

The Protection of Hunting and the Role of Local Governments in
the James Bay and Northern Quebec Agreements

A commentary prepared for the Alaska Native Review Commission,
Hon. Thomas R. Berger, Commissioner.

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1. The protection of the Cree and Inuit hunting economies and societies was viewed as an objective requiring the simultaneous accomplishment of several tasks, most importantly: a) the definition and recognition of rights of indigenous hunters; b) the specification of the relative standing of those rights vis-a-vis other rights to the wildlife resources and the land; c) the establishment of wildlife management procedures and administrations to coordinate the various groups with rights and roles in the management of the wildlife and land resources; d) the means to protect the wildlife resources from the impacts of industrial developments and competing users; and e) means to assure that indigenous hunters have the cash resources and access to the services and equipment essential to the maintenance of the subsistence economy. It was the combined pursuit of each that was essential, because the hunting economy and societies could be undermined by the failure of any one of these components.

It was rather fortunate, that each of these types of problems was also a felt need in the Cree or Inuit communities at the time of the negotiation, so that there was a general consensus to pursue them all, rather than to only address one or two that were seen as crises at the moment. Rights without administrative means to implement them, or without protection of the wildlife themselves, or without the cash to hunt, would not have been sufficient. Similarly, cash without rights or wildlife or practical means to manage resources would also have failed.

2) The JBNQA recognizes a very broad right of the beneficiaries of the agreement to harvest wildlife. The following points seem worth making note of in relation to the Alaskan context.

-The native peoples right to hunt, fish and trap wild fauna was called a right to harvest in order to separate it, at least partially, from the rights to hunt, fish or trap per se, because the latter have been the subject of a long history of jurisprudence, much of which is restrictive of the rights of individuals and social groups within the national polity.

-The right to harvest is a right which every native person benefiting from the agreement has, but it is a collective right as well in so far as it applies only to native people, and in so far as the band and local governments under the agreement have specific powers with respect to such rights; namely they can pass certain regulations and by-laws concerning wildlife and harvesting (see below), and they can accept persons as beneficiaries under the agreement.

-The right extends to all species of wild fauna except those requiring complete protection to assure their continued existence in the territory; it extends over the entire territory subject only to specific limitations in towns and for public safety; the right extends to personal and community use and to commercial trapping and fishing but not to commercial meat production for general market sale, which has not been traditional in the region; the right includes the right to possess and use all equipment reasonably needed, with specific exceptions which do not conflict with present usage; it includes the right to travel, to use camps, and to use present and traditional methods of harvesting, and the rights to possess, transport and trade the products of harvesting.

-Arguments for recognition of the right during negotiations were not as

keenly fought in these negotiations as they are being fought in other jurisdictions, but they were fought on the kinds of arguments which may prove useful elsewhere: a) specifically on the already existing partial recognitions of native rights, such as the special recognitions of the needs of indigenous hunters in the existing regulations, and the existing exclusive areas and seasons; b) implicit recognitions in government wildlife managers policies of not applying all existing regulations fully to native hunters; c) the special recognitions contained in international treaties, such as the Migratory Birds Convention which although it restricted native hunters in some respects also recognized them as a group with special rights as well; d) the existing court rulings recognizing aboriginal rights, and the earlier documents on aboriginal rights; e) the more general and basic economic and cultural/religious importance of access to wildlife for indigenous peoples; f) the claim that the native people were already finding these needs compromised by the ongoing developments in their region; and finally on g) the argument that native hunters could be and had to be distinguished from non-native hunters of the same regions by the fact that they had their own community wide mechanisms for management of wildlife and of wildlife harvesting (see below).

-The compromises which permitted a broad definition of the harvesting rights to be accepted by government negotiators were: that the right did not violate government claims to sovereignty over wildlife; that the right was subject to the principle of conservation, a goal which it was thought the native people and the government could broadly agree upon, and therefore to the intervention of the senior governments under certain

specified conditions; and that the right would not be a grounds on which to oppose development per se.

-A key to accepting the compromises on the Cree side was that there was recognition given to the existence and continuation of native wildlife management. The provisions on harvesting recognized that the present system of Cree traplines existed and would continue, and defined a trapline as an area where harvesting is by tradition under the supervision of a Cree tallyman, who were in turn defined as persons recognized by a Cree community as having such responsibilities. This was a critical means of giving some legal recognition and standing to the existing Cree system of wildlife management, but in a general form which left the nature of the system in Cree hands and did not tie the system to formal specifications of its structures or principles which could then become inflexible or a burden on the Cree. A similar recognition might have been applied to an Inuit system of hunting leaders, but the Inuit of northern Quebec did not pursue this option.

3. The recognition of priority to native hunters over non-native sport hunters and commercial users of wildlife followed largely from the arguments put for special rights for native peoples. In addition to the common arguments concerning the special economic, and socio-cultural and religious importance of wildlife to native peoples two additional arguments were made here:

-The native people are unique as a user group in having social systems of knowledge and of stewardship of hunting activities which are capable of conserving and managing wildlife, and which no other user group has

despite the fact that other groups are also dependent on wildlife for subsistence, and no matter how conservation minded the individual non-native hunters may be. There are no comparable community-wide social means of resource management among any other general user group. The significance of this issue has not been generally appreciated, I think it could be a strong basis for recognizing special native rights for continuing control of wildlife. And I think the argument is as much about the capability to exercise such management as it is about the actual current practice. The argument in short is that native people have special rights not because they are subsistence hunters, but because they are communities with the reality and the potentiality of using their own functioning systems of game management.

-Another argument was that while it used to be thought that the native people did not have the means to over-harvest or endanger wildlife resources before contact with Europeans, increasing evidence suggests that they had extensive knowledge of game habits and a sufficiently effective technology that over-hunting was a potential problem for them. That they successfully met this problem in general is indicated by the survival of the nearly all of the species which they were using intensively up to the time of the arrival of Euro-Americans. Thus the heritage of wildlife which is now shared by natives and non-natives is itself a result native management.

-It is difficult for me to reconstruct how influential these arguments were in the context of a closed negotiation, but as I recall it they certainly met at least as much skepticism as acceptance, nevertheless I

continue to think they are important as general educational issues, and as means of differentiating native from non-native hunters.

-Once the principle of priority of native use was established, the argument was made that this implied management of the wildlife resources for goals which were different from those which would be pursued for sport hunters, for example hunting efficiency is more important in subsistence hunting than in sport hunting; and therefore the recognition of priority to native users implied both a specific definition of conservation which would recognize the difference of native users from sports hunters, and a principle that all management of the wildlife populations would be bound to recognize these differences and take them into account in decision making.

-The principle of priority to native users was built into the agreement at several levels: by incorporating it into the principle of conservation which had precedence over all rights and other principles; by establishing a principle of less restriction on native activities when conservation justified some regulatory action; by establishing an allocation principle and a mechanism for implementing it, which gave means of limiting non-native users access to the resources when the combined harvests were too great; and finally by reserving species and areas that were then primarily used by natives as exclusive species and areas, thus preventing an expansion of non-native users in these directions.

-While a recognition of the priority of native users was recognized, all efforts to establish a higher place for harvesting rights among competing rights to use land based resources were not achieved, and specific

statements were included in the agreement that the right to harvest could not prevent or limit access by non-natives in general, only as specified in the agreement.

-The trade offs were therefore recognition of a strong native right and native priority in hunting for recognition that development, although restricted and controlled in certain ways, would not generally be stopped.

4. The powers to legally regulate the management of the wildlife resources are split under the JBNQA between native and senior governments, and also with a joint co-ordinating committee which has a largely advisory role but which also has certain decision-making powers. Such co-ordinating type committees are becoming common in northern Canada, and also parts of Australia. I think they arise from certain features of the interaction of indigenous hunters and government wildlife management, which were apparent in the JBNQA case.

-The legal authority of the various governments is subject under the JBNQA to the principles of conservation, minimum of regulation of native people, and priority of native use, so that the JBNQA was intended to assure in practice that the native right to harvest could only be restricted for reasons of conservation, that is where species or populations are endangered. Thus while the authority to legally regulate managerial matters resides with governments and formal committees, the day to day management authority resides with the native hunters and hunting stewards, whose activities can only be interfered with when there is a recognizable and demonstrable management problem which they are not or cannot solve on

a day to day basis. This restriction on governmental interference is critical to the real working of the regime, and to the real degree of relative autonomy which the Cree have.

-It is based on the fact that no government can effectively regulate native hunting without native cooperation. Because of the number of native hunters and their wide distribution, attempts at government enforcement where cooperation is not forth-coming, almost without exception rely on imposing penalties on a limited number of individual cases which are meant to serve as a warning to other hunters. And the effect of such practice is to force people to give up overtly disapproved of behavior, but to replace it with covert or less easily detectable practices, practices which often undermine the intended effects of the original effort at restriction. Where this problem is clearly recognized by both non-natives and natives, there is a basis for seeking a system of governmental action which compliments rather than conflicts with native systems of management. This was the intention in the JBNQA.

-The need for some system of governmental involvement arises from the fact that probably the majority of the resources which native people harvest are now affected in various ways by the activities of non-native users of the same resource populations or by non-native users of the land and other biological resources on which the used resource depends, so that some form of cooperative regulation of those wider impacts is as important to native hunters as it is important to the governments to gain the cooperation of native hunters. While in some jurisdictions this might take the form of an autonomous native system meeting an autonomous senior government system, this was not an achievable goal in the JBNQA negotiations.

-There was therefore a basis for negotiating a division of powers between various levels of government over matters relating to the conservation of wildlife, native harvesting, and non-native use of wildlife, and although the particular divisions struck in the JBNQA are not entirely satisfactory or acceptable elsewhere, the kinds of distinctions made may be useful.

-Matters relating primarily to the protection of the wildlife resources are the jurisdiction of the responsible federal or provincial government, subject to exercising their powers only on the advice and after mandatory consultation with the joint co-ordinating committee.

-Matters relating to non-native hunting and fishing are similarly the jurisdiction of senior levels of government.

-Matters relating to native harvesting, where action is required for conservation, are taken jointly by native and senior governments through the co-ordinating committee, and such actions take the form of guidelines or advisory programs, except where the latter prove to be ineffective, in which case senior governments can act; but then subject to the condition that the regulations adopted shall have a minimum impact on native people and harvesting.

-Within both the lands set aside for the native people, and the lands on which they have an exclusive right to use wildlife, the native local or regional governments, have jurisdiction to pass measures concerning matters relating to the harvesting of wildlife by native people.

-Within those lands, the local or regional native governments have jurisdiction to pass measures relating to protection of wildlife, and hunting and fishing by non-natives permitted to use those lands, except that where senior governments have regulated these areas the native governments by-laws must be more restrictive.

-I would emphasize that native control of wildlife is exercised at the by-law and regulatory level through native governments, and at the level of traditional systems of stewardship and hunting leadership through the day to day practices of the hunting stewards and leaders, who the JBNQA recognizes and also deputizes as auxiliary conservation officers. The Cree are free to link these two systems, but it is important to note that the local government political leaders and staff are not the same people as the hunting stewards, and although there is extensive cooperation I find the stewards have tended following the implementation of the JBNQA to formalize their own committees, so as to deal with native or senior governments as a group, not simply leaving representation up to the native government structures.

-The co-ordinating committee is a body with equal native and government representation and a rotating chairmanship, which is the exclusive and preferential forum which all levels of government must consult before exercising their authority. It has a broad mandate to take initiatives necessary to formulate regulations and supervise the administration and management of the legal provisions for wildlife established by the JBNQA and subsequent legislation.

-The co-ordinating committee concept arose because neither the native people nor the governments were prepared to recognize the authority of the other without some significant restrictions on that authority, and the consultation with the coordinating committee is therefore mandatory although its advice is not generally binding on the governments; in addition, and the principles of conservation, minimum control or regulation of the native people, and priority of native harvesting, among others are binding on government decisions and actions.

-The idea of a coordinating committee, and the idea of native management in the first instance appeared to echo with one line of recent thinking in wildlife management administrative theory, namely that management is not solely a technical or scientific task, but an ongoing process of learning by experience, and therefore one which is best done at the lowest level of decentralization possible. While this view is not universally accepted, it is gaining adherents, and a key component is the need for wildlife managers to involve and share responsibility with wildlife users and other sectors of the politically active public, and while this could develop in directions which would not aid native control, as may already be the case in Alaskan game boards, it also can be used to argue for joint management structures, and I think this is reflected in the growth of such native/government structures in recent years in several jurisdictions.

5. Protection of the wildlife from the impacts of development projects is of course critical for the future of native harvesting, and it is my sense that this is the area in which the least progress has been made in the JBNQA and in the north in general. In the JBNQA a social and

environmental impact assessment and review procedure was established for the whole of the territory, and environmental quality commissions were established to review legislation, regulations and general provisions and conditions in the territory, but their decisions are either advisory or subject to change by the senior governments. The Inuit environmental quality commission is a joint native/government body with equal representation and a chairman appointed by the mutual agreement of both parties, and with decision-making powers, although subject to over-ruling by the provincial government.

-The ability to design these provisions was eased by the fact that there were no environmental procedures in place in northern Quebec at the time of the JBNQA negotiations, and the form of the provisions were shaped by trying to set up a more workable and practical system than that which then existed in the US, which appeared to be encouraging only political responses rather than also aiding effective review and decision-making. The experience with the JBNQA provisions is not really any more satisfying, and large-scale development remains hard to effectively regulate despite its large scale impact. Under the circumstances only a few concepts may be specifically worth examining in other jurisdictions.

-The native local or regional governments have environmental management and land use powers on native controlled lands, and various joint regimes apply on other lands.

-The non-Cree lands in the southern portion of the JBNQA territory are subject to federal and provincial authority to take decisions respecting the authorization of development projects, but subject to the regimes and

procedures established by the JBNQA for environmental review and assessment, and for environmental quality maintenance. Several joint committees were established to implement these procedures.

-The Cree have standing and/or participation in the environmental and social protection regimes in several ways: they comprise 40 to 50 percent of the membership of the various committees, review boards, and commissions established to implement the regime; the Cree communities, and under certain conditions Cree individuals, have rights to make representations to each body so established, and to have a restricted form of public hearing specifically for the Cree to present their views in written form or orally; the Cree are informed of all proposals and items for business.

-The operation not only of the bodies set up by the JBNQA but the government decision-making as well is bound by specific principles, including: protection of aboriginal people, societies, communities and economies; protection of wildlife; protection of hunting, fishing and trapping rights; minimization of impacts on native peoples; and significantly, the right to develop lawfully. Other sets of principles might prove more effective elsewhere.

-The Inuit environment regime is in effect a regional environmental administration jointly run by the Inuit and the governments and has probably worked better than the Cree regime, but it is under less severe development pressure. It is a balanced and independent body with decision making authority, subject to a final government authority to over-ride its

decisions. The Inuit have various forms of standing and priority in its operations which are essentially similar to the measures outlined for the Cree above.

-The development of completely autonomous native environmental regimes, which would extend beyond the native land holdings, was not a possibility in the JBNQA negotiations, although of course the special participation of the native people in the general regional regimes gives them some input over all the lands in northern Quebec.

6. The need of contemporary hunters for cash incomes creates real dependencies on both the sources of those incomes and the sources of the various goods and services they need and must acquire by means of purchase. Dependencies therefore develop on governments where significant portions of the incomes come from government payments of various kinds, on the labor market conditions where incomes are derived from wages, and on market conditions and commercial institutions more generally for incomes from the sale of commercial wildlife products, and for access to opportunities to purchase needed goods and services. On one fashion or another these dependencies need to be limited or reduced.

-In the JBNQA the Cree met these dependencies through a guaranteed annual income program for cash inputs, and through measures intended to facilitate establishment of Cree controlled institutions for the marketing of the products of harvesting and for purchases of commercial products.

-The development of the commercial institutions to support hunting, often on a non-profit basis, has been slow but steady, and the main limits on

the Cree have been the economies of scale, and the limited market control which can be exerted by small organizations in large markets. Thus, fur marketing has been centralized, but production is not sufficiently large to establish a separate fur auction. Provision of bush air services is being developed, but the highly seasonal nature of Cree needs makes it uneconomic for local Cree air service companies to have the equipment needed to meet all Cree needs. The bulk purchase of goods for hunters has generally worked most effectively. And the Cree have increasingly put priority on creating new and expanding employment in their communities, both for full-time workers and for season work by people engaged primarily in hunting.

-These measures significantly enhance native control of their market dependent needs, but they do not eliminate dependence on general market conditions beyond their control, such as world energy prices, general recessionary or boom conditions and inflation factors, and prices for fur and other commercial harvesting products which are notoriously volatile, and are increasingly so as they become objects of political environmental movements. It is therefore essential to address the supply side as well as the demand side of native engagement in cash markets.

-Provision of more stable and adequate cash incomes will be essential for many, possibly most, native hunters over the next few decades. The JBNQA solution of a guaranteed annual income program, in which governments are legally bound to transfer necessary monies, and beneficiaries have legal rights to the benefits, is one type of solution. It has the advantage of being highly flexible, and reasonably free of new dependencies, but may

not be adaptable or desired in other jurisdictions, especially where there are different levels of welfare state support, different public ideologies concerning state payments, and different native historical experiences with dependencies.

-Alternative forms of cash support for hunters could be derived from other types of programs, for example from the provision of capital funds directly to hunters groups or communities, which they could invest to provide incomes to be used to aid hunters. Or from the incomes of native economic ventures, or royalty payments. Each has certain advantages and disadvantages. The general characteristic of these provisions as opposed to guaranteed income type programs is that they should permit a very high level of native control, and possibly greater flexibility concerning how funds are paid out, permitting changes to the structure of programs based only on local decisions. But such types of provisions also bring greater dependency on general market conditions for incomes depend on the general conditions for long-term investment or for the growth of economic enterprises, and they therefore depend on fully adequate capitalization at the initiation, which implies substantial funding, and political difficulties of its own. What is workable in a given situation is therefore a complex judgement.

-People need to find solutions that they are comfortable with, and that are politically realistic, but the dependencies created by the involvement of hunters in cash exchanges need to be addressed along with the other issues discussed above if the autonomy and future of hunters is to be enhanced. Indeed it will take measures addressing all of the above problems to accomplish that goal.