra* note 28.

[80] *Ibid.*

attraction for summer and winter tourists looking for northern recreational opportunities: it boasts over 40 different fish species, a popular ice fishery, and a sport fishery featuring bass, yellow perch, northern pike, and (formerly) walleye. It is also a primary source of fish that supports the Nipissing and Dokis First Nation communities.[81]

The walleye population in Lake Nipissing has been declining for decades.[82] Very high harvest rates, exceeding 100, 000 kilograms per year in the 1970s and 1980s contributed to a declining population in the 1990s and management actions in the mid-2000s to reduce overall harvest to 66, 000 kilograms per year.[83] Despite management actions in the new millennium, the walleye population has continued to decline, and is now half of what it was in the 1980s.[84] Specifically, the MNRF has identified high levels of juvenile mortality as the most significant stressor on the walleye population.[85] The Ministry says that, partly as a result of very high harvest in the 1970s and 80s, walleye now reach the size at which they become vulnerable to harvest at a younger age and for a longer length of time prior to spawning, which in turn leads to a decreased juvenile population and fewer adult walleye in later years.[86] In ecological terms, this is a positive feedback loop, where an initial decline in the walleye population has triggered an effect (faster growth rates) that acts to exacerbate the initial issue. Ultimately, the MNRF points to exploitation by humans as the cause of the walleye population decline.[87]

In an effort to interrupt the positive feedback loop, the Ministry has, over the years, adjusted and readjusted recreational angling slot size restrictions as well as winter and open water seasons to decrease the chances that younger fish will be harvested from the lake prior to spawning.[88] At the present time, seasons for the recreational walleye fishery are open from January 1st – March 15th

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[81] *Ibid.*
[82] Morgan, *supra* note 78 at 4.
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*
[87] Ontario Ministry of Natural Resources and Forestry, "Fisheries Management Plan for Lake Nipissing" (2014) at 22, online: https://dr6j45jk9xcmk.cloudfront.net/documents/4387/lake-nipissing-final-fishmp-rd-approval-2014-09.pdf [Fisheries Management Plan].
[88] Morgan, *supra* note 78 at 11.

for ice fishing, and from the third Saturday in May to October 15th for open water fishing.[89] Recreational anglers are restricted from possessing any walleye that measures less than 46 centimeters in length and catch limits are set at two walleye for fishers with sport licences, and one for fishers with conservation licences.[90]

In addition to the recreational fishery, the Dokis and Nipissing First Nations rely on Lake Nipissing for subsistence fishing.[91] Moreover, the Nipissing First Nation (NFN) operates a commercial fishery on the lake focused primarily on walleye, but also white fish and northern pike.[92] Like the MNRF, NFN has also responded to concerns for Lake Nipissing's walleye stock. In 2004, NFN Chief and Council mandated a moratorium on spring gill netting from April 1st to May 1st.[93] Strict and active enforcement of this moratorium began in 2008, with the help of the Anishinabek Police Service, the Ontario Provincial Police, and the West Nipissing Police Service.[94] Moreover, NFN banned commercial spearing in 2010 and limited spearing for recreational purposes to 20 walleye per boat.[95] In 2006, NFN implemented the Nipissing First Nation Fisheries Law to govern First Nation commercial fishing on Lake Nipissing.[96] In addition to regulating the practice of commercial gill netting,[97] the Fisheries Law required that NFN collaborate with the MNRF on annual programs to collect information on the walleye fishery in the lake.[98] In 2008, NFN implemented the first community walleye harvest "quota" to replace what was formerly a harvest "target", and developed a new protocol for adjusting quotas for subsequent years.[99] In 2015, NFN introduced the NFN Fisheries Management Plan which brought with it changes to the First Nation Fisheries Law regulations, including a longer spring

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[89] Fisheries Management Plan, *supra* note 87 at 27.
[90] *Ibid.*
[91] *Ibid* at 7. *R v Commanda,* 10 WCB (2d) 554, 1990 CarswellOnt 3310 (Ont Dis Ct) confirms the Nipissing First Nation's treaty right to commercial fish in Lake Nipissing.
[92] Morgan, *supra* note 78 at 11.
[93] *Ibid.*
[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid.*
[97] Regulations require registration by commercial fishers, daily harvest reports, restrictions on mesh size for gill nets, restrictions on the number or length of net per fisherman, and restrictions on where nets could be set. See Doris Smith, "Achieving a Sustainable Lake Nipissing Walleye Fishery" (May 2017) at 14, online: http://nbdcc.ca/wp-content/uploads/2017/05/Lake-Nipissing-final-report-May-18th.pdf?utm_source=baytoday.ca&utm_campaign=baytoday.ca&utm_medium=referral [Smith].
[98] Smith, *ibid* at 13.
[99] Morgan, *supra* note 78 at 12.

moratorium on gill netting, a reduction in the number of nets a commercial fisherman can possess, an increase in the minimum mesh size for gill nets, and a stipulation that commercial harvesting would cease when community quotas were met.[100]

Most recently, in March 2016, a Memorandum of Understanding (MOU) was signed between NFN and the MNRF. The MOU contains a number of crucial provisions that facilitate significant collaboration and is regarded as a major milestone in the sustainable management of the walleye fishery.[101] The MOU creates a collaborative framework that provides staffing, technical, and financial resources to NFN for a variety of fisheries management and assessment needs, including for the collection, analysis, and sharing of commercial fisheries data in a timely and accurate manner, and for the operating costs associated with conducting fisheries assessments, compliance monitoring, and enforcement.[102] Under the MOU, NFN and the MNRF share harvest and other fish data to support informed decision-making for sustainable recreational and commercial fisheries. Furthermore, the MOU provides that commercial fishing must be in accordance with the NFN Fisheries Law and that NFN has the lead responsibility for compliance and enforcement of the Nipissing commercial fishery.[103] The MOU also stipulates a process for enforcing the Fisheries Law in accordance with the principles of Aboriginal restorative justice. Non-compliance engages the First Nation's Compliance Conference and/or Justice Circle; if the accused fisher fails to participate or comply with the restorative justice efforts, NFN may refer the infraction to the MNRF to take appropriate action under provincial law.[104]

Despite considerable cooperation between NFN and the MNRF, the MNRF's Lake Nipissing Fisheries Management Plan lists walleye population management "in the absence of an agreed upon allocation mechanism between commercial and recreational interests", that balances both recreational and commercial fishery objectives, as an ongoing management challenge for Lake

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[100] Smith, *supra* note 97 at 15. See also Nipissing First Nation, "Fisheries Update", online: http://www.nfn.ca/documents/nr/nfn_fishing_booklet_v4_416.pdf [Fisheries Update].
[101] Anonymous Interview #1, (7 December 2017), on file with author [Anonymous Interview #1] and Anonymous Interview #2, (7 December 2017), on file with author [Anonymous Interview #2].
[102] Nipissing First Nation, "Summary of the Memorandum of Understanding" (March 2016) at 1 and 3, online: http://www.nfn.ca/documents/nr/nfn_mnrf_mou_summary316.pdf [MOU Summary].
[103] *Ibid* at 4.
[104] *Ibid* at 5.

Nipissing.[105] Moreover, frustration and animosity among stakeholders remain, and result in "tense and combative exchanges" over perceived biases for certain regulatory approaches, failures to abide by harvest controls, and unequal burden-sharing among stakeholders to recover the fishery.[106] Racism manifests frequently as blatant disregard for constitutionally-protected treaty rights and demonization of First Nation members for exercising those rights.

One very recent example of frustration among stakeholders is the controversy that arose over a report titled "Achieving a Sustainable Lake Nipissing Walleye Fishery", authored by Dr. Doris Smith and commissioned by the North Bay and District Chamber of Commerce to be an independent third-party assessment of the state of the walleye fishery in Lake Nipissing. NFN Chief Scott McLeod called the report "a colossal waste of time" and expressed concern that Smith's report carried a colonial tone by focusing on the economic value of the fishery to local tourist operators.[107] The Chief also objected to the fact that Smith credited the MNRF for the lion's share of the good work done recently to benefit the fishery.[108] Equally disappointed with Smith's report was the Lake Nipissing Stakeholders Association (LNSA), a local organization founded in 2012 by tourist operators whose objectives include facilitating communication and consultation among Lake Nipissing interest groups to ensure transparency and accountability in the use of the resource.[109] LNSA President Samantha Simpkin expressed concern that Smith's report was unduly influenced by government, claiming that the publicly-released version was missing the recommendation to significantly increase restocking efforts in Lake Nipissing, a recommendation that was present two months earlier when the report was released to stakeholders for comment.[110] Simpkin commended NFN for its efforts and criticized the government for interfering with progress on recovering the fishery: "I think the Chief is doing a

[105] Fisheries Management Plan, *supra* note 87 at 25.
[106] Smith, *supra* note 97 at 4.
[107] Jeff Turl, "Latest walleye study 'a colossal waste of time' says NFN Chief" (29 May 2017) *Bay Today*, online: https://www.baytoday.ca/local-news/latest-walleye-study-a-colossal-waste-of-time-says-nfn-chief-628020?utm_source=sudbury.com&utm_campaign=sudbury.com&utm_medium=referral.
[108] *Ibid*.
[109] Lake Nipissing Stakeholders Association, "About Us", online: http://www.lnsa.net/About_Us.html.
[110] Jeff Turl, "Latest report on Nipissing walleye fishery gets a thumbs down" (31 May 2017) *Sudbury.com*, online: https://www.sudbury.com/around-the-north/latest-report-on-nipissing-walleye-fishery-gets-a-thumbs-down-629982.

good job" she said.[111] "It's the government that is creating the problem by keeping us from working together".[112]

Another example is Chief McLeod's call to the MNRF to close the 2016 – 2017 walleye ice fishing season.[113] NFN came to this request following careful consideration of scientific data and the constitutionally protected rights of its members.[114] Chief McLeod highlighted the troubling mortality rate of walleye caught and released in the winter to emphasize the negative impact of the winter fishery on the walleye stock.[115] He also pointed to the SCC's decision in *Sparrow*, specifically where it discusses the allocation of resources and establishes an order of priority for harvesting fish, namely; conservation, the Indigenous right to fish for subsistence, commercial harvesting, and recreational harvesting.[116] The precautionary closure of the wintery fishery was heralded as not only a step towards preserving a shared resource, but also a demonstration of "understanding and support on the part of government and treaty partners toward the fishermen of Nipissing First Nation" and a "gesture toward reconciliation".[117] Chief McLeod stated:

> Every effort was made to disconnect us from our identity, from taking our kids and putting them in residential school to harassing us when our grandmothers and grandfathers tried to feed their families. But we are still here and if the Ontario government is sincere in moving towards reconciliation, they will work with us and close the walleye fishery for the winter.[118]

The MNRF acknowledged NFN's concerns about the impact of the winter walleye fishery, but instead of closing the season, announced the commissioning of a new study on the mortality rate

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[111] *Ibid.*
[112] *Ibid.*
[113] Anishinabek News.ca, "Nipissing First Nation calls for closure of recreational winter walleye fishery" (13 September 2016), online: http://anishinabeknews.ca/2016/09/13/nipissing-first-nation-calls-for-closure-of-recreational-winter-walleye-fishery/.
[114] *Ibid.*
[115] *Ibid.*
[116] *Ibid*. See also *Sparrow,* supra note 8 at 1115 – 1116.
[117] *Ibid.*
[118] *Ibid.*

of walleye caught and released during the winter.[119] Former LNSA president Scott Nelson sided with the Ministry and said that recreational anglers should not be asked to "sacrifice any more".[120] Chief McLeod maintained that recreational fishing has had a significant impact on the fishery: "Prior to the treaty, we fished this lake for centuries with no problems. We're now dealing with a situation that we did not create", McLeod said. "We didn't create this mess. It's like the fat guy leaving the buffet and there's no food left".[121]

Not long after NFN's call to end the winter walleye fishery, Ice Hut Rentals, an ice hut rental company servicing the North Bay area, posted an advertisement for their services on a popular online classifieds website stating outright that "status card holders" were "not welcome".[122] One man was referred to the ad and was refused a rental from the company when he confirmed that he was a status card holder.[123] An individual writing for the company aggressively defended the company's position in exchanges on social media, stating that "if it's not equal, it's not legal" and that "anything [other than equal access] is illegal and purely discriminatory".[124] The individual suggested further that "it's time for a new treaty" and expressed an unwillingness to "dance with terrorists unhinged and bent on continuing inequality in our fishing rights and responsibilities".[125] Marc David Hyndman, CEO of Ice Hut Rentals, issued an apology for the "poorly worded ad".[126] In this apology, addressed to "Local Native Canadians", he wrote:

> Our ad was not meant to imply that you are not allowed in our huts. Everyone is welcome at our huts on Sunset Point, Lake Nipissing. While in our huts we kindly ask you to obey the house rules. Everyone in our huts is to fish under one set of rules and regulations. You may still fish with us as long as Ontario 2017

[119] Jeff Turl, "UPDATED: MNRF won't close Nipissing ice fishing season this winter" (18 November 2016) *Bay Today,* online: https://www.baytoday.ca/local-news/mnrf-wont-close-nipissing-ice-fishing-season-this-winter-467922. See also, Gord Young, "Walleye ice fishing season on Lake Nipissing a go" (19 November 2016) *Sudbury Star*, online: http://www.thesudburystar.com/2016/11/19/walleye-ice-fishing-season-on-lake-nipissing-a-go [Young].
[120] Young, *ibid.*
[121] *Ibid.*
[122] Stefanovich, "Debate erupts", *supra* note 1.
[123] Turl, *supra* note 2.
[124] *Ibid.*
[125] *Ibid.*
[126] *Ibid.*

> fishing regulations are followed. This is to ensure our fishing location is not abused and that every guest in our huts is on a level playing field.[127]

The company's initial advertisement was recognized as overtly racist by NFN members, Chief McLeod, Ontario Regional Chief Isadore Day, and the broader community.[128] Hyndman's apology was also not well received. Chief McLeod called it "damage control" and said that he "doesn't put a lot of stock in [it]", while Northern College instructor Norbert Witt, from Attawapiskat, said that there "is no confusion about what was meant by the original ad".[129] In an interview with CBC News, Ontario Regional Chief Isadore Day said that "he wants the province's Human Rights Tribunal and Premier Kathleen Wynne to deal with the ad".[130] Chief McLeod saw the conflict as an opportunity "to improve public education on why Indigenous people hold status cards in the first place" and to deal with the racism and the discrimination in the community.[131] He emphasized education as crucial to reconciliation: "Until we get better understanding, the movement towards reconciliation is never really going to be achieved".[132]

Unrelated to the Ice Hut Rental controversy is the conflict that exists internally to NFN regarding restrictions placed on commercial fishers by regulations under the First Nation's Fisheries Law. The MOU between NFN and the MNRF recognizes NFN's jurisdiction over its fisheries and sets out a framework for joint patrols to ensure compliance and enforcement of NFN's Fisheries

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[127] *Ibid.*
[128] *Ibid*. And Rocco Frangione, "Online ad on ice hut rentals called racist by Ontario Regional Chief" (4 January 2017) *My Cochrane Now*, online: https://www.mycochranenow.com/7421/online-ad-ice-hut-rentals-called-racist-ontario-regional-chief/; Olivia Stefanovich, "Status card holders will 'not get the time of day,' ice hut rental company's Kijiji ad said" (3 January 2017), online: http://www.cbc.ca/news/canada/sudbury/controversial-ice-hut-ad-1.3919377; Olivia Stefanovich, "Ontario Human Rights Tribunal, province asked to deal with controversial ice hut ad" (5 January 2017) *CBC News*, online: http://www.cbc.ca/news/canada/sudbury/ice-hut-kijiji-ad-fallout-1.3922217 [Stefanovich, "Ontario Human Rights Tribunal"]. See also image 2/2 of a screenshot of a Facebook comment thread involving icehutrentals.ca and a woman defending the First Nation's treaty rights.
[129] Stefanovich, "Ontario Human Rights Tribunal", *ibid*. See also, Stu Campaigne, "Infamous ice hut owner is, in fact, not the 'Incoming Honorable Minister of Natural Resources'" (9 January 2017) *Subdbury.com*, online: https://www.sudbury.com/around-the-north/infamous-ice-hut-owner-is-in-fact-not-the-incoming-honorable-minister-of-natural-resources-505772: Campaigne labels the apology of the "sorry-not-sorry" variety.
[130] *Ibid.*
[131] *Ibid.*
[132] *Ibid*.

Law.[133] In the autumn of 2016, Chief McLeod closed the commercial fishing season early so as to not exceed community quotas pursuant to the Fisheries Law.[134] On September 10th, 2016, three First Nation commercial fishers using gillnets were confronted by two MNRF conservation officers and one NFN natural resources representative aboard a Ministry vessel.[135] The heated encounter was caught on camera and posted to Facebook and YouTube where it was viewed over 2000 times. While it is not clear how NFN dealt with the specific individuals in the video, one year later, eight First Nation commercial fishers have been charged by the MNRF as per the MOU.[136] Moreover, a small group of NFN commercial fishers have hired a lawyer and have challenged their Chief and Council for their decision to limit how much they can fish.[137] Within the First Nation, the Lake Nipissing walleye fishery conflict has become a battle over the nature of the First Nation's treaty rights to fish commercially, that is; whether the right is individual or collective and where legal lines can be drawn between fishing for subsistence, where a fisherman sells fish he catches and has no other means of providing for his family, and fishing for commercial purposes.[138] Counsel for the commercial fishers, Michael Swinwood, says that what the NFN Chief and Council are doing is "perpetuating apartheid".[139] Chief McLeod says that First Nation members have individual rights, so long as they don't interfere with the collective rights of the community.[140]

It appears, however, that this dispute over the nature of the treaty right to fish and the appropriateness of NFN imposing rules on its commercial fishers may not have been prompted

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[133] Fisheries Update, *supra* note 100 at 6. Under the MOU, if NFN observes non-compliance, it will take appropriate action under its laws to address the wrongdoing. If the non-compliant person does not adhere to NFN's own legal process, NFN may transfer the matter to the MNRF for appropriate action under the MNRF Interim Enforcement Policy. If a Ministry conservation officer observes non-compliance, it notifies NFN and the same process is followed.
[134] Jeff Turl, "Confrontation between Nipissing First Nation fishers and the MNRF conflicts with Chief's promise" (14 September 2016) *Bay Today*, online: https://www.baytoday.ca/local-news/confrontation-between-nipissing-first-nation-fishers-and-the-mnrf-conflicts-with-chiefs-promise-video-413866.
[135] *Ibid.*
[136] Erik White, "Northern Ontario fishing dispute could lead to big changes for Indigenous rights" (06 October 2017) *CBC News,* online: http://www.cbc.ca/news/canada/sudbury/nipissing-first-nation-indigenous-hunting-fishing-rights-case-1.4338840 [White, "fishing dispute"].
[137] *Ibid.*
[138] Dave Dale, "Right to fish to be tested in court" (15 September 2016) *Sudbury Star Opinion Column,* Online: http://www.thesudburystar.com/2016/09/15/right-to-fish-to-be-tested-in-court.
[139] White, *supra* note 3.
[140] *Ibid.*

by the MOU or actions thereunder, but has existed for some time. In 2014, a member of NFN started an internal petition to have gillnetting and the commercial fishery shut down.[141] The petition read:

> We, the undersigned, sign this petition, not as an attack against the fishers who have adopted sustainable ways of fishing, but this petition is to carry out an obligation by the people of Nipissing for the protection of treaty rights granted to all of the Nipissings as a collective group, not individuals. This is the way the Treaty was signed, as a collective. We feel the fishing rights belong to us, not a few. We are speaking up for those who have no voice: the children, the next seven generations, the fish, and they deserve our respect as equal parts of society.
>
> We, the community are concerned citizens who urge our leaders to act now to stop commercial fishing in Lake Nipissing, so that we can keep our inherent rights to fish sustainably for future generations.[142]

The petition clearly communicates a preference for collective rights over individual rights and contains notions of self-governance, respect for spiritual and natural relationships, and sustainability for the benefit of future generations. Nonetheless, some NFN members read the petition as an unwelcomed restriction on rights that the First Nation had fought so long to defend, and as the First Nation accepting blame for the decline of the fishery.[143]

2.2. Northern Ontario Moose

Just as the walleye are culturally and economically significant to Indigenous and non-Indigenous people alike, so too are moose. And just like the walleye, recent reports say that the moose

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[141] Jeff Turl, "Petition to ban Nipissing commercial fishing launched" (18 July 2014) *Bay Today*, online: https://www.baytoday.ca/local-news/petition-to-ban-nipissing-commercial-fishing-launched-23229. See also Bob Goulais, "If you only read a few things about the Lake Nipissing fishery…" (13 June 2015) *Bob Goulais Anishinaabe: Anishinaabe Blog*, online: http://www.anishinaabe.ca/index.php/category/anishinabek-nation/page/2/.
[142] *Ibid.*
[143] Nicole Latulippe, personal communication (24 October 2017).

population in northern Ontario is in serious decline.[144] One MNRF biologist says that "the moose will be the next walleye, for sure".[145] Unlike the walleye, however, no single cause has been identified as the main driver of moose population decline. Habitat degradation, disease and parasites transmitted by the booming white tail deer population, hunting, predation by bears and wolves, and weather could all be contributing to a higher mortality rate among moose, and climate change could be making things worse in the long term.[146] As a result, moose population management should employ a myriad of approaches to appropriately address population decline, including forestry law and policy, wildfire regimes, and hunting regulation. The following discussion focuses on the role of moose hunting regulation in moose population management, but I acknowledge that, in reality, moose harvest for the purpose of moose population management should never be addressed in a vacuum that fails to also consider factors influencing moose population both related and unrelated to hunting.

The regulation of hunting is one of the MNRF's primary modes of managing moose populations.[147] At present time, a resident hunter may harvest one moose calf if he or she holds an outdoors card accompanied by a resident moose licence tag.[148] A moose validation tag (required in addition to an outdoors card and moose licence tag) authorizes the holder to hunt either a bull moose or cow moose, in the area and under the conditions specified on the tag.[149]

In 2014, the Ministry launched a moose population management project (the "Moose Project") to reduce pressures on the moose population and to help it grow and reach a sustainable level.[150] Phase One of the Moose Project specifically addressed the moose population in northern Ontario and brought two important changes. First, the calf hunting season in Northern Ontario was

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[144] Environmental Commissioner of Ontario, "Small Steps Forward: Environmental Protection Report 2015/2016. Volume 2: Biodiversity" (*Environmental Commissioner of Ontario*) at 55, online: http://docs.assets.eco.on.ca/reports/environmental-protection/2015-2016/EPR-Small-Steps-Forward_Vol2-EN.pdf [ECO].
[145] Anonymous Interview #1, *supra* note 96.
[146] ECO, *supra* note 144 at 56.
[147] *Ibid* at 57.
[148] *Hunting, supra* note 12, ss 52(1) and (2).
[149] *Ibid,* s 52(3).
[150] Government of Ontario, "Moose population management" (18 July 2014), online: https://www.ontario.ca/page/moose-population-management.

shortened beginning in 2015 to reduce harvest.[151] Second, beginning in 2016, the start of moose hunting season was delayed by one week across much of northern Ontario in an attempt to decrease hunting during the moose breeding period when bull moose are more vulnerable, thereby allowing uninterrupted breeding and possibly reducing the number of moose killed.[152] In addition to altering the moose hunting season, the MNRF has also reduced the number of validation tags available to licensed moose hunters in order to reduce the number of adult moose that could potentially be harvested.[153] Validation tags are issued by a lottery system and specify the management unit, time period, class of firearm, and sex of moose that can be hunted.[154]

Despite the changes to quotas and season lengths, and despite significant public resources invested to monitor moose populations in the province, the MNRF has no reliable way of knowing whether their management efforts are working. This is because it collects harvest information from only about one third of the licensed resident moose hunters in the province and does not have information on the harvest of moose by Indigenous hunters.[155] The Environmental Commissioner of Ontario says that "the MNRF is making critical decisions with one eye closed, and gambling with Ontario's moose populations".[156]

One academic study that surveyed 40 hunters from two First Nation communities located approximately 400 kilometers northeast of Thunder Bay shows the critical importance of knowing First Nation moose harvest numbers.[157] The study found that survey respondents were harvesting 87 moose per year, resulting in an error of approximately 40% in the MNRF's moose harvest report for the area in question.[158] The authors of this study were sure to make clear that this 40% error was conservative, given that only 40 hunters from two First Nation communities responded to study surveys and that there are an additional three First Nations communities

[151] *Ibid.* See also ECO, *supra* note 144 at 57.
[152] *Ibid.* See also ECO, *supra* note 144 at 58.
[153] ECO, *supra* note 144 at 58.
[154] *Ibid.*
[155] *Ibid* at 62.
[156] *Ibid.*
[157] Joseph Leblanc *et al.*, "First Nation Moose Hunt in Ontario: A Community's Perspectives and Reflections" (2011) 47 *ALCES* 163 [LeBlanc].
[158] *Ibid* at 172.

exercising their treaty rights to hunt on the traditional territory that makes up the area in question.[159] This error is considered to have the potential to adversely impact moose management and "the viability of future populations".[160] The authors' concluding remarks are framed in the context of reconciliation: a lack of dialogue and meaningful consultation between First Nations and the MNRF is to blame for the underestimation, and the authors recommend building working relationships between First Nations and the Ministry to effectively manage moose in Ontario.[161] They emphasize that continued moose harvest management "without acknowledging First Nations practices will cause conflict to escalate".[162]

Indeed, First Nation harvest of moose is often blamed for the plummeting moose population. Vince Chrichton, a moose researcher and biologist originally from Chapleau, Ontario, says that First Nation "overharvesting" is the reason there are so few moose, especially in the Chapleau area.[163] Chrichton calls for better cooperation between First Nations and the Ministry to devise a mutually agreed upon conservation plan, but also advocates for a universal ban on moose hunting for everyone in the area including a moratorium brought via the government's power to infringe on treaty rights under *Sparrow*.[164] Other disgruntled parties who have had their hunting opportunities limited by the MNRF share Chrichton's sentiment for government restriction of First Nations rights, leaving comments on online articles like: "regulate the native hunt"; "limit the native harvest!!!", and; "stop the native poaching".[165] Some even go so far as to blame the Constitution for allowing the Ministry to "[ignore] the impact of what native hunting is doing to moose populations", calling for a "correction" of the Constitution's "shortcomings" to provide the "same rights, freedoms and responsibility to every native and non-native Canadian".[166]

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[159] *Ibid.*
[160] *Ibid.*
[161] *Ibid* at 171.
[162] *Ibid.*
[163] Vince Chrichton in Erik White, "Northern Ontario First Nation considers hunting limits to protect moose" (29 October 2017) *CBC News Sudbury*, online: http://www.cbc.ca/news/canada/sudbury/chapleau-moose-hunting-limits-northern-ontario-1.4374646 [White, "Northern Ontario"]. See also Vince Chrichton, "How unregulated hunting is putting Canada's moose at risk" (19 October 2015) *Outdoor Canada*, online: http://www.outdoorcanada.ca/How_unregulated_hunting_is_putting_Canadas_moose_at_risk.
[164] White, "Northern Ontario", *Ibid.*
[165] Comment thread: Bill Hodgins, "Province proposes changes to moose hunting season" (9 February 2015) *Ontario Out of Doors,* online: https://www.oodmag.com/news/province-proposes-changes-moose-hunting-season/.
[166] Gevaert, *supra* note 4.

A less popular topic in mainstream media is the adverse impact that dwindling moose populations in northern Ontario have had on First Nations hunters. In the 49 Nishnawbe-Aski Nation communities that are scattered east and west across northern Ontario as far south Temiskaming Shores, moose hunting festivals bring everyone together and the moose population is vital for food security, connectedness to the land, and overall wellbeing.[167]

To help protect the moose population, some First Nations have taken steps to reduce the number of moose harvested in their treaty areas. For example, Brunswick House First Nation and Chapleau Cree First Nation have both stopped a convention of welcoming Indigenous hunters from other treaty areas to hunt moose in their territory.[168] As a further step, Brunswick House First Nation is looking to limit moose hunting by their members, similar to how the NFN Fisheries Law has limited their members' right to commercially fish walleye in Lake Nipissing.[169] The Algonquins of Ontario (AOO), which is comprised of 10 communities in central/southeastern Ontario, was the first Indigenous group in Canada to voluntarily enact harvest management practices for hunting activities.[170] It first took steps toward harvest management in 1991 and now have the AOO Harvest Management Plan (HMP) for Algonquin Park and the Wildlife Management Units within Algonquin territory.[171] The HMP "articulate[s] the framework in which the Algonquin harvest is conducted" including setting Sustainable Harvest Targets per Wildlife Management Unit with input from the MNRF.[172] To harvest moose, Algonquin hunters are required to participate in a draw-based tag system that is coordinated among all 10 AOO communities.[173] Harvest Summaries of each hunting season are made public

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[167] Cameron Perrier, "How Ontario's dwindling moose population is hurting First Nations" (24 November 2016) *TVO*, online: https://tvo.org/article/current-affairs/climate-watch/-how-ontarios-dwindling-moose-population-is-hurting-first-nations. See also: Leblanc, *supra* note 151. For a map of Nishnnawbe-Aski Nation communities, see: http://www.nan.on.ca/upload/images/nan-map.jpg.
[168] White, "Northern Ontario", *supra* note 164.
[169] *Ibid*.
[170] Algonquins of Ontario, "Algonquins on Ontario Harvest", online: http://www.tanakiwin.com/community/aooharvest/.
[171] *Ibid.* For a map of Algonquin territory, see: http://www.tanakiwin.com/algonquins-of-ontario/who-are-the-algonquins-of-ontario/.
[172] *Ibid.*
[173] *Ibid.*

on the AOO website,[174] and if harvest targets are met before the hunting season is over, hunting is no longer permitted.[175]

The Lake Nipissing walleye and Northern Ontario moose case studies present the same conundrum: where First Nations treaty rights and non-Indigenous hunting and fishing interests compete in the context of a wildlife population in crisis, how should the resource be managed to reduce conflict and save the species? The remainder of this paper is dedicated to identifying and analyzing the key legal and social pillars for addressing these resource management crises and others like them. It recognizes both provincial and inherent Indigenous jurisdiction to manage natural resources, and proposes a framework for cooperation and co-management in the context of a reimagined process for reconciliation.

3. Jurisdiction and Reconciliation Reimagined: Pillars to an Improved Approach

3.1. Matters of Jurisdiction

Canada's federalist system purports to divide law-making powers exclusively among the federal and provincial governments by way of sections 91 and 92 of the *Constitution Act, 1982*, respectively, such that federal Parliament and the provinces may make laws with regard to the heads of power assigned to them by these sections.[176] Notwithstanding, sections 91 and 92 both contain heads of power that form the basis for the exercise of jurisdiction over environmental matters.[177] And while provincial power to legislate over the environment is, in fact, shared with the federal government, it is largely uncontested.[178] Of particular interest for the purposes of this paper, section 92A(1)(b) of the *Constitution Act, 1982* allocates the jurisdiction to make laws with regard to "conservation and management of non-renewable natural resources" exclusively

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[174] *Ibid.*
[175] Algonquins of Pikwàkanagàn First Nation, "Moose", online: http://www.algonquinsofpikwakanagan.com/harvest_moose_deer.php.
[176] *Constitution Act, 1982, supra* note 36.
[177] Dayna Nadine Scott, "The Environment and Federalism (in Context)" in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) at 495 – 501.
[178] Barry C Field and Nancy D Olewiler, "Environmental Policy and Institutions in Canada: An Overview" in *Environmental Economics*, 3rd ed (Toronto: McGraw Hill Ryerson, 2011) at 15-2.

to the provinces.[179] Hunting regulation, therefore, falls squarely within provincial, rather than federal jurisdiction.

Fisheries, however, are under the jurisdiction of the federal government, as per section 91(12).[180] But according the federal Department of Justice, this federal authority gives way to provincial jurisdiction when fishing becomes a matter of property and civil rights.[181] This overlapping provincial/federal jurisdiction is constitutionally valid by way of the double aspect doctrine, which allows a given subject to be of valid provincial jurisdiction for one purpose, and for it to be of valid federal jurisdiction for another purpose.[182] As previously mentioned, Lake Nipissing is a "specially designated water" of local importance and is thus managed by the province through a separate planning process.[183]

Of greater importance for the purpose of crafting potential solutions to the types of resource management conflicts described above is the growing recognition of inherent Indigenous jurisdiction to manage natural resources. Only once Indigenous jurisdiction is recognized can a new and more appropriate regulatory model be conceptualized. Indigenous peoples have long asserted jurisdiction over natural resources but Canada's colonial legal frameworks have failed to properly acknowledge these assertions to date.[184]

International law offers a point of departure for national governments to recognize the jurisdiction of Indigenous peoples. The *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) recognizes that "respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the

[179] *Constitution Act, 1982, supra* note 36, s 92A(1)(b).
[180] *Ibid*, s 91(12).
[181] Walden, *supra* note 26 at 3. Provinces have jurisdiction over property and civil rights under subsection 92(13) of the *Constitution Act, 1867.*
[182] *Multiple Access Ltd v McCutcheon,* [1982] 2 SCR 161 at 182, 138 DLR (3d) 1.
[183] FMZ 11, *supra* note 28.
[184] Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake Against the State* (Minneapolis: University of Minnesota Press, 2017) [Pasternak].

environment".[185] Moreover, there are several articles of the *UNDRIP* that directly support Indigenous jurisdiction to manage resources:

- Article 4 establishes the right Indigenous self-government;
- Article 18 establishes that Indigenous Peoples have the right to maintain and develop their own decision-making institutions and to participate in decision-making that would affect their rights, through their own processes and procedures;
- Article 19 establishes that states shall consult and cooperate with Indigenous Peoples through their own institutions "to obtain free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them";
- Article 25 establishes that Indigenous Peoples have the right to maintain and strengthen their spiritual relationship with traditional resources and to "uphold their responsibilities to future generations in this regard";
- Article 26 establishes that Indigenous Peoples have the right to use, develop, and control traditional resources and that states shall legally recognize and protect these resources in a manner that respects the customs and traditions of Indigenous Peoples;
- Article 29 establishes that Indigenous Peoples have the right to conserve and protect the environment and resources and that states "shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination", and;
- Article 32 establishes that Indigenous Peoples have the right to determine and develop priorities and strategies for the use of traditional resources.

Canada's recent commitment to fully implement the *UNDRIP* may be interpreted as a signal of the Government's readiness to acknowledge Indigenous jurisdiction over traditional resources.[186]

The following two subsections of this research paper explore potential sources of Indigenous jurisdiction in Canadian (colonial) law and Indigenous law. The analysis unequivocally

[185] *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations General Assembly, 61st session, UN Document A/RES/61/295 (13 September 2007) at 2 [*UNDRIP*].
[186] Trudeau, *supra* note 5.

establishes that an approach reliant on Canadian law to establish Indigenous jurisdiction is inconsistent with the *UNDRIP,* with the reconciliatory aims of section 35(1) of the *Constitution Act, 1982*, and thus with any new approach to natural resource management.[187]

3.1.1. Sources of Indigenous Jurisdiction in Canadian Law

The federal *Indian Act*, originally passed in 1876, must be immediately rejected as conferring any legitimate and actionable rights or jurisdiction to Indigenous peoples despite the fact that it leaves First Nations to exercise certain powers, like the limited power to govern their communities through the prescribed band and council system.[188] The Act aims to heavily regulate and subordinate many activities that might be protected as Aboriginal and treaty rights,[189] to assimilate Indigenous peoples, and to constrain First Nation political and legal development.[190] The Act does not respect the Constitution's democratic values,[191] like dignity, equality, accommodation of religious beliefs, respect for group culture and identity, and faith in social and political institutions,[192] and is thus entirely inconsistent with the reconciliatory aims of section 35(1) of the *Constitution Act, 1982*.[193]

First Nations can gain authority to manage *reserve* lands via the *First Nations Land Management Act* (*FNLMA*), which essentially replaces land administration provisions in the *Indian Act* and removes reserve lands from the Minister of Indigenous and Northern Affairs.[194] Under the *FNLMA,* First Nations may grant interests in land, regulate land use and environmental protections, enforce and prosecute under First Nations law, and directly receive land-related

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[187] Justice Binnie in *Mikisew, supra* note 52 at para 1 says that "[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions".
[188] John Borrows, "Aboriginal and Treaty Rights and Violence against Women" (2013) 50:3 Osgoode Hall LJ 699 at 734. See also *Indian Act,* RSC 1985, c I-5.
[189] John Borrows, "Unextinguished: Rights and the *Indian Act*", (2016) 67 *UNBLJ* 3 at 17 [Borrows, "Unextinguished"]. Borrows names land, governance, education, and family organization as activities that are regulated by the *Indian Act* that might be protected as Aboriginal and treaty rights.
[190] *Ibid* at 13 – 14.
[191] *Ibid* at 14.
[192] *R v Oakes,* [1986] 1 SCR 103 at 136, 53 OR (2d) 719.
[193] Borrows, "Unextinguished", *supra* note 189 at 12. See also: *Mikisew, supra* note 52 at para 1.
[194] Thomas Isaac, "First Nations Land Management Act and Third Party Interests" (2005) 42 Atla L Rev 1047 at 1048 – 1049.

revenue.[195] While this mechanism goes some way to empowering First Nations political and legal institutions, the mere property rights conferred by the *FNLMA* to First Nations with respect to *reserve* lands *only* (not across territory more broadly) is far too limited to equate to jurisdiction. The inadequacy of property rights as equivalent to Indigenous rights came to the fore in Barriere Lake where members of the Algonquin Nation blocked a highway in protest of clear cutting on their traditional lands.[196] In an exchange detailed by Shiri Pasternak in a recent book, a Québec Provincial Police officer asked what right the Algonquin Nation had to stop the logging, Chief Jean Maurice Matchewan responded with: "A right to live. To have food on the table".[197] Unsatisfied, the officer pressed for some documented proof of the Algonquin's right to live on the land, misrecognizing the fundamental difference between a right to live off the land, grounded in thousands of years of pre-colonial occupation, and property rights.[198] In a telling quote, Chief Matchewan says: "We're not talking about dealing with rights to the land. We're talking about food on the table and protecting the natural habitat. The wildlife".[199]

Unlike Canadian statutes, Canadian constitutional jurisprudence goes some way to recognizing the significance of Indigenous peoples' pre-colonial presence and suggests that Indigenous jurisdiction is derived from the fact that Indigenous peoples lived in communities and had their own distinctive cultures for centuries prior to European contact.[200] In fact, Canadian jurisprudence suggests that the Canadian Constitution is compatible with a multi-tiered governance framework that includes federal, provincial, and Indigenous governments.[201] In *Reference re Secession of Quebec* (*Secession Reference*) the Supreme Court of Canada recognizes how the division of powers allows governments to make decisions for the development of societies and facilitates democratic efficiency by distributing jurisdictional

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[195] *Ibid* at 1049.
[196] Pasternak, *supra* note 184 at 1 – 2.
[197] *Ibid* at 1.
[198] *Ibid* at 1 – 2.
[199] *Ibid* at 1.
[200] Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" (2007) National Centre for First Nation Governance, online: http://fngovernance.org/ncfng_research/kent_mcneil.pdf> [McNeil]. at 6. See also *R v Van der Peet, supra* note 8 at para 30.
[201] Theresa A. McClenaghan, "Why should Aboriginal Peoples Exercise Governance over Environmental Issues?" (2002) 51 New Brunswick Law Journal, Aboriginal Issues 211 at 212 [McClenaghan]. See also *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference*].

power to the government most in tune with a given society's objectives.[202] Furthermore, in *Campbell v British Columbia,* the British Columbia Supreme Court found that the non-exhaustive nature of sections 91 and 92 of the *Constitution Act, 1982,*[203] combined with federalism as a mechanism for unity among diversity,[204] and section 35 as the manifestation of an important constitutional value for respect for minority rights,[205] effectively creates jurisdictional space for Indigenous governments.

The question then becomes how constitutionally-entrenched Indigenous jurisdiction stacks up against overlapping federal or provincial heads of power. Recall that the SCC in *Sparrow* said that the Crown cannot interfere with any Aboriginal right unless it can justify the infringement,[206] and in *Haida* and *Mikisew* that the Crown has an obligation to consult and, where necessary, accommodate when it contemplates conduct that might adversely affect a proven or unproven Aboriginal right, treaty right, or claim to title.[207] More recently, the SCC in *Tsilhqot'in* confirmed that Aboriginal title is essentially the "right to choose" how communally-held traditional lands will be used.[208] The Court also indicated that the government must seek consent from the title-holding nation before interfering with title lands, and must justify its interference according to *Sparrow* if consent could not be obtained.[209] Former Chief Justice McLachlin in *Tsilhqot'in* seemed to indicate that serious infringements would not be lightly justified;[210] the land control and management power allocated to title-holding nations in this case is substantial and nearly akin to "jurisdiction".[211] Nonetheless, this allocation of power remains subject to justified overruling government initiatives. Moreover, the *Sparrow* justification framework fails to offer the same level of protection as does, for example, the "pith and substance" analysis and doctrine of interjurisdictional immunity that is called on to protect the

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[202] *Secession Reference, ibid* at para 58.
[203] *Campbell et al v AG BC/AG Cda & Nisga'a et al*, 2000 BCSC 1123 at para 76, 189 DLR (4th) 333 [*Campbell*].
[204] *Ibid* at paras 77 and 78.
[205] *Ibid* at para 81.
[206] *Sparrow*, *supra* note 8 at 1110.
[207] *Haida Nation, supra* note 52 at para 35 and 37; *Mikisew supra* note 52 at paras 55 and 57. *Mikisew* extends the duty to consult to include treaty interpretation.
[208] 2014 SCC 44 at paras 67, 73, and 94, [2014] 2 SCR 256 [*Tsilhqot'in*].
[209] *Ibid* at para 76.
[210] *Ibid* at para 127.
[211] Avnish Nanda, "How the Right to Self-Government is an Inherent Part of Aboriginal Title" (30 September 2015) *Nanda Law*, online: http://www.nandalaw.ca/blog/2015/9/11/mcneil.

jurisdiction of one level of government against intrusions by the other level in situations of federal/provincial jurisdictional overlap.[212] *Tsilhqot'in* is the closest the SCC has reached to allocating jurisdiction to Indigenous peoples and is barely more than a reiteration of the "justification" jurisprudence that came before it.

A second, less immediate issue with the Canadian law approach to recognizing the right to Indigenous self-government is the difficulty involved in delineating the scope and content of Indigenous jurisdiction. Canadian jurisprudence has approached this question from two different angles, both of which have Indigenous groups start with an "empty box of jurisdiction" and an onus "to fill this box by proving Aboriginal or treaty rights, or a combination Aboriginal and treaty rights".[213]

In *Pamajewon*, the Supreme Court of Canada resists the recognition of broad rights and Indigenous governance of excessive generality and limits the content of Indigenous jurisdiction to Aboriginal rights that can be proven as historically and culturally significant.[214] To prove an Aboriginal right as historically and culturally significant, the Indigenous claimant must establish that a given interest or activity is an element of a practice, custom, or tradition integral to the claimant's distinctive pre-contact culture.[215] This test relies on colonial notions of fact and history, effectively freezing Indigenous cultures to one point in time,[216] and ignoring the "very significant adaptations that Aboriginal nations have been obliged to make to come to terms with the impact of European colonization".[217]

In *Campbell*, in addition to recognizing mutually negotiated treaty provisions a means of defining Indigenous jurisdiction,[218] Justice Williamson interpreted the SCC's emphasis in

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[212] *Burrardview Neighbourhood Assn v Vancouver (City)*, 2007 SCC 23 at para 41, [2007] 2 SCR 86. And *City National Leasing Ltd v General Motors of Canada Ltd*, [1989] 1 SCR 641 at para 47, 58 DLR (4th) 255.
[213] McNeil, *supra* note 192 at 12.
[214] *R v Pamajewon*, [1996] 2 SCR 821 at para 27, 138 DLR (4th) 204. And *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 170, 153 DLR (4th) 193 [*Delgamuukw*]. Note that these two cases deal with Aboriginal rights, not treaties and treaty rights, and may thus be of limited applicability to establish jurisdiction for First Nations who are signatories to treaties.
[215] *R v Van der Peet, supra* note 8 at paras 44 – 46, 55 – 56, and 60 – 62.
[216] John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 American Indian Law Review 37.
[217] McNeil, *supra* note 200 at 13.
[218] McNeil, *supra* note 200 at 15.

Delgamuukw on the communal nature of title to mean that all communally held Aboriginal title, rights, and treaty rights, must equate to the right for that community to make decisions related to those communally-held interests.[219] This second angle to delineating the scope and content of Indigenous jurisdiction, in comparison to the *Pamajewon* angle, starts with a very broad scope, and extends potentially to any interest that is held communally by the Indigenous group in question.[220] Yet, the problem of defining the content of those communally-held interests remains; the jurisdictional box is still empty and the Indigenous group still bears the burden of proving Aboriginal and treaty rights to establish jurisdiction according to the "integral to a distinctive culture test" outlined above.[221]

Article 26 of the *UNDRIP* requires that states legally recognize traditional land and resources in a manner that respects the customs and traditions of Indigenous Peoples. Since Indigenous Peoples are required to rely on colonial notions of facts and history to prove their rights, the Canadian law approach to establishing Indigenous jurisdiction is inconsistent with the *UNDRIP* and with the reconciliatory aims of section 35(1) of the *Constitution Act, 1982*.

3.1.2. Indigenous Jurisdiction from Indigenous Law

To preface this discussion, I must explicitly recognize my identity as a non-Indigenous person. The following discussion of Indigenous law thus represents my current understanding and best interpretation of what I have learned from reading and listening to the works of Indigenous legal scholars, most of whom identify as Anishinaabe. As such, I rely on my understanding of Anishinaabe legal principles in the following discussion, but do recognize that Anishinaabe perspectives are not necessarily shared among all Indigenous peoples.

One of the overarching goals of this research is to take Indigenous rights and reconciliation out of abstract discourse to where they can be deployed and relied on by Indigenous peoples as a

[219] *Campbell, supra* note 203 at paras 138 – 139.
[220] *Delgamuukw, supra* 214 at para 115. See also *Campbell, ibid* at 136 – 137. See also McNeil, *supra* note 200 at 17.
[221] McNeil, *ibid* at 17.

political tool to further regulate Indigenous interests.[222] The first step in this exercise was to discuss the socio-political context in which those rights operate, as in Parts I and II of this paper. The next step is to consider Indigenous rights from the viewpoint of Indigenous peoples, unconstrained by colonial legal frameworks.[223]

Anishinaabe creation stories are a useful starting point toward understanding Anishinaabe law and Anishinaabe constitutionalism,[224] especially as they compare to the western liberal constitutional order. Simply put, in western liberal ideology, autonomous humans who are independent from one another and from the rest of the natural world enter into social contracts to ensure their safety and, in exchange for their radical freedom, receive both rights and obligations.[225] Justice is the end goal and is obtained when rights and obligations are upheld.

John Borrows argues that non-Indigenous Canadians would benefit from increased accessibility of Indigenous laws; that accessibility to Indigenous laws would generate "a greater appreciation for the nature and scope of these laws", would reduce anxiety and fear about Indigenous legal traditions, and increase willingness to "consider Canada as a multi-juridical society".[226] He also emphasizes that "when oral traditions are expressed in written form, it is important that steps be taken to ensure that their flexibility is not lost".[227] Moreover, Borrows explains that increased accessibility could lead to misunderstandings, imported meaning, and appropriation where the context of Indigenous laws is not fully appreciated by recipients.[228]

Below, I reproduce two Anishinaabe creation stories as told by Anishinaabe storytellers. I reproduce these stories, as opposed to excerpt and quote from them, to ensure that I do not

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[222] Borrows, "Unextinguished", supra note 189 at 3 – 4.
[223] *Ibid* at 6.
[224] Heidi Kiiwetinepinesiik Stark, "Changing the Treaty Question: Remedying the Right(s) Relationship" in John Borrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 248 at 251 and 254 [Stark].
[225] Aaron Mills/Waabishki Ma'iingan, "What Is a Treaty? On Contract and Mutual Aid" in John Borrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 208 at 213 – 214 [Mills].
[226] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 142.
[227] *Ibid* at 144.
[228] *Ibid* at 148.

inadvertently exclude relevant contextual details or import meaning that I do not intend. My analysis of these stories is based on my understanding that I have derived from reading and listening to the works of Indigenous legal scholars, most of whom identify as Anishinaabe.

Consider the following Anishinaabe creation stories:

"The Vision of Kitche Manitou" by Basil Johnston:[229]

CREATION
Young and old asked:
Who gave to me
The breath of Life
My frame of flesh?
Who gave to me
The beat of heart
My vision to behold
Who?

When to Rose the gift
Of shade, of beauty
And grace of form?
When to Pine to gift
Of mystery of growth
The power to heal
When?

How to Bear the gift
Of sense of time
A place of wintering?
How to Eagle came the gift
Of glance of love
The flash of rage?
How?

Who gave to Sun
His light to burn
His path to tread?
Who gave to Earth
Her greening bounty

[229] Basil Johnston, "The Vision of Kitche Manitou" in *Ojibway Heritage* (Lincoln: University of Nebraska Press, 1976) at 77 – 79 [Johnston].

Cycles of her being?
Who?

Who gave to us
The gifts we do not own
But borrow and pass on?
Who made us one?
Who set the Path of Souls?
Who carved the Land of Peace?
Who?

As the young asked, the old men and old women thought about these matters.

They gave their answers and explanations in the form of stories, songs, prayers, rituals, and ceremonies.

Kitche Manitou (The Great Spirit) beheld a vision. In this dream he saw a vast sky filled with stars, sun, moon, and earth. He saw an earth made of mountains and valleys, islands and lakes, plains and forests. He saw trees and flowers, grasses and vegetables. He saw walking, flying, swimming, and crawling beings. He witnessed the birth, growth, and the end of things. At the same time he saw other things live on. Amidst change there was constancy. Kitche Manitou heard songs, wailings, stories. He touched wind and rain. He felt love and hate, fear and courage, joy and sadness. Kitche Manitou meditated to understand his vision. In his wisdom Kitche Manitou understood that his vision had to be fulfilled. Kitche Manitou was to bring into being and existence what he had seen, heard, and felt.

Out of nothing he made rock, water, fire, and wind. Into each one he breathed the breath of life. On each he bestowed with his breath a different essence and nature. Each substance had its own power which became its soul-spirit.

From these four substances Kitche Manitou created the physical world of sun, stars, moon, and earth.

To the sun Kitche Manitou gave the powers of light and heat. To the earth he gave growth and healing; to waters purity and renewal; to the wind music and the breath of life itself.

On earth Kitche Manitou formed mountains, valleys, plains, islands, lakes, bays, and rivers. Everything was in its place; everything was beautiful.

Then Kitche Manitou made the plant beings. These were four kinds: flowers, grasses, trees, and vegetables. To each he gave a spirit of life, growth, healing, and beauty. Each he placed where it would be the most beneficial, and lend to earth the greatest beauty and harmony and order.

After plants, Kitche Manitou created animal beings conferring on each special powers and natures. There were two-leggeds, four-leggeds, wingeds, and swimmers.

Last of all he made man. Though last in the order of creation, least in order of dependence, and weakest in bodily powers, man had the greatest gift – the power to dream.

Kitche Manitou then made The Great Laws of Nature for the well being and harmony of all things and all creatures. The Great Laws governed the place and movement of sun, moon, earth and stars; governed the powers of wind, water, fire, and rock; governed the rhythm and continuity of life, birth, growth, and decay. All things lived and worked by these laws.

Kitche Manitou had brought into existence his vision.

"The Great Flood" by Edward Benton-Benai:[230]

For many years the first people lived together in harmony with all of the Creation. This harmonious way of life on Earth did not last forever. Men and women did not continue to give each other the respect needed to keep the Sacred Hoop of marriage strong. Families began quarrelling with each other. Finally villages began arguing back and forth. People began to fight over hunting grounds. Brother turned against brother and began killing each other.

It saddened the Creator, Gichi Manidoo, to see the Earth's people turn to evil ways. It seemed that the entire Creation functioned in harmony except for the people who were the last to be placed there. For a long time Gichi Manidoo waited hoping that the evil ways would cease and that brotherhood, sisterhood, and respect for all things would again come to rule over the people.

When it seemed that there was no hope left, Gichi Manidoo decided to purify the Earth. He would do this with water. The water came like a mush-ko-be-wun (flood) upon the Earth. The flood came so fast that it caught the entire Creation off guard. Most all living things were drowned immediately, but some of the animals were able to keep swimming, trying to find a small bit of land on which to rest. Some of the birds were caught in the air and had to keep flying in order to stay alive.

The purification of the Earth with water appeared to be complete. All the evil that had built up in the hearts of the first people had been washed away.

[230] Edward Benton-Benai, "The Great Flood" in *The Mishomis Book: The Voice of the Ojibway* (Minneapolis: University of Minnesota Press, 2010) at 29 – 34.

But how could life on Mother Earth begin anew?

There are many Anishinaabe teachings that refer to a man named "Way-na-boo-zhoo". Some people have actually referred to Anishinaabe or Original Man as Waynaboozhoo. Most of the elders agree that Waynaboozhoo was not really a man but was a spirit who had many adventures during the early years of the Earth. Some people say that Waynaboozhoo provided the link through which human form was gradually given to the spiritual beings of the Earth. Everyone agrees that Waynaboozhoo had many human-like characteristics. He made mistakes at times just like we do. But he also learned from his mistakes so that he could accomplish things and become better at living in harmony with the Earth. These things that Waynaboozhoo learned were later to become very useful to Anishinaabe people. He has been looked upon as kind of a hero by the Anishinaabe people. These "Waynaboozhoo Stories" have been told for many years to children to help them grow in a balanced way.

The teaching about how a new Earth was created after the Great Flood is one of the classic Waynaboozhoo Stories. It tells of how Waynaboozhoo managed to save himself by resting on a chi-mi-tig (huge log) that was floating on the vast expanse of water that covered Mother Earth. As he floated along on this log, some of the animals that were able to keep swimming came to rest on the log. They would rest for a while and then let another swimming animal take their place. It was the same way with the winged creatures. They would take turns resting on the log and flying. It was through this kind of sacrifice and concern for one another that Waynaboozhoo and a large group of birds and four-leggeds were able to save themselves on the giant log.

They floated for a long time but could gain no sight of land. Finally, Waynaboozhoo spoke to the animals.

"I am going to do something," he said. "I am going to swim to the bottom of this water and grab a handful of Earth. With this small bit of Earth, I believe we can create a new land for us to live on with the help of the Four Winds and Gichi Manidoo".

So Waynaboozhoo dived into the water. He was gone for a long time. Some of the animals began to cry for they thought that Waynaboozhoo must have drowned trying to reach the bottom.

At last, the animals caught sight of some bubbles of air, and finally, Waynaboozhoo came to the top of the water. Some of the animals helped him onto the log. Waynaboozhoo was so out of breath that he could not speak at first. When he regained his strength, he spoke to the animals.

“The water is too deep…I never reached the bottom….I cannot swim fast enough or hold my breath long enough to make it to the bottom.”

All the animals on the log were silent for a long time. Maang (the loon) who was swimming alongside the log was the first to speak.

“I can dive under the water for a long ways, for that is how I catch my food. I will try to dive to the bottom and get some of the Earth in my beak.”

The loon dived out of sight and was gone a long time. The animals felt sure he had drowned, but the loon floated to the top of the water. He was very weak and out of breath.

“I couldn’t make it,” he gasped. “There appears to be no bottom to this water.”

Next, Zhing-gi-biss (the helldiver) came forth. “I will try to swim to the bottom,” he said. “I am known for diving to great depths.”

The helldiver was gone for a very long time. When the animals and Waynaboozhoo were about to give up hope, they saw the helldiver’s body come floating to the top. He was unconscious and Waynaboozhoo had to pull him onto the log and help him regain his breath. When the helldiver came to, he spoke to all the animals on the log.

“I am sorry my brother and sisters. I, too, could not reach the bottom although I swam for a long ways straight down.”

Many of the animals offered themselves to do the task that was so important to the future of all life on Earth. Zhon-gwayzh (the mink) tried but could not make it to the bottom. Ni-gig (the otter) tried and failed. Even Mi-shii-kenh (the turtle) tried but was unsuccessful.

All seemed hopeless. It appeared that the water was so deep that no living thing could reach its bottom. Then a soft, muffled voice was heard.

“I’ll try,” it said softly.

At first, no one could see who it was that spoke. The little Wa-zhushk (muskrat) stepped forth.

“I’ll try,” he said again.

Some of the animals laughed and poked each other. The helldiver jeered, “If I couldn’t make it, how can he expect to do any better?”

Waynaboozhoo spoke, “Hold it everyone! It is not our place to judge the merits of another; that task belongs to the Creator. If little muskrat wants to try, I feel we should let him.”

The muskrat dived down and disappeared from view. He was gone for such a long time that Waynaboozhoo and all the animals on the log were certain that muskrat had given up his life in trying to reach the bottom.

The muskrat was able to make it to the bottom of the water. He was already very weak from lack of air. He grabbed some Earth in his paw and with every last bit of strength he could muster, muskrat pushed away from the bottom.

One of the animals on the log caught sight of muskrat as he floated to the water’s surface. They pulled his body onto the log. Waynaboozhoo examined the muskrat.

“Brothers and sisters,” Waynaboozhoo said. “Our little brother tried to go without air for too long. He is dead.” A song of mourning and praise was heard over all the water as Wa-zhushk’s spirit passed to the next world.

Waynaboozhoo spoke again, “Look! Muskrat has something in his paw. It is closed tight around something.” Waynaboozhoo carefully pried open muskrat’s tiny paw. All the animals gathered around trying to see. Muskrat’s paw opened and there, in a little ball, was a piece of Earth. All the animals cheered! Muskrat had sacrificed his life so that life could begin anew on the Earth.

Waynaboozhoo took the piece of Earth from the muskrat’s paw. At that moment, Mi-shii-kenh (the turtle) swam forward and said, “Use my back to bear the weight of this piece of Earth. With the help of the Creator, we can make a new Earth.”

Waynaboozhoo put the piece of Earth on the turtle’s back. All of a sudden the noo-di-noon (winds) began to blow. The wind blew from each of the Four Directions. The tiny piece of Earth on the turtle’s back began to grow. Larger and larger it became, until it formed a mini-si (island) in the water. Still the Earth grew but still the turtle bore its weight on his back.

Waynaboozhoo began to sing a song. All the animals began to dance in a circle on the growing island. As he sang, they danced in an ever-widening circle. Finally, the winds ceased to blow and the waters became still. A huge island sat in the middle of the great water.

Today, traditional Anishinaabe people sing special songs and dance in a circle in memory of this event. Anishinaabe people also give special honour to our brother, the turtle. He bore the weight of the new Earth on his back and made life possible for the Earth’s second people.

> To this day, the ancestors of our brother, the muskrat, have been given a good life. No matter that marshes have been drained and their homes destroyed in the name of progress, the muskrats continue to multiply and grow. The Creator has made it so that muskrats will always be with us because of the sacrifice that our little brother made for all of us many years ago when the Earth was covered with water. The muskrats do their part today in remembering the Great Flood; they build their homes in the shape of the little ball of Earth and the island that was formed from it.

In these stories, several principles of Anishinaabe constitutionalism are clear. First and foremost, humans are interdependent with the rest of creation; that is, the physical, plant, and animal worlds.[231] Rather than facilitating social contracts for mutual security and a just society, Anishinaabe constitutionalism coordinates mutual aid: the challenge is not how autonomy can be appropriately constrained for just social functioning, but instead how the gifts of one being can satisfy the needs of another to achieve social harmony.[232] Relationships between interdependent beings are the driving force behind Anishinaabe constitutionalism,[233] balance and coexistence are key,[234] which stands in stark contrast to reliance on rights, attained or retained, in the western liberal constitutional order.[235]

These Anishinaabe legal principles were drawn on by Anishinaabe leaders as they negotiated historical treaties with the State.[236] As such, Anishinaabe law must form the basis to interpreting treaties: the analysis must shift to an exploration of responsibilities and obligations arising from relationships with and within the natural world, instead of a western rights discourse that acts to constrain visions for co-existence.[237]

Where treaties are understood as flowing from sacred Anishinaabe law, treaty proceedings must be understood as bringing the Crown into relationships of responsibility and obligation with Creation and with Anishinaabe people.[238] Moreover, in acknowledging the Creator and Creation

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[231] Mills, *supra* note 225 at 232 – 233 quoting Johnston, *supra* note 229.
[232] Benton-Benai, *supra* note 230 at 32. See also Mills, *ibid* at 215.
[233] Mills, *ibid* at 211.
[234] Stark, *supra* note 224 at 275.
[235] *Ibid* at 248. Mills, *supra* note 225 at 236.
[236] Stark, *ibid* at 251 and 254 – 255.
[237] *Ibid* at 248 – 252.
[238] *Ibid* at 254 and 266.

in treaty negotiations, specifically the Earth as a gift from the Creator and human dependence on the lands, rivers, and animals for sustenance, "the Anishinaabe brought their pre-existing relationships with the land, animals, and flora into the treaty" thereby reserving "the rights to hunt, fish, and gather in shared territories […] as well as the ability to regulate these rights according to Anishinaabe legal traditions".[239] Therefore, with Anishinaabe law as the basis for understanding treaties, treaty interpretation should not proceed by asking what Indigenous rights are in regards to the land, but rather what signatories must do to act in accordance with pre-existing relationships with Creation.[240] This approach permits co-existence and properly recognizes Indigenous responsibilities with regard to resource management.

Clearly then, processes delineating Indigenous "rights" and "title" outlined in Canadian jurisprudence must be rejected as a means of sourcing Indigenous jurisdiction. Chief Edward John of the First Nations Summit, describes the existing colonial processes as an outright erasure of Indigenous identity:

> When a government asks us to agree to surrender our title and agree to its extinguishment, they ask us to do away with our most basic sense of ourselves, and our relationship to the Creator, our territory and the other peoples of the worlds. We could no longer do that without agreeing that we no longer wish to exist as a distinct people.[241]

Moreover, this discussion reveals fundamental problems with the SCC's interpretation of section 35(1) of the *Constitution Act, 1982.* Recall that the SCC in *Sparrow* found that "existing aboriginal and treaty rights" means those that were not "extinguished" prior to 1982,[242] which "assumes that Indigenous rights, interests, responsibilities, and possessions could be legitimately

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[239] *Ibid* at 258.
[240] *Ibid* at 272 – 273.
[241] Brian Egan, "Resolving 'the Indian Land Question'? Racial Rule and Reconciliation in British Colombia" in Andrew Baldwin, Laura Cameron, and Audrey Kobayashi, eds, *The Great White North: Race, Nature, and the Historical Geographies of Whiteness in Canada* (Vancouver: UBC Press, 2011) at 223. First Nations Summit is an Indigenous-based group that represents the interests of First Nations engaged in the British Colombia treaty process.
[242] *Sparrow, supra* note 8 at 1092 – 1093

terminated by unilateral government action prior to the enactment of section 35(1)".[243] John Borrows argues that this interpretation "potentially erased existing powers that were – and should still be – held by Aboriginal peoples despite the Crown's attempts to expunge such activities".[244]

3.2. Recasting Reconciliation

According to the Oxford English dictionary, to *reconcile* means to "restore friendly relationships between" parties, which might entail settling a conflict, attaining compatibility, or making someone accept a disagreeable or unwelcomed thing.[245] *Reconciliation* is defined as "the restoration of friendly relations" and also "the action of making one view or belief compatible with another".[246] It may be argued that these definitions contain within them two very different approaches to relationship building or rebuilding, namely; a meeting of the minds where two perspectives come together and settle at a mutually agreeable point, and a more unidirectional shaping of one perspective until it meets the aims of another. It is no surprise then that reconciliation, in the context of Indigenous and non-Indigenous peoples in Canada, can mean different things for different people. And that the chosen meaning can have implications for relationships going forward. The question is: how should the reconciliatory process look for Indigenous and non-Indigenous people in Canada?

A look to historical treaty negotiations proves fruitful in proposing an answer to this question. Treaty negotiations between Indigenous peoples and colonial powers in the early days of European expansion are regarded as "formalized efforts to achieve peaceful coexistence between Indigenous nations and newcomers to the continent".[247] Grounded in mutually respectful nation-

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[243] Borrows, "Unextinguished" *supra* note 189 at 18.
[244] *Ibid* at 19.
[245] English Oxford Living Dictionaries, online, *sub verbo* "reconcile", online: https://en.oxforddictionaries.com/definition/reconcile.
[246] English Oxford Living Dictionaries, online, *sub verbo* "reconciliation", online: https://en.oxforddictionaries.com/definition/reconciliation.
[247] Patrick Macklem, "Indigenous Peoples and the Ethos of Legal Pluralism in Canada" in Patrick Macklem and Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 17 at 20 [Macklem].

to-nation relationships, the Crown entered into treaties with Indigenous people as an attempt to settle its legal and factual position on Indigenous territories.[248] Early treaties were not perceived as stipulating legal rights enforceable in a court of law but rather as signaling the start of an ongoing relationship from which rights and obligations flowed.[249] Patrick Macklem argues that these early encounters "suggest a nascent legal pluralism at play among the parties",[250] where legal pluralism is defined as the presence of more than one source of legal validity or, in other words, more than one valid legal order exercising law-making authority within one territorial boundary.[251]

But this relational approach to treaty negotiation did not last long. When treaties assumed legal form in Canada, courts failed to see them as markers of ongoing relationships grounded in mutual respect and acknowledgement of each party's legal order, and saw them instead as a contractual instrument for legal hierarchy that allowed the Crown to unilaterally override treaty terms.[252] From there, Canadian constitutional law developed a version of sovereignty "incapable of comprehending multiple sovereign actors on one territory".[253] Put succinctly by the SCC in *Sparrow,* discussing British policy and the rights of Indigenous peoples to occupy traditional lands: "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown".[254] With this, Crown intentions in treaty negotiations shifted from mutually respectful relationship-building exercises to processes for relocating and assimilating Indigenous peoples.[255]

From this historical basis, the Supreme Court of Canada in *Van der Peet* decided that the purpose of section 35(1) – the recognition and affirmation of existing Aboriginal and Treaty rights – is twofold: "to constitutionally recognize the fact of prior Indigenous presence in North America

[248] *Ibid* at 21.
[249] *Ibid.*
[250] *Ibid* at 20.
[251] *Ibid* at 18 – 19.
[252] *Ibid* at 23.
[253] *Ibid* at 21.
[254] *Sparrow, supra* note 8 at 1103.
[255] Macklem, *supra* note 247 at 21.

and to reconcile this fact with the assertion of Crown sovereignty over Canadian territory".[256] Macklem and Sanderson argue that this idea of constitutional reconciliation is no more than a concept to give meaning and purpose to recognizing Aboriginal and Treaty rights.[257] In light of this dual purpose, Chief Justice Lamer, as he then was, crafted the "integral to a distinctive culture test",[258] outlined above. Brian Slattery argues, and I agree, that while the *Van der Peet* "integral to distinctive culture test" may go some way to recognizing the central attributes of a given Indigenous community's pre-contact culture, the test fails to account for historical or modern modes of relationship-building between Indigenous and non-Indigenous people.[259] Slattery then suggests that the casting of Aboriginal rights as *specific* to the circumstances of each individual Aboriginal claimant is at least partially to blame for the shortcomings of *Van der Peet's* idea of constitutional reconciliation.[260] Casting Aboriginal rights as *generic* rights, by focusing on "the underlying rationales for various categories of Aboriginal rights", like the right to cultural integrity and the right to self-government which house specific Aboriginal rights, Slattery argues, will help to bridge the gap between historical and modern incarnations of Aboriginal rights and will better serve the ongoing needs of Indigenous peoples.[261] But Slattery's approach to constitutional reconciliation on the basis of generic rights fails to give meaning to these fundamental Indigenous rights. It fails to recognize the socio-political realities in which these rights exist and lacks guidance on what to do in the case of competing interests from other groups.[262] Since it offers nothing in the way of relationship-building or conflict resolution between interest groups, the doctrine of generic rights contributes very little to reconciliation. Slattery suggests that this shortcoming can be easily rectified with proper acknowledgement of the "affirmation" component of section 35(1); that affirmation lends itself easily to reconciliation as requiring the proper treatment of Aboriginal rights in contemporary times.[263] Specifically, he

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[256] Patrick Macklem and Douglas Sanderson, "Introduction: Recognition and Reconciliation in Indigenous-Settler Societies" in Patrick Macklem and Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 1 at 3.
[257] *Ibid* at 6.
[258] *Van der Peet, supra* note 8 at paras 44 – 46, 55 – 56, 60 – 62.
[259] Brian Slattery, "The Generative Structure of Aboriginal Rights" in Patrick Macklem and Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 100 at 102.
[260] *Ibid* at 103 – 105 and 128.
[261] *Ibid* at 104 – 105 and 128.
[262] *Ibid* at 128.
[263] *Ibid* at 128 – 129.

suggest that generic rights, identified in reference to historical and normative considerations, serve as a starting point, but that reconciliation, or the affirmation of Aboriginal rights in contemporary times, require that a range of other factors be considered, like "the modern condition of the lands and resource affected, the Aboriginal group's contemporary needs and interests, and the interests of third parties and society at large".[264] Slattery recommends that this reflection on generic rights in context be done in the form of modern treaties between parties, instead of left to the judicial system.[265] He also recognizes that this process cannot take place without proper recognition of historical injustices and grievances, such that a balance may be struck between "past injustices and the need to accommodate the full range of contemporary interests".[266] Slattery says that the Supreme Court in *Haida Nation* and *Taku River* does this well: the Crown must negotiate honourably with Indigenous peoples for the recognition of their rights in a manner that balances their contemporary interests with those of broader society.[267] According to its obligation to act honourably, the Crown must also consult with Indigenous peoples in all cases where Crown actions might affect asserted rights, and must accommodate those rights by adjusting its actions where appropriate.[268] I argue that this conception of reconciliation, as a negotiation and consultation with Indigenous peoples in the face of the violation of their rights, is inappropriate. John Borrows points out that this framework continues to subject Indigenous peoples to colonial entrenchment, especially given the political power differentials that subordinate Indigenous peoples.[269] Borrows cautions that this framework puts Indigenous interests at risk of being forced into alignment with Crown interests, as Indigenous "victories" in the form of stopping or constraining government action come at the cost of reconciling themselves to the colonial framework.[270] So how might the process of reconciliation proceed outside the auspices of colonialism?

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[264] *Ibid* at 129
[265] *Ibid.*
[266] *Ibid* at 130.
[267] *Ibid* at 132.
[268] *Ibid* at 132. See also *Haida Nation, supra* at para 52; *Taku River Tlingit First Nation v British Columbia,* 2004 SCC 74 at para 24, [2004] 3 SCR 550.
[269] John Borrows, "Canada's Colonial Constitution" in John Borrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 17 at 32 – 33.
[270] *Ibid* at 33 – 34.

A first step to recasting reconciliation must be to move away from relying on rights as they are attained or retained in the colonial framework. With the "integral and distinctive to culture test" as a starting point, Dale Turner argues that Indigenous interests ought not to be discussed in terms of "cultural" practices, customs, and traditions, since this approach does little more than ensure that Indigenous political identity remain within the authority of Crown sovereignty.[271] Moreover, he states bluntly that conceiving of Aboriginal rights as a means of reconciling pre-contact Aboriginal cultures and unilateral assertions of Crown sovereignty "is not cognizable to Aboriginal ways of understanding the world".[272] Instead, Turner suggests that Indigenous practices, customs, and traditions ought to be understood "in their proper contexts within Indigenous philosophical traditions".[273] This liberates discussions of Indigenous interests from the confines of normative common law: it affords meaning to Indigenous interests based on Indigenous ways of thinking about the world and recasts the idea of reconciliation.[274] Turner points to interconnectedness as an often central component of Indigenous ways of thinking, commonly expressed in terms of spiritual relationships with creation and in the form of Indigenous knowledge.[275] Rights are revealed not as culturally distinct in the language of the common law, but as an integral component of Indigenous knowledge. This shift moves away from the colonial rights discourse and recasts the idea of reconciliation; it validates Indigenous worldviews and recognizes Indigenous peoples as nations.

A second, perhaps coincidental, step to recasting reconciliation might be to disrupt the Supreme Court's unilateral assertion of Crown sovereignty.[276] Jeremy Webber explains that, central to sovereignty is self-government and political agency: decision-making authority and related institutions with the freedom of public participation without restriction by outside forces.[277]

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[271] Dale Turner, "Indigenous Knowledge and the Reconciliation of Section 35(1)" in Patrick Macklem and Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 164 at 174 – 175.
[272] *Ibid* at 178.
[273] *Ibid* at 175.
[274] *Ibid* at 174 – 175.
[275] *Ibid* at 175.
[276] Jeremy Webber, "We Are Still in the Age of the Encounter: Section 35 and a Canada beyond Sovereignty" in Patrick Macklem and Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 62 at 64.
[277] *Ibid* at 69.

Webber points to instances in which the Supreme Court has softened the unilateral assertion of Crown sovereignty. He points to *Haida Nation* where the Court noted that treaties were a means to "reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty".[278] He suggests that the Court's common qualification of Canada's sovereignty as "asserted" or "assumed" might allow for it to be interpreted as being incomplete or diminished, given that the Crown's asserted sovereignty has not been consented to by Indigenous peoples.[279] If sovereignty has at its core the right to self-governance, then any proper claim to such sovereignty must refer to "the idea that law and the associated governmental rights originate from within the particular people's own traditions" as opposed to some delegated grant of authority from another governmental body.[280] Webber argues that this idea of sovereignty, as opposed to one that is focused, for example, on the idea of ultimate decision-making power, is most consistent with the reconciliatory framework of section 35(1) since it recognizes the separate origins of each group's understanding of governmental legitimacy.[281]

These two steps to recasting reconciliation relate back to the notion of legal pluralism. If Indigenous interests are understood in their proper philosophical contexts, and the assertion of Crown sovereignty is altered to make room for Indigenous self-governance, treaties may be properly understood as depicting the basic terms and conditions of co-existence, instead of being understood as the distribution of rights and obligations by the State. In *Badger*, the Supreme Court said that treaties represent "an exchange of solemn promises [and] an agreement whose nature is sacred".[282] Patrick Macklem argues that *Badger* "marks a significant transformation in the judicial understanding of a treaty's form and substance" such that treaties should not be understood as mere contractual agreements but instead as possessing formal constitutional status.[283] Where treaties are understood as constitutional accords, they "operate as instruments of mutual recognition".[284] And where Indigenous constitutional orders are properly recognized and

[278] *Ibid* at 71. See also *Haida Nation, supra* note 52 at para 20.
[279] *Ibid* at 72.
[280] *Ibid* at 81.
[281] *Ibid* at 96.
[282] *R v Badger,* [1996] 1 SCR 771 at 773, 133 DLR (4th) 324.
[283] Macklem, *supra* note 247 at 27.
[284] *Ibid* at 28.

validated, relationships between Indigenous people and the Canadian state may evolve in the process of reconciliation.[285]

In the MOU signed between NFN and the MNRF, the MNRF recognizes the Nipissing Gichi-Naaknigewin (Constitution), NFN's treaty rights and their Fisheries Law, and the NFN recognizes the MNRF's responsibilities for managing and regulating Ontario's natural resources, including fisheries.[286] The Nipissing Gichi-Naaknigewin situates NFN's responsibilities and obligations within the context of creation, unity, and intergenerational sustainability, and asserts the First Nation's sovereignty, acknowledging its government and governing institutions.[287] The MNRF notes that "[t]his recognition supports a new approach to fisheries management and government-to-government relationship building".[288] NFN refers to the MOU as establishing a collaborative framework to continue the process of reconciliation and relationship re-building between the First Nation and the provincial government.[289]

4. Co-Management as an Improved Approach to Natural Resource Management

Two important conclusions were drawn in the preceding Part III discussion. First, that Indigenous jurisdiction must be established with reference to Indigenous law, as opposed to Canadian law. And second, that constitutional reconciliation must be recast in order for Indigenous groups and the Crown to mutually rebuild their relationship. In the following discussion, I put forth a set of observations and suggestions for an improved resource management framework to conserve species and reduce conflict where Indigenous and non-Indigenous groups have concurrent interests but divergent rights to hunt and fish. Throughout the following section, I refer to and rest on the conclusions drawn above, and rely heavily on conversations I had with individuals involved directly with walleye population management in North Bay.

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[285] *Ibid.*
[286] MOU Summary, *supra* note 102. Government of Ontario, "Lake Nipissing Memorandum of Understanding Update" (2016 – 2017) at 2, online: http://www.nfn.ca/documents/nr/lake_nipissing_mou_update_517.pdf [MOU Update].
[287] MOU Summary, *ibid* at 1, 4, and 6.
[288] MOU Update, *supra* note 286 at 2.
[289] MOU Summary, *supra* note 102 at 2.

4.1. Education for Improved Understanding

"Until we get better understanding, the movement towards reconciliation is never really going to be achieved" – Nipissing First Nation Chief Scott McLeod.[290]

In addition to recognizing NFN's Gichi-Naaknigewin, the MOU contains provisions for cultural and historical learning opportunities provided by NFN to MNRF staff regarding the Nipissing peoples' historical relationship to Lake Nipissing.[291] While NFN and MNRF staff in charge of implementing the MOU on the ground seem to agree on ways to manage the fishery, some skepticism remains among upper management and policy makers at NFN about working with the MNRF.[292] This skepticism is likely due in large part to a lack of respect shown by provincial governments and the MNRF to NFN historically and in recent memory. It was not long ago that the federal and provincial governments refused to recognize the First Nation's right to fish commercially and prosecuted commercial fishers under provincial law,[293] so it is not difficult to see how First Nation members might be concerned about how collaboration with the MNRF may too easily result in the MNRF dominating management initiatives. A better understanding of NFN governance by MNRF policy-makers is required to continue progressing collaboration on managing the walleye fishery. Continued cultural education for MNRF staff, specifically those staff involved in policy-making and negotiation with First Nations, should be mandatory and should include information on treaties and treaty rights as means for mutual relationship and co-existence. In the past, a willingness to engage in cultural learning has had good results for progressing collaboration on the walleye fishery. Richard Rowe, NFN's first biologist and former MNRF employee, joined the NFN Natural Resources Department from the MNRF in 2006 to help the First Nation understand and manage the walleye population.[294] Upon his arrival, Rowe had limited knowledge of NFN governance or management strategies, so he committed

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[290] *Ibid*.
[291] MOU Summary, *supra* note 102 at 3.
[292] Anonymous Interview #2, *supra* note 101.
[293] Anonymous Interview # 1, *supra* note 101. And Anonymous Interview #2, *supra* note 101. Also, Nikki Commanda, "Treaty Rights and Aboriginal Rights to Fisheries" submitted to Roman Brozowski in partial satisfaction of requirements for Natural Resources Planning GEOG 4806 at Nipissing University, School of Graduate Studies [Commanda].
[294] Anonymous Interview # 1, *supra* note 101. And Anonymous Interview #2, *supra* note 101.

himself to learning about Nipissing culture and history.[295] This allowed him to better understand the First Nation governance framework, NFN's connection with the lake, and their rocky relationship with the MNRF. Rowe's willingness to learn about the culture and history of the First Nation created the capacity for future collaboration which, over time, resulted in joint data collection, modelling, and decision-making for fisheries management.[296]

Skepticism among First Nation members regarding commercial fishery regulation and collaboration between NFN and MNRF is not isolated to policy-makers. Recall the small group of commercial fishers who have chosen not to comply with NFN's Fisheries Law and oppose Chief and council's decision to limit commercial fishing. Those individuals have sought legal advice and have argued publicly that the treaty right to fish is an individual right that Chief and council have no authority to regulate.[297] Moreover, there are First Nation members who choose to steer clear of the topic entirely to avoid conflict but also because they feel that they have an insufficient understanding of the history of treaty negotiation and treaty rights to reach an informed opinion.[298] The residential school system halted the sharing of knowledge and information from one generation of Indigenous people to the next.[299] As such, cultural learning for First Nation members may help to achieve a shared understanding of treaties and treaty rights and to reduce conflict within the community.

Also recall that frustration and animosity among groups interested in the Lake Nipissing walleye result largely from perceived biases for certain regulatory approaches, failures to abide by harvest controls, and unequal burden-sharing among stakeholders to recover the fishery, which manifests as blatant disregard for constitutionally-protected treaty rights and demonization of First Nation members for exercising those rights.[300] Basic cultural education on the origins of First Nation relationships to land, treaties as mechanisms for mutual understanding, and treaty "rights" as responsibilities and obligations, may help to reduce conflict among interest groups,

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[295] *Ibid.*
[296] *Ibid.*
[297] *Ibid*. See also: White, "fishing dispute", *supra* note 136.
[298] Anonymous Interview # 1, *supra* note 101. And Anonymous Interview #2, *supra* note 101.
[299] Commanda, *supra* note 293.
[300] Smith, *supra* note 97 at 4.

specifically with regard to Lake Nipissing walleye but also for resource management more broadly. Over the first year of the MOU, NFN and the MNRF had 90 contacts with commercial fishers to discuss the MOU and NFN Fisheries Law, and approximately 600 contacts with recreational anglers to discuss the MOU and the Lake Nipissing fishery.[301] Cultural education could be provided at these points of outreach in the form of, for example, a brief information card with content generated by NFN community members and sources for more detailed information. Cultural information with content from First Nation members could also be distributed by the MNRF with outdoors card renewals and/or tag disbursements. Persistent and unwavering dissemination of this information to non-Indigenous hunters and fishers might eventually help to change the mindset that treaty rights lead to inequality between Indigenous and non-Indigenous hunters and fishers, and act to focus attention on the conservation conundrum at hand. Moreover, outreach to recreational anglers to discuss the MOU and the Lake Nipissing fishery should also include the basics of NFN Fisheries Law, the role of the NFN Natural Resources Department, and emphasis on the high rate of compliance by commercial fishers with the Fisheries Law and the successful collaboration between NFN and MNRF biologists to work toward a sustainable harvest. These discussions could help generate a more informed perception of joint fisheries management and reduce unfounded perceptions that commercial fishers generally fail to abide by harvest controls.

4.2. Three Critical Steps to Co-management

The current collaborative arrangement that exists between the MNRF and NFN on managing the walleye fishery is perceived by both parties as a form of co-management.[302] Co-management has been defined as "the sharing of power and responsibility between government and local resource users"; [303] *adaptive* co-management occurs when the sharing or power and responsibility is combined with joint on-the-job learning to address complex issues.[304] Where Indigenous groups are the local resources users, co-management might be more accurately defined as the sharing of

[301] MOU Update, *supra* note 286 at 5.
[302] Anonymous Interview # 1, *supra* note 101. And Anonymous Interview #2, *supra* note 101.
[303] Fikret Berkes, "Evolution of co-management: Role of knowledge generation, bridging organizations and social learning" (2009) 90:5 Journal of Environmental Management 1692 at 1692.
[304] *Ibid.*

power and responsibility between governments. Adaptive co-management is recommended for the management of natural resources, where management needs are often too complex to be governed by a single interest group.[305] Effective co-management has many benefits, including: a more equitable balance of power; the strengthening of trust as pre-curser for joint action and learning, and; collaborative problem-solving.[306] In the resource management context, adaptive co-management can lead to improved data collection, improved joint decision-making on harvest allocation, collaborative enforcement of regulations, and better long-term planning.[307]

The following is a list of three critical steps toward an improved approach to resource management in northern Ontario, based on an adaptive co-management model.[308] Many of these steps are exemplified in the existing collaborative arrangement between the MNRF and NFN to manage Lake Nipissing walleye.

First, colonial governments must recognize Indigenous sovereignty, including jurisdiction to manage natural resources. This requires that treaties be understood as tools for building relationships, grounded in mutual respect and acknowledgement of each party's legal order, instead of contractual instruments for establishing a legal hierarchy by which the Crown may unilaterally override treaty terms. Moreover, Aboriginal and treaty "rights" must be regarded as responsibilities and obligations that flow from relationships with the land. The *Haida Gwaii Reconciliation Act* is an example of provincial legislation that creates an agreement between a provincial government and an Indigenous group for "joint decision-making respecting lands and natural resources".[309] Clauses in the Act's preamble acknowledge a competing claim to

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[305] *Ibid.*
[306] *Ibid* at 1694 – 1695.
[307] Derek Armitage, Fikret Berkes and Nancy Doubleday, "Introduction: Moving beyond Co-Management" in Derek Armitage, Fikret Berkes and Nancy Doubleday, eds, *Adaptive Co-Management: Collaboration, Learning, and Multi-Level Governance* (Vancouver: UBC Press, 2007).
[308] These steps track closely with the seven hallmarks of collaborative consent outlined in Merrell-Ann Phare et al, *Collaborative Consent and British Columbia's Water: Toward Watershed Co-governance* (Center for Indigenous Environmental Resources and POLIS Project on Ecological Governance, September 2017), online: https://poliswaterproject.org/files/2017/09/CollaborativeConsentReport.pdf. Those hallmarks are (at page 10 – 12): respect, trust, and diplomacy between governments; recognition between governments of each other as legitimate authorities; platforms for collaboration where all parties have equal authority for decision-making and implementation; a mutually agreed upon scope of issues; collaboration as a long-term and on-going process; problem-solving to the satisfaction of each party, and; the generation of real outcomes.
[309] SBC 2010, c 17, preamble.

sovereignty by the Haida Nation but maintain that the Haida Nation and provincial government "hold differing views with regard to sovereignty, title, ownership and jurisdiction".[310]

This legislation falls short of what is required for effective co-management: it fails to recognize Indigenous sovereignty and demonstrates no more than "a willingness to agree to disagree".[311] By contrast, in the MOU for walleye management in Lake Nipissing, the Government of Ontario explicitly recognizes NFN's Constitution and the validity of their Fisheries Law, and describes the joint management regime as a means of "government-to-government relationship building".[312] One specific and particularly interesting component of the Lake Nipissing MOU that goes some way toward recognizing First Nation sovereignty is the provisions for compliance and enforcement. Under the MOU, non-compliant commercial fishers are subjected first to First Nation processes for restorative justice.[313] If the accused fails to participate or comply with the restorative justice processes, "NFN may refer the infraction to the MNRF to take appropriate action" under provincial law.[314] Compliance enforcement is crucial to any co-management regime for natural resource management because it demonstrates that laws and regulations have teeth. This dual enforcement system prioritizes the right of the First Nation to self-governance and ensures that laws for the protection and restoration of the species are effective.

Second, First Nation and local branches of provincial governments must carry equal authority in decision-making. For effective working relationships, government policy-makers must be educated in Indigenous culture and practices to better understand Indigenous perspectives. To oversee the implementation of the Lake Nipissing MOU, the MNRF and NFN formed a steering committee "on which both parties have equal representation [and] decisions are made by consensus and members commit to proactive problem solving".[315] To ensure that high-level policy decisions are made based on the best understanding of the resource management challenges at hand, local branches of provincial government must actively advocate on behalf of

[310] *Ibid.*
[311] Webber, *supra* note 276 at 75.
[312] MOU Update, *supra* note 286 at 2.
[313] MOU Summary, *supra* note 102 at 5.
[314] *Ibid.* And Anonymous Interview # 1, *supra* note 101. And Anonymous Interview #2, *supra* note 101.
[315] *Ibid.*

local collaborative working relationships. In this way, co-management regimes between First Nations and the MNRF could act as a vehicle for making regional policy that more accurately reflect regional interests. Co-management may thereby reduce the perception among northerners that northern Ontario is alienated from the political decision-making structures that exist in southern Ontario.

Finally, both parties must demonstrate a willingness to learn and problem-solve together. In North Bay, management of the walleye fishery benefited immensely from the joint development of scientific monitoring and assessment tools for the collection of data used to determine yearly sustainable harvests.[316] Jointly developed protocols ease discussions at the policy-making level because they add transparency and demonstrate collaboration from the ground up.[317] Moreover, joint collection and the sharing of data lead to predictive population models with a smaller margin of error and thus a management regime with better long-term results.[318] Crucial to effective on-the-ground collaboration is a demonstrated willingness by the non-Indigenous party to work in good faith with Indigenous government. In the Lake Nipissing walleye context, the MNRF did this by reducing the catch limit and increasing the slot size for recreational anglers;[319] however, there is room for improvement as exemplified by the MNRF refusal to close the 2016 – 2017 walleye ice fishing season.

Conclusion

Where Indigenous and non-Indigenous people hunt and fish the same declining wildlife population, as is the case with Lake Nipissing walleye and northern Ontario moose, an improved approach to natural resource management is required to conserve declining wildlife populations and to reduce local conflict.

[316] Anonymous Interview #1, *supra* note 101.
[317] *Ibid.*
[318] *Ibid.*
[319] *Ibid.*

I began this paper by demonstrating how the current colonial approach to understanding rights and obligations contained in treaties rests on a notion of reconciliation that is inconsistent with relationship-building between the Crown, Indigenous peoples, and the natural world. I demonstrated how this understanding creates an "us versus them" mentality which erupts in conflict laden with racism where treaty rights are perceived as granting unencumbered and unequal access to a declining wildlife species that is the target of both Indigenous and non-Indigenous hunters and fishers. The Lake Nipissing walleye and northern Ontario moose case studies are two examples of this conflict.

To reduce conflict among Indigenous and non-Indigenous interest groups, I propose in this paper two fundamental pillars. First, processes delineating "rights" in Canadian jurisprudence must be rejected in favour of an Indigenous law approach which perceives treaties as modes of creating lasting relationships of responsibility and obligations between the Crown, Indigenous people, and Creation. Second, reconciliation with Indigenous people must be re-cast to liberate Indigenous interests from the confines of a normative "rights" discourse and to alter the assertion of Crown sovereignty to make room for Indigenous self-governance. With these two fundamental pillars, treaties may be properly understood as depicting the basic terms of co-existence instead of being understood as the allocation of rights and obligations by the State.

These pillars support my recommendation for resource management based on an adaptive co-management model, in which Indigenous and non-Indigenous governments share power and responsibility to address complex resource management issues. I recommend cultural education, for non-Indigenous and Indigenous groups alike, as a necessary pre-condition to effective collaboration and reducing conflict. Moreover, I set out three critical steps to co-management:

1. Colonial governments must recognize Indigenous sovereignty, including jurisdiction to manage natural resources. Treaties must be understood as tools for building relationships instead of contractual instruments, and Aboriginal and treaty "rights" must be regarded as responsibilities and obligations that flow from relationships with the land.
2. First Nation and local branches of provincial governments must carry equal authority in decision-making.

3. Both Indigenous and non-Indigenous parties must demonstrate a willingness to learn and problem-solve together.

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