THE HUNTING RIGHTS OF INDIAN PEOPLE IN MANITOBA: AN HISTORICAL OVERVIEW AND A CONTEMPORARY EXPLICATION TOWARD ENHANCED CONSERVATION THROUGH JOINT MANAGEMENT

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ABSTRACT: Hunting, fishing, gathering and trapping were the industries of the aboriginal societies of North America. The British Government recognized these rights, at the time of re-settlement of North America. The right to hunt and fish was later enshrined in treaty and Acts of Parliament, including the Canadian Constitution Act, 1982. The provisions of Canadian law are such that conventional wildlife management practice (i.e. harvest restrictions) can only be partially effected in managing wildlife populations which are hunted by Indian people in Manitoba. Co-operative wildlife management is a venture based on a trust relationship between an Indian Band, usually represented by Chief and Council and staff of the Wildlife Branch. Both parties benefit from such agreements without associated cost or sacrifice. Indian rights to hunt are not compromised: on the contrary, the agreements serve to enhance those rights, through the production of more game. The agreements are statements of goodwill and have no force in law. Joint management agreements would provide for investment of decision making authority with Indian people in recognition of hunting rights and enhanced conservation on the landscape.

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Hunting, fishing, gathering and trapping were the industries of the aboriginal societies of North America. Animals and plants provided all the material needs of the people and their cultures. The Indian people depended on hunting, fishing and trapping to provide the basic necessities of life (Okimaw and Abramson 1988).

Conservation of resources was effected in manners not well understood. Clearly technological limitations played a role but spiritual reverence, cultural and religious constraints were probably more significant. Diamond Jenness, an early Canadian anthropologist-wrote: "The Indians were keen naturalists within the limitations of their interests. They knew the life-histories of the animals they hunted, the different stages of growth, their seasonal movements and hibernation haunts, and the various foods they sought for sustenance."(Jenness 1932). The agriculturalist and naturalist Gordon Hewitt described the Indian lifestyle and conservation practices as follows:"In his primitive state he was merely a unit in the balance of nature that is so marvelously adjusted that while the abundance of species rises and falls extermination does not follow the preying of one species upon another." (Hewitt 1921). A general conservation of wildlife was effected by Indian practices, although it is not to be implied that there was any recognized knowledge of conservation principles or that social practices were evolved as conservation measures.

It was upon this cultural landscape that the fur industry was imposed by the British and French traders. We stress the cultural landscape at this time because although the physical landscape would later experience the impact, it was upon the cultural landscape which was most endeared to the Indians that immutable change was first imposed. The concept of land ownership was alien to aboriginal people,as was the concept of ownership of live wild game. However, usufruct rights or the right of access to the utilities of the land was an integral part of the cultural landscape.

The flexibility and adaptability of the Cree culture resulted in the fur trade being readily established: the Cree welcomed the traders' goods of convenience, i.e. guns, knives, cooking utensils and enjoyed the luxury consumer goods, beads, tea, alcohol and tobacco. Land use rights were essentially granted to the traders by the Indians at this time, but the Indians' usufruct rights were retained. For the trade items, the Indians paid in furs, recognizing the intrusion on the physical landscape but probably failing to notice the cost of the invasion of their cultural landscape. Great Britain transferred jurisdiction over Rupert's Land and the North-Western Territory to the Government of Canada in 1870. At that time the British government imposed on Canada the obligation to enter into treaty with the aboriginal people, 'to deal and settle with claims of compensation'. The Canadian Government respected the provisions of the Imperial Order-in-Council and proceeded to enter into treaty with the Indian people.

Generally speaking the treaties extinguished or at least infringed upon aboriginal rights. Many treaties made no mention of hunting rights, but all imply, one way or another that the right to hunt and fish would remain unaltered. Clauses such as "It is further agreed by Her Majesty and the said Indians that the sum of fifteen hundred dollars shall be yearly and every year expended by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Indians" (McNeil 1983), imply that the right to hunt and fish would remain unimpaired.

At the time the treaties were signed, hunting and fishing rights were of paramount importance to the Indians. Had legal council been available to the Indians at that time, it is probable that the treaties would have asserted hunting and fishing rights in no uncertain terms. The following exerpt from the Report of the Royal Commissioners for Treaty No.8 (in Cumming and Mickenberg 1972) supports this view:

> "Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. By and over we had to solemnly assure them that only such laws as to hunting and fishing as were in the interests of the Indians and were found necessary in order protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it."

It is worthy of note that this is one of the rare mentions of privilege in regard to hunting and fishing rights of Treaty Indians. A'right' in this context is defined as 'something to which one has a just claim' or 'the power or privilege to which one is justly entitled.' In comparison a 'privilege' is defined as 'a right or immunity granted as a peculiar benefit, advantage or favour'. How could the Indians be granted the right to hunt by the Crown, unless the Crown first abrogated that right ? Clearly, the Crown did not abrogate and regrant the right to hunt, but, to the contrary, the Crown recognized the existence of a right and affirmed hunting and fishing rights in the treaties which both parties entered into. Many verbal promises were omitted from the treaties but understood as binding by the Indians. However, some treaties, for example Treaty 8, included hunting clauses (in Cumming and Mickenberg 1972):

> "And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to

> pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulation as may from timeto time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be taken up for settlement, mining, lumbering, trading or other purposes."

In recapitulation, the Commissioners assured the Indians that their right to hunt and fish would not be impaired through entering into treaty with the Crown and the treaties ratified their assurances. The treaties provided no new right to the Indians in this regard, but the Indians required clear recognition of existing rights. And, Treaty Indian rights to hunt and fish are not privileges granted by the Crown.

The legislative history of Canada reveals that although Canada has abrogated many aspects of the rights of Treaty Indians to hunt and fish, legislation has periodically affirmed those rights, at least in principle. Affirmation was embodied in the Indian Act, the Natural-Resources Transfer Agreements (Manitoba, Saskatchewan and Alberta) and recently in the Canada Constitution Act, 1982 (Payne 1987).

The Canada Constitution Act, affirmed 'existing' hunting rights of Treaty Indians (and other aboriginal people including Metis). Rulings by the Supreme Court of Canada, in recent time (the past ten years) indicate that 'existing' Treaty Indian rights as they pertain to hunting, trapping and fishing, are as defined in the Natural Resources Transfer Agreements: Acts of Parliament whereby Canada transferred jurisdiction over natural resources to the Provinces of Manitoba, Saskatchewan and Alberta. In consideration of the rights of Treaty Indians to hunt, trap and fish, the Manitoba Resources Transfer Act, scheduled to the British North America Act, provided as follows (Saskatchewan and Alberta Acts provide essentially the same provision) and enshrined Indian hunting rights in the Canadian constitution at that time:

> "13. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided however that the said Indians shall have the right which the Province assures them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and any other lands to which the said Indians may have a right of access." (in McNeil 1983).

However, the Supreme Court of Canada has also ruled that Indians are subject to Canadian law and that the Government of Canada has the right to abrogate the treaties and repeal laws which affirm rights, as exampled by the Migratory Birds' Convention Act.

Approximately two-thirds of the Manitoba land-base is Crown land to which Treaty Indians have right of access for hunting in all seasons. The Supreme Court of Canada has ruled that Provincial Parks and Wildlife Management Areas are not excluded areas. National Parks are excluded because their designation is a federal government jurisdiction. Essentially, a Treaty Indian may hunt any game animal, in all seasons in any area where hunting or trapping of any species is licenced by the province, on a seasonal basis. Treaty Indians may also hunt on privately titled lands, provided permission of the land-owner is secured.

There are approximately 61,000 Treaty Indians in Manitoba. Clearly, the rights of these people to harvest unlimited amounts of game, during all seasons of the year poses a

quandary for wildlife managers. Leopold in his treatise on Game Management (1933), outlined four steps for the restoration of a game population: Cancel the season (hunting); Reduce predation (kill wolves); Restore the habitat; Re-introduce the species. These steps do not serve wildlife managers in the Prairie Provinces of Canada very well because the law in Canada is such that hunting by Treaty Indians is not subject to the game laws of the Provinces. Implementation of predator control or habitat restoration programs will serve little purpose if the real need is for harvest control.

In addition, Indian demography is not congruous with overall demographic trends in Manitoba, although there is a trend toward parity. Succinctly, the Indian population is increasing at a faster rate than the overall population of Manitoba. There are many reasons,most of which are not our concern. Suffice it to say, there will be more Treaty Indians exercising their hunting rights in the future than there are today. And in the absence of progressive management,wildlife populations to which Indian people have right of access will continue to decline and ultimately become extirpated.

It is reasonable to assume that the mandate of government wildlife agencies is to increase or at least maintain wildlife populations on the landscape and to allocate the use of wildlife resources in accordance with the law and government policy. Clearly, Indian hunting rights present a formidable challenge to wildlife managers in pursuit of this mandate.

If we accept the apparent impasse in which wildlife managers find themselves in contemplation of population management and the need for harvest controls, then clearly the dilemma faced by Indian people must also be recognized. The Canada Constitution Act guarantees to Treaty Indians, rights which other Canadians do not enjoy. Social and democratic ideals esteeming equality of rights for all citizens are not the issue: continued debate of this principle is leftover and in excess, the Canada Constitution Act has been proclaimed law. It is within this context that a contemporary concept is advanced to Indian people and wildlife managers, toward effective population management.

The notion of co-operation is founded in noble thought and operates with efficiency while the immediate aims and long-range ambitions of the co-operators continue to correspond. Co-operative wildlife management arrangements have met with success in Manitoba. It is a worthwhile initiative and much further work will certainly be accomplished. However, when objectives contest and confrontations arise, co-operative arrangements are jeopardized.

Joint management of wildlife is a relatively new concept that has evolved from recognition of the need for inter-jurisdictional management of migratory species, advisory boards and committees on matters of local concern and recognition of the rights of Treaty Indians. It requires that management authority be partially (degree and matter to be defined) vested in Treaty Indian Wildlife Management Authorities. Implicit is that the Government partially divest its authority and partially delegate its responsibility to Indian people. Joint management, in various forms, is an old concept. Payne and Goulden (1982) contended that the Inuit and the Chipewyan Indians jointly managed the barrenground caribou on a seasonal basis.

The significance of Treaty Indian hunting rights has long been under-estimated in wildlife management. There are reasons for this. It is a Canadian problem, largely unrecognized in wildlife journals, largely un-studied, essentially un-taught in schools of wildlife management and perceived by Canadian wildlife managers as an anomaly which they have been reluctant to accept. Historically, our efforts have been devoted to finding legal means to over-rule Treaty Indian hunting rights: these efforts have repeatedly failed. The Supreme Court of Canada has largely up-

held Treaty Indian hunting rights, ergo advising the Governments of Canada and the Provinces of their interpretation of the law as it exists. The Government of Canada has affirmed Treaty Indian hunting rights (with other existing rights) in the Canada Constitution Act. The court rulings are advising wildlife managers that it would be on the part of wisdom for us to find a way to work within the Canadian Constitution and devise wildlife management systems and strategies which are compatible with the Manitoba environment, rather than doggedly following the management principles of schools of wildlife management, which fail to recognize our problem and therefore fail to offer solution toward its resolution.

However, Indian hunting rights and wildlife management must not be too firmly shackled to each other. To do so will inhibit co-operative effort, establish a re-conditioned adversary arrangement and stifle wildlife management potential. Nor can they be viewed as isolated issues, because both in unison are essential ingredients in the recipe for Indian development and effective management of wildlife populations to which Indian people have right of access. Indian development may result from increased autonomy in decision making through self-government or improved management of local wildlife populations or a combination of both.

Indian rights to hunt would not be compromised by such arrangements, to the contrary, joint management has the potential to demonstrate that Indian people can exercise their rights in a manner that enhances rather than threatens conservation. Joint management could become a cornerstone of a conservation strategy for large mammals in Manitoba. The public at large is expected to welcome an initiative of this nature by Indian people. Joint management could demonstrate that Treaty Indians not only use and enjoy hunting rights, but also respect the special rights which were safe-guarded in Treaty and later enshrined inthe Canadian Constitution. Economic development may result from collective or joint wildlife management systems. Unshackled by adversary and competitive modes, local resources can be managed to benefit not only individuals but the extended community. Contemporary wildlife management philosophy argues that conservation will be better ensured if the benefits to society can be enhanced in direct and measurable form. However, economic development must not be bridled to joint management, but rather tenuously grafted to it. There are many potential benefits to joint management, none are guaranteed, but some are assured.

The antithesis of joint management systems is that present practices will tend to prevail. Co-operative management strategies will continue to enjoy some successes. Large mammal populations will continue to decline, and although the decline will be slow, the wildlife rangelands of northern Manitoba will become increasingly under-stocked.

In summary, joint management of wildlife populations in concert with Indian people offers potential for enhanced management of wildlife,increased wildlife populations, increased harvest and wildlife economic development opportunity. Management strategies designed in recognition and in accord with the hunting rights of Treaty Indians can succeed. Co-operative management has demonstrated potential; joint management proposes to refine and expand the strategy but chiefly, joint management proposes to secure it, through precise legal definition of responsibilities and authorities.

REFERENCES

CUMMING, P.A. and N.H. MICKENBERG, 1972. Native Rights in Canada. 2nd. edition. Indian and Eskimo Association of Canada in association with General Publishing Co. Ltd., Toronto. 352pp.

HEWITT, C.G. 1921. The Conservation of Wild Life in Canada. Charles Scribner's

Sons, New York. 344pp.

JENNESS, D. 1932. The Indians of Canada. Reprinted 1972. Information Canada, Ottawa. 452pp.

LEOPOLD, A. 1933. Game Management. Charles Scribners Son's. New York. 481pp.

MCNEIL, K. 1983. Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada. Native Law Centre. University of Saskatchewan, Saskatoon, Saskatchewan. 64pp.

OKIMAW, M. and R. ABRAMSON. 1988. Indian Hunting, Fishing and Trapping Rights. A paper presented to joint Manitoba Keewatinowi Okimakanak Inc./ Manitoba Conference. February 22-23. 10pp.

PAYNE, C.H. 1987. The Waterhen Project: The introduction of the endangered wood bison to the Interlake Region of Manitoba and its role in the economic development of the Waterhen Band of Saulteaux Indians. Ph.D. Thesis. University of Manitoba, Winnipeg. 127pp.

__________, and R.C.GOULDEN. 1982. Interjurisdictional Management. Proceedings of the 46th Federal-Provincial Wildlife Conference. Whitehorse, Yukon Territory. 10pp.