

Jurisdictional, Manitoba First
Nations and Inuit Issues
for the
Western Hudson Bay Region

A Discussion Paper

February 6, 2001

Magdalena A K Muir
International Energy, Environmental
and Legal Services Ltd.

Biographical notes

Magdalena A K Muir is President of International Energy, Environmental and Legal Services Ltd. (IEELS). IEELS provides legal and business services for natural resources, environment, First Nations, and multi-party negotiations. One area of specialization for IEELS and Ms Muir is resource management under northern land claim agreements. Further information on IEELS is available at www.ieels.com.

Ms Muir has an educational background in law, engineering, geology and the arts. She completed a law degree at the University of Calgary in 1989, and is a member of the Alberta Law Society since 1990. Ms Muir has previously been employed as a lawyer in a corporate law practise, as a legal writer on northern land claims, and in a legal, regulatory and business capacity with a large North America gas marketer.

Ms Muir is a Research Associate of the Arctic Institute of North America, and has published extensively in the areas of energy, environment, resource management and indigenous issues. For the past five years, Ms. Muir has been is an instructor in environmental and natural resources law for the Environmental Management Certificate Program of the University of Calgary Faculty of Continuing Education. She is also past Chair on the Canadian Bar Association National Environmental Law Section, and continues to be active on the executive in organizing conferences, and legislation and law reform.

Copyright Magdalena A K Muir 2001.

TABLE OF CONTENTS

TABLE OF CONTENTS	3
SECTION 1: OVERVIEW OF THE REPORT	5
SECTION 2: JURISDICTIONAL ISSUES	8
Introduction	8
Geographical ambit of the western Hudson Bay region	9
Resource uses and environmental issues	11
Figure 1: Map of the western Hudson Bay region	16
Common law	17
International agreements and conventions	22
Government departments and responsibilities	26
Department of Fisheries and Oceans	26
Department of Indian Affairs and Northern Development	28
Environment Canada	30
Canadian Environmental Assessment Agency	30
Parks Canada Agency	31
Department of Transport	33
Government of the Nunavut Territory	33
Land and resource management boards	34
Government of Manitoba	35
Town and Port of Churchill	37
SECTION 3: MANITOBA FIRST NATIONS RIGHTS	38
Introduction	38
ABORIGINAL RIGHTS AND FIRST NATION AGREEMENTS	40
Aboriginal rights	40
Historic numbered treaties	44
Manitoba Treaty Land Entitlement Framework Agreement	45
Northern Flood Agreement	48
Other initiatives	50
RESOURCE MANAGEMENT ARRANGEMENTS	52
Introduction	52
National parks	54
Wildlife management areas	58
Resource management areas under the Northern Flood Agreement	62
Interjurisdictional species management	66
SECTION 4: INUIT RIGHTS	69
Introduction	69
The Nunavut Settlement Area	72
Inuit Owned Lands and water rights	73

Inuit wildlife rights	75
Parks and conservation areas	79
Nunavut land and resource management boards	83
Nunavut Marine Council	84
Nunavut Wildlife Management Board	85
Nunavut Surface Rights Tribunal	87
Nunavut Planning Commission	87
Nunavut Impact Review Board	87
Nunavut Water Board	88
Impact of Nunavut Final Agreement in Manitoba	89
BIBLIOGRAPHY	91
International Conventions	91
Constitutional documents	91
Inter-jurisdictional agreements	92
Legislation	92
Judicial decisions	93
Government policies	94
Publications	95

SECTION 1: OVERVIEW OF THE REPORT

This report reviews jurisdictional, Manitoba First Nation and Inuit issues for the western Hudson Bay region. These issues need to be considered for integrated coastal management and marine protection for the region.

The first section of the report is this overview. The second section of the report is an review of jurisdictional issues for the western Hudson Bay region. It begins with a review of resource uses and environmental issues for the region. This is followed by a review of the common law for water and coastal management. A discussion of the constitutional authority of federal, territorial and Manitoba governments then ensues. The section continues with a summary of relevant international agreements. The section on jurisdictional issues concludes with a discussion of the legislative responsibilities of governments and agencies.

The next two sections of the report consider Manitoba First Nation and Inuit issues for the western Hudson Bay region. The third section of the report considers Manitoba First Nation rights and resource management arrangements involving First Nations in northern Manitoba. Manitoba First Nation rights include aboriginal rights, and those rights arising under historic numbered treaties, the Manitoba Treaty Land Entitlement Framework Agreement, and the Northern Flood Agreement.

While there are a variety of resource management arrangements in northern Manitoba, discussion is limited to national

parks, wildlife management areas, and resource management areas under the Northern Flood Agreement. Interjurisdictional arrangements for barren grounds caribou are also discussed.

The fourth and final section of the report considers Inuit rights under the Nunavut Final Agreement, concentrating on the Kivalliq region. The Nunavut Settlement Area is defined, and Inuit lands, water rights and wildlife rights under the Agreement are reviewed. Next, there is a discussion of parks and conservation areas in the Nunavut Settlement Area. This is followed by a brief review of the land and resource management boards established under the Agreement, and their impact for marine areas within the Nunavut Settlement Area, as well as any impacts beyond this area. Finally, the section concludes with a summary of the impact of the Agreement in northern Manitoba, and offshore coastal waters.

At the end of the report, there is a bibliography. The bibliography lists international conventions, constitutional documents, interjurisdictional agreements, legislation, judicial decisions, government policies, and publications.

This report is intended to serve as a discussion paper. It reflects issues raised at the October 2000 workshops sponsored by Fisheries and Oceans Canada: The Western Hudson Bay Workshops: Charting a Coordinated Approach to Management of the Region.

An earlier version of the section of the report on jurisdictional issues was presented at one of those workshops. At that time, comments were received from participants including Environment Canada, Manitoba Conservation, Parks Canada Agency, and Transport Canada. The analysis

of jurisdiction issues was modified in response to those comments.

Since that time, further comments and assistance has been provided for other sections of the report. Parties providing comments or assistance include the Kivalliq Inuit Association, Manitoba Aboriginal Affairs and Northern Development, Manitoba Conservation, the Manitoba Crown Land Registrar and the Nunavut Planning Commission. This assistance is gratefully acknowledged. However, any views or inaccuracies in the report are solely the responsibility of the author.

Where possible, the report draws analogies and makes comparisons between jurisdictional and aboriginal issues throughout the western Hudson Bay region. The report suggests that there are common issues within the region that are relevant for integrated coastal management and marine protection.

Despite differences in governmental structures, common jurisdictional issues exist. These issues include complexity of regulation, duplication and overlap of federal and regional government functions, and allocation of scarce financial resources and staff. These common jurisdictional issues will shape any cooperative approach to integrated coastal management and marine protection.

Similarly, the report concludes there are common aboriginal issues for Manitoba and Kivalliq. These issues include subsistence and commercial wildlife harvesting; tourism and commercial opportunities in relation to wildlife and parks; joint wildlife management; parks and conservation areas, and joint management structures. Additionally, joint management arrangements and inter-jurisdictional species

management provide models for aboriginal participation and integrated coastal management.

Overall, the report suggests that it is an appropriate time to implement integrated coastal management and marine protection for the western Hudson Bay region. Both Manitoba and Kivalliq are on the cusp of experiencing greater economic activity and related pressures on ecosystems. As such, it is an appropriate time to consider the implementation of a cooperative process to ensure that the inevitable economic development occurs in the context of an integrated approach to the region.

Discussions at the Hudson Bay workshops indicated that a diverse range of parties are interested in moving forward on and participating in an inclusive process. This inclusive process could include all levels of government, Inuit, First Nations, private parties and environmental interests. While the eventual shape of the process will be determined by the participants, it might be useful to suggest some general principles and possible models.

Parties might consider collaborating in a unanimous inclusive manner. As a collaborative unanimous process, no significant efforts would proceed without the support of all parties. As the process is inclusive, it will include key government departments and agencies, Manitoba First Nations and the Inuit, local communities, and significant private, commercial and public interest organizations.

This collaborative process should not involve any modification of the jurisdiction of any government department or agency. The process would also not compromise the interests of the private and commercial parties, or public interest organizations.

At least initially, this collaboration need not involve any formal relationships or agreements between the parties. Instead, the early stage of this collaboration could manifest itself in meetings of the parties, and the development of means of sharing information about the interests, activities and research of the parties. Subsequently, when trust is built up among the parties and joint implementation begins on certain issues, formalization or documentation of the process may be useful. However, this formalization and documentation need not be extensive. Irrespective of the eventual process, the Department of Fisheries and Oceans and other government departments and agencies could facilitate the implementation of the overall process within the scope of their legislative responsibilities.

There are a number of existing models for collaborative inclusive processes. One model is the management of the Beverly and Qamanirjuaq barren ground caribou herds. One advantage of this model is its existence within the western Hudson Bay region. Parties are likely to be familiar with its history and practices. Section 3 of this report discusses interjurisdictional species management for these caribou herds.

Another model based on watershed management is the evolving multi-party process for management of the Fraser River watershed in British Columbia. The strength of this model lies in its watershed approach as, logically, any coastal and marine management initiative for Hudson Bay will eventually need to recognize and adopt a watershed approach.

The Fraser Basin watershed is the area drained by the Fraser River and its tributaries. It comprises more than one quarter of BC's land mass, supports more

than two-thirds of its population, and contributes to eighty percent of the province's gross domestic product. Mines and half of the province's agricultural lands are in the basin, and the area is subject to increasing population pressures.

The Fraser Basin Council is a multi-stakeholder negotiated settlement process for water management in the Fraser River watershed. The Fraser Basin Council was established in 1997 as an autonomous non-profit non-government organization to succeed the Fraser Basin Management Program. The Council was established to advance sustainability of the Fraser Basin, and through working with the Charter for Sustainability. The Charter is a non-legally binding good faith agreement to work towards the social, economic and environmental sustainability of the Fraser Basin.

The Council has thirty-six directors from federal, provincial, local and First Nations administration, as well as private and non-governmental sectors. The federal and provincial governments each appoint three directors. The eight regional directors in the watershed each appoint a Director. Eight First Nations groups each appoint a Director. The Council appoints two non-governmental representatives for each region to represent private sector interests in the watershed. Three directors are also appointed to represent the sustainability, environmental, and social and economic dimensions. Lastly, the Council has an impartial chair.¹

¹ Further information on the Fraser Basin Council is available at their website, www.fraserbasin.bc.ca; and the article: Muir, M A K, "Contrasting Approaches to Aboriginal Water Management: Joint Management and Multi-Stakeholder Processes".

SECTION 2: JURISDICTIONAL ISSUES

Introduction

Jurisdictional issues are complex in the western Hudson Bay region. Despite its relative isolation, the western Hudson Bay region is subject to various governments, legislation, international agreements, and Inuit and First Nation rights.

This discussion of jurisdictional issues begins with a description of the geographical ambit of the western Hudson Bay region. It continues with a summary of resource uses and environmental issues for the western Hudson Bay region. A review of the common law for water and coastal management follows. There is then a summary of the constitutional authority of federal, territorial and Manitoba governments. Relevant international agreements are discussed. Finally, the legislative responsibilities of the federal, provincial and territorial governments are summarized.

Geographical ambit of the western Hudson Bay region

The western Hudson Bay region is formed of the coastal lands and adjacent marine waters of the western Hudson Bay region. This region extends from the Manitoba boundary with Ontario, along the entire Manitoba coast, to the northern limits of the Kivalliq region in the Nunavut Territory. The land portion of the western Hudson Bay region is characterized by low lying plains. The bay is a shallow sea. The map in Figure 1 illustrates the geographical ambit of the western Hudson Bay region, as well as land and resource uses in the region.

Manitoba is a province with a manufacturing and distribution sector focused near Winnipeg, and extensive agriculture in the southern and central portion of the province. The northern region is more isolated and less densely inhabited than the southern and central region. Residents of the northern region are primarily engaged in mining, forestry, tourism and subsistence activities.

Manitoba is an unique location in Canada. The province contains the eastern limit of the prairies and the southwestern portion of the Canadian Shield. The province borders on central Canada and the US midwest, yet has access to Hudson Bay and Arctic Canada.

Coastal regions and access to Hudson Bay is becoming more important for Manitoba. This is partly due to the development of the Port of Churchill and increases in maritime traffic through that port. It is also due to the development of national and provincial parks and

conservation areas in the northern region of the province, and significant increases in tourism. Finally, Manitoba is the closest province to the Nunavut Territory. The two regions are logical partners for joint approaches to transportation, re-supply, and natural resource and transportation projects. Some discussion has been taking place in this regard.

The Nunavut Territory is Canada's most recent political entity, being formally established in April 1999. The territory was established contemporaneously and in satisfaction of commitments made in the Nunavut Final Agreement. The relationship between the Inuit, the Nunavut Final Agreement, and the federal and territorial governments is unparalleled in Canadian history.

Government structures and land ownership patterns in the Nunavut Territory closely reflect the Nunavut Final Agreement. Similarly, Inuit rights under the Agreement influence the structures and priorities of both the federal and territorial governments within this territory. Therefore, this report considers Inuit rights, and land and resource management under the Nunavut Final Agreement.

The boundary of the Nunavut Settlement Area is not the same as the boundary of the Nunavut Territory. The map in Figure 1 illustrates the boundaries of the Nunavut Territory and the Nunavut Settlement Area, as well as Inuit Owned Lands, parks, and conservation areas within the western Hudson Bay region.

The Nunavut Settlement Area is composed of Area A, which is the Arctic Islands and mainland of the Eastern Arctic and adjacent marine areas, and the Area B, which is the Belcher Islands, associated

islands and adjacent marine areas in Hudson Bay. The Nunavut Territory includes all these areas, plus the islands of Hudson Bay, the Hudson Strait, James Bay and Ungava Bay.

Both the Nunavut Territory and the Nunavut Settlement Area extend to the offshore marine regions of Hudson Bay situated north of 60th parallel. The Nunavut Final Agreement describes rights and processes that extend to coastal and marine areas south of the 60th parallel, including inland and coastal areas of Manitoba.

Resource uses and environmental issues

The western Hudson Bay region is subject to a variety of resource uses and environmental issues. Figure 1 at the conclusion of this section is a map that graphically illustrates boundaries, resource uses and environmental issues in the western Hudson Bay region. The map illustrates contains parks, conservation areas, wildlife management areas, and resource management areas in the region. The map also indicates Manitoba First Nation lands, Inuit Owned Lands, and boundaries established under the Nunavut Final Agreement.

Hudson Bay is a broad shallow basin, averaging 125 metres in depth and less than 80 metres depth for up to 20 to 100 kilometres from the coast. Ice cover traditionally lasts from October to June. Shore leads along the entire inner edge of the bay are kept open by strong prevailing wind, separating landfast ice along the coast from pack ice which predominates in most of the bay.

The waters of Hudson Bay are Arctic in nature as the strong outflow in the northeast part of bay prevents the Atlantic-Arctic water mix in Hudson Strait from entering. Freshwater discharges into the bay from rivers results in significantly lower salinity in the bay during the spring and summer. The tide in the bay varies from less than one meter to a little over two metres.

Hudson Bay is a Paleozoic platform deposited in a pre-existing depression in the Canadian Shield. The west and southwest coasts and the southern portion of

Southampton Island are a vast expanse of drowned swampland, front by extensive tidal flats reaching nine kilometres in width. Eskers, moraines, and raised beaches are common, and deltas and estuaries are important habitats.

Some forty to fifty freshwater and anadromous, and Arctic and subarctic marine fish species are found in the bay. Arctic charr, capelin, Arctic cod, ogac, sculpins, and blennies are the most abundant species.

Approximately 22,000 beluga whales summer along the west coast of Hudson Bay. The highest concentrations are in larger estuaries, particularly the Nelson River.

The coastal areas near Churchill have the highest densities polar bear denning in Canada. The bears congregate at the coast of the Cape Churchill to wait for the return of ice. Polar bears use coastal lands, and land-fast and sea ice.

Tidal flats and inland marsh areas of Hudson Bay support some of the world's largest concentrations of breeding, molting and migrating shorebirds and waterfowl.

Inland and offshore fish and marine species are important for subsistence, recreational and tourism purposes throughout the western Hudson Bay region. Inland fish include anadromous fish utilize the freshwater and marine environment in their life cycle. Offshore fish and marine species include seals, walruses, beluga whales, bowhead whales, and narwhales. Polar bears are also an important marine species, though they are considered terrestrial mammals under federal legislation.

The western Hudson Bay hosts a large beluga whale population that moves

from Churchill to the northern regions of the bay. This beluga population is subject to subsistence hunting throughout its range, and may be affected by tourism activities in and around Churchill.

Polar bears move between Manitoba and Nunavut Territory. The bears are commercially hunted in Kivalliq and the focus of tourism activities in northern Manitoba.

Walrus and walrus pullouts are an important issue in the northern region of Hudson Bay. Walrus pullouts are areas where walrus are harvested. The Keewatin Land Use Plan includes recommendations for greater protection of these walrus pullouts and the designation of these areas as marine protected areas under the Oceans Act.² Walrus are also subject to an experimental commercial hunt in the northern reaches of Kivalliq.

Each marine species gives rise to different concerns, may be subject to different regulations, and interact differently with other species. Seals are the main food source for polar bears. Any variation in numbers of seals due to harvesting, environmental factors or a changing climate could affect the polar bear population. Seals and polar bears are independently regulated as a marine species and terrestrial wildlife, respectively, under separate Acts and departments. Further, bowhead and narwhale populations in the Kivalliq region may still be affected by historic and present harvesting practices, while tourism

² Keewatin Regional Land Use Plan (Nunavut Planning Commission, 1998) at 104. This plan will soon be replaced by the Kivalliq Land Use Plan which was approved by the federal government in October 2000.

and subsistence harvesting activities influence beluga whales.

Manitoba First Nations hunt caribou and fish inland, and hunt waterfowl and marine species and fish along the coast. They harvest wildlife in northern Manitoba under the *Manitoba Natural Resources Transfer Agreement*, aboriginal and treaty rights, and other wildlife arrangements.

Manitoba First Nations also participate in wildlife management for northern Manitoba through resource management regimes established under the Northern Flood Agreement, the joint management regime established for the Wapusk National Park, and specific provincial initiatives.

Discussions are underway to clarify Manitoba First Nation harvesting rights and other matters in the Nunavut Territory.³ The memorandum does not define the scope of these harvesting rights, and whether these rights are subsistence rights, or include commercial applications and management rights

The Inuit harvest wildlife for subsistence purposes in the Kivalliq, and the coastal and inland region of Manitoba. Inuit harvesting occurs in Kivalliq pursuant to the Nunavut Final Agreement, and in Manitoba pursuant to traditional uses and aboriginal rights. The Inuit have subsistence and commercial harvesting rights, and commercial applications such as tourism, and guiding and lodge operations. The Inuit also participate in wildlife management in

³ Canada and the Manitoba Denesuline signed a Memorandum of Understanding on July 12, 1999 to negotiate wildlife harvesting north and south of the 60th parallel, to consider land selection in Manitoba, and to address Manitoba Denesuline concerns with the Nunavut Final Agreement.

the Kivalliq, primarily in accordance with boards and processes under the Nunavut Final Agreement.

The Inuit fish for arctic charr, hunt geese, ptarmigan and caribou inland. Beluga whales, seals and walrus are harvested by the Inuit throughout the Nunavut Territory and northern Manitoba. Beluga whales and seals are harvested for subsistence purposes only.

Polar bears in Kivalliq are subject to a subsistence and commercial hunt. Local Inuit communities receive quotas for polar bears and may transfer that quota to sport hunters for a fee. At this time, polar bears are not hunted in Manitoba. Walrus is important in the more northern portion of the Kivalliq region, and a commercial hunt for walrus has been established on an experimental basis. Charr are commercially fished in several rivers in the Kivalliq. Sportfishing occurs throughout the western Hudson Bay region.

Tourism is a fast growing industry throughout the western Hudson Bay region. Polar bears and beluga whales are the mainstays of the northern Manitoba tourism sector, particularly around Churchill and Wapusk National Park. Polar bears congregate and attract tourists to the region during the fall. Significant numbers of people also visit Churchill, the Churchill River, and Wapusk National Park during the summer months when beluga whales move into the Churchill River estuary during July and August. Migratory birds are also prevalent from May to August.

Similarly, tourism activities in Kivalliq focus on wildlife. This includes wildlife viewing, visits to parks and conservation areas, and commercial hunting. Most parties fly into Kivalliq for these

activities. More recently, passenger and cruise ships, and individual boats have been visiting the Kivalliq region, local communities, parks, and conservation areas. Manitoba has been experiencing similar increases in visits of passenger and cruise ships.

Tourism activities for wildlife, including polar bears and beluga whales, could influence and possibly affect populations available for harvesting in the western Hudson Bay region.

Hudson Bay and James Bay have been modified by hydroelectric developments in Manitoba, Ontario, and Quebec. Dams change the flow regime and variation in seasonal flows, by holding back and releasing water in non-natural cycles. Dams may also change ocean currents, near-shore ice conditions, nutrient availability, the use of estuaries by marine mammals and anadromous fish, and the patterns of land and marine use along the coast. As a result, hydroelectric developments change river and marine ecosystems. Most marine changes are concentrated in the near shore in proximity to the coast. Developments permit increased mobilization of mercury, which is a concern.

Within Manitoba, hydroelectric developments have resulted in the reduction of water flows, the release of mercury and contamination of fish. Manitoba Hydro compensates Manitoba First Nations for some of these impacts under the Northern Flood Agreement. Manitoba Hydro will compensate the Town of Churchill through the construction of a weir to increase water levels in the Churchill River.

The Inuit have concerns for the cumulative impacts of hydroelectric projects located in Manitoba, Ontario, and Quebec

may have for Hudson and James Bay, and Hudson Strait.⁴ Existing Inuit concerns and the environmental assessment process in the Nunavut Final Agreement suggest that environmental assessment under the Agreement will need to be completed before further hydroelectric projects affecting the region are developed.

Projects have been proposed in the past to divert water flowing into Hudson Bay or James Bay to southern Canada for irrigation or export, but these projects have not been implemented.

Development is occurring in and around Churchill. A weir is being constructed in Churchill, and dredging is occurring for the Port of Churchill. There are proposals to extend the season for commercial shipping from this port, which could necessitate further ice-breaking activities by the Coast Guard and result in increased marine traffic.

Discussions are underway to integrate transportation strategies for northern Manitoba and the Nunavut Territory. Federal, provincial and territorial departments responsible for transportation have been participating in the discussions. In the past, Chesterfield Inlet has been proposed as a possible northern port under a northern transportation strategy.⁵ The Keewatin Land Use Plan stresses the impact of marine transportation throughout the coast, and the need to consider future

northern transportation or communications corridors under the context of the plan.⁶

Communities in Kivalliq have expressed environmental concerns for oil re-fueling proposals of the Northwest Territories Power Corporation, particularly when this re-fueling occurs with ocean going tankers and significantly longer cables. These longer cables may contravene fueling transfer regulations and cause greater risk of spillage in the re-fueling operations.

Air and water-born pollution is increasing in the western Hudson Bay region as a result of agricultural and industrial activity external to the bay. Two groups of pollutants are significant: persistent organic pollutants such as chlorine, bromine, and fluorine; and heavy metals such as mercury and cadmium. These pollutants tend to accumulate in the food chain, marine mammals, and sea birds. Other compounds like dichlor-diphenyl-trichloroethane (DDT), and polychlorinated biphenyls (PCB) are more volatile.

All these pollutants enter the Arctic by the ocean and the atmosphere. For example, winter airflows over the pole from Eurasia deposit thousands of tonnes of soil, ash, and pollutants on sea and land. The pollutants enter the ocean when the ice melts and enter the food chain through algae and phytoplankton, concentrating in the flesh of marine mammals, sea birds, and humans.

Climate change is also an important environmental influence in the western Hudson Bay region, and for Hudson Bay and James Bay. It is believed that climate change will occur most strongly at high

⁴ Keewatin Regional Land Use Plan (Nunavut Planning Commission, 1998).

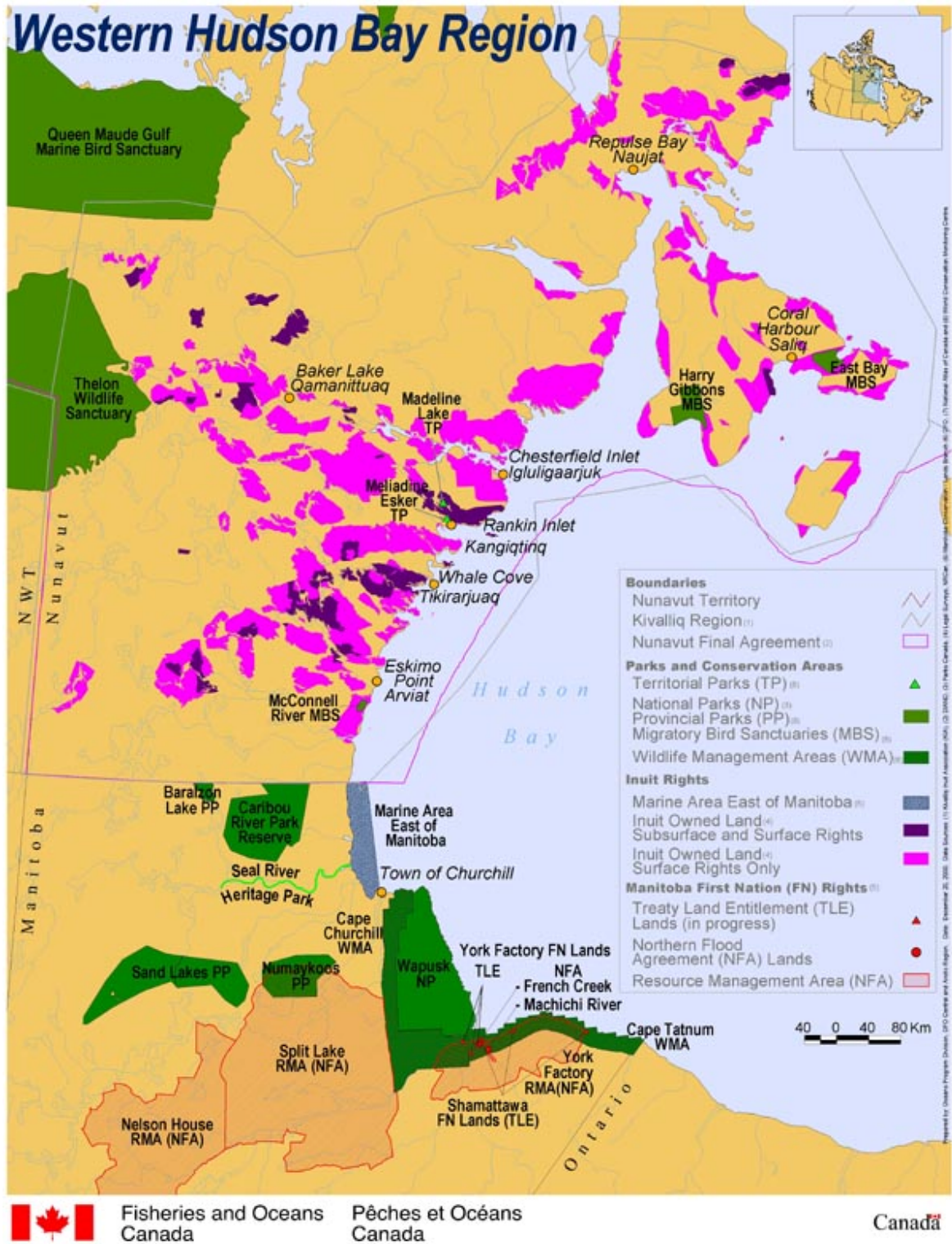
⁵ Prolog Canada, Northwest Territories Transportation Study, 1998.

⁶ Keewatin Regional Land Use Plan (Nunavut Planning Commission, 1998) at 77.

latitudes, with increases in winter temperatures and snowfall, and probable reductions in the extent and thickness of sea ice. The physical effects could include a gradual transformation of arctic to subarctic, with a northward movement of ice edges. At the very least, it will result in a shift in animal populations.

Apparently, Hudson Bay and James Bay are experiencing some impacts from climate change with earlier ice breakup and later ice freeze-up. The ice-free shipping season has been extended, though annual variations still occur.

Figure 1: Map of the western Hudson Bay region



Common law

The term "common law" is used to refer to the law derived from the cumulative decisions of the court and quasi-judicial bodies. Common law is based on judicial decisions in Canada and other "common law" countries such as the United Kingdom, United States, Australia, and New Zealand.

Common law predates legislation, and may be modified by legislation or agreements. The common law may be international, and derived from the decisions of international tribunals, arbitrators, and courts formed under treaties and conventions.

The common law evolves over time in response to legislation and international agreements. For example, a number of common law rights are based on ownership of riparian lands, and have been restricted by legislation which removes the private ownership necessary to create the right. Similarly, international customary law dealing with the economic and territorial rights of coastal countries has been formalized or expanded by the *United Nations Convention on the Law of the Sea*.

Finally, while the common law describes the rights of parties, it does not determine which parties or level of government holds these rights in a federal state. The common law for riparian lands, riverbeds, and coastal lands is described below.

Riparian rights are the rights of persons who own riparian lands, or lands adjacent to a river or water body. The landowner has the right to receive waters unaffected in quality, quantity, and rate of

flow, and has the obligation to pass on the water in the same state that they received it. Under common law, a riparian owner owns the bed of the river body to midstream in the river, and has the right to fish and erect structures on that riverbed, subject to public rights of navigation. Riparian rights may be restricted by legislation which eliminates them, or which prevent the transfer of land adjacent to the river necessary to give rise to these rights.

Under common law, the right to fish is determined by ownership of the bed of the river, lake, or water body. The party who owns the bed has the exclusive right to fish in waters above that bed. Though there are exceptions, legislation usually specifies that government owns land adjacent to and under the bed of rivers, lakes, and water bodies.

The federal government controls the right to fish in water bodies, which are on or adjacent to federal lands, such as national parks and the majority of the northern territories. A province such as Manitoba owns most riparian lands within its boundaries, and thus has riparian rights. Provinces control the right to fish in waters within provincial boundaries. Provincial control over the right to fish may also result from the pre-existing rights of that province when entering Confederation, or as a result of the constitutional documents such as the *Manitoba Natural Resources Transfer Agreement*.

Territorial governments own and control very limited lands in their territory, and usually do not own lands adjacent to rivers, or the beds of rivers and other waterbodies. Therefore, territorial governments do not own the riparian lands necessary to create riparian rights. They also can not derive the right to fish as a result of

the ownership of the bed of rivers and water bodies. Territorial rights for wildlife result from legislative delegation more than the operation of the common law. For example, the territorial government's authority for wildlife in the Nunavut Territory is derived from the federal land ownership and legislative powers over wildlife. The Nunavut Final Agreement modifies both the federal and territorial governments' role for wildlife.

The Nunavut Final Agreement transfers riparian lands, the beds of rivers and water bodies, and coastal lands to the Inuit throughout the Nunavut Territory, including the Kivalliq region. Inuit Owned Lands are adjacent to rivers and coasts, and include the beds of river and water bodies. The Agreement provides that the Inuit have the exclusive right to use waters flowing on or through their lands. The Agreement also provides compensation when developments within and external to the Nunavut Settlement Area affect these water rights. Therefore, the Agreement recognizes or creates "riparian-like" rights based on the Inuit ownership of riparian lands.

At common law, tidal waters are exceptions to the general rule that ownership of the bed includes the exclusive right to fish. Tidal waters are waters affected by the tide including the sea and its bays, estuaries, and the mouths of rivers. There is the public right to fish in tidal waters, which overrides any rights of the owner of the bed. Hudson Bay and James Bay are subject to the tide, and can be considered tidal waters. The federal government regulates fishing rights, and public rights of navigation for tidal waters in Hudson and James Bay.

Under common law, a country's jurisdiction to its coast extends to the low-

water mark. Government usually retains ownership and jurisdiction between the high water mark and the low-water mark. As the provinces own most of the coast within their boundaries, the province will, subject to national parks and other federal lands, own up to the low-water mark along coastlines. Waters and the seabed below the low-water mark are vested in the federal government.

International common law recognizes the territorial sea as belonging to the coastal country. The territorial sea originally consisted of the sea within three miles, or a cannon's range from the coast. Over time, coastal countries could claim a wider sea under international law. Canada, along with other coastal countries, claimed a territorial sea of twelve miles. International law also recognizes that coastal countries have the exclusive right to explore and exploit natural resources on the continental shelf.

Under common law, inland waters such as harbours, bays and estuaries within the "jaws of the land" of a country are in the jurisdiction of that country. Inland waters may be under federal or provincial control. It is difficult to state whether a harbour, bay, or estuary is within federal or provincial jurisdiction without specific knowledge of the geography, and land ownership. For example, jurisdiction over a bay is a factual determination based on the depth and width of the bay, and the surrounding geography. Larger bays such as Hudson Bay and James Bay are bounded by two or more provinces, and are under federal jurisdiction. Smaller harbours, bays, and estuaries located entirely within a province are likely to be under provincial jurisdiction.

The Nunavut Territory is defined to include the most extensive marine areas of

any territory or province. Only the federal government has greater territory in the offshore. The territorial government has limited legislative powers in the offshore marine area, and the federal government continues to own the seabed underlying the marine areas. The future transfer of legislative powers between the federal and territorial government over the offshore may not be that important given institutions, processes and rights under the Nunavut Final Agreement.

Land and resource management boards under the Agreement have extensive powers and responsibilities for the coastal and offshore regions of the Nunavut Territory and beyond. As a result, territorial influence over offshore marine waters may be more extensive than suggested in the formal legislative delegation of powers to the Nunavut Territory.

As rights under the Nunavut Final Agreement are constitutionally protected, legislative responsibilities of the federal and territorial governments will be implemented in cooperation with these joint management boards. This may have the affect of blurring the distinctions erected by either the common law or the constitutional division of powers.

Constitutional authority

The *Constitution Act, 1867* describes the constitutional authority of the federal and provincial governments. The government of the Nunavut Territory does not have a unique or distinct status under the Constitution. Instead, the legislative authority of a territorial government is delegated from the federal government. As a result and unless otherwise noted, this analysis of the constitutional authority only describes the authority of the federal and Manitoba governments for the western Hudson Bay region.

Section 91(12) of the *Constitution Act, 1867* transfers authority over "sea coast and inland fisheries" to the federal government. Federal powers over fisheries include the management of fish and protection of fish habitat. Fish management includes both conservation and business purposes. Canada legislates for conservation by establishing closed seasons, and by prohibiting the use of destructive fishing methods, irrespective of the ownership of the fishing rights.

The federal government may also act to protect fish habitat, and to ensure that spawning grounds and fish habitat are not polluted. This power to protect fish habitat is not a general power over water pollution. Instead, it is a power to regulate where there is a clear connection between the activity and a harmful effect on fish or fish habitat.

The federal government regulates navigation and shipping under section 91(10) of the *Constitution Act, 1867*. Canada has the ability to regulate fresh and marine navigable waters, works of navigation, harbours; maritime or admiralty law; marine insurance; the sale, ownership, construction, repair and maintenance of

ships; pilotage; and towing. The federal government regulates dumping at sea to the extent this dumping affects navigation and shipping.

The federal government has further basis of authority in the western Hudson Bay region. These include Indians, lands reserved for Indians, and general powers for the protection of the environment. Powers for the environment are derived from interprovincial matters, national concerns, the criminal law power and the residual constitutional power for "peace, order and good government".

Canada may enter into international agreements for matters within the constitutional jurisdiction of the federal and provincial governments. However, the federal government can not require the provinces to comply with agreements for matters within provincial jurisdiction. Therefore, international agreements, and particularly those agreements for the environment, need to be implemented cooperatively by federal and provincial governments. As territorial governments do not have an independent status, the federal government may require territorial governments to implement international agreements.

Provinces have considerable constitutional authority for lands within the provinces as the underlying owner and manager of most lands in the province. They also have the ability to regulate land-based activities in the province that affect offshore waters. However, provincial rights cease at the coast unless the province has jurisdiction in the offshore for historical reasons.

Provinces generally do not own the seabed, or have rights to explore or exploit minerals. Provinces also do not have any

constitutional authority over the territorial sea, seabed or continental shelf. Instead, the federal government has the right to explore and exploit these resources and has jurisdiction over the seabed of the territorial sea.

Similarly, the high sea beyond the territorial sea is outside provincial jurisdiction. The only exception may be if the province had offshore rights and territory when it entered Canada. These conclusions resulted from extensive constitutional litigation over jurisdiction for offshore lands and waters in the east and west coast of Canada.⁷

Manitoba owns land up to the low-water mark on the coast, and has legislative jurisdiction to that land. Manitoba does not own the seabed under Hudson Bay or James Bay, or have the right to explore or exploit resources on or under the seabed.

The Nunavut Territory is treated differently than the provinces in a number of ways. First and unlike the provinces, the *Nunavut Territory Act* defines the boundaries of the territory to include marine areas, including marine areas north of the 60th parallel and in the west Hudson Bay region. The Act does not transfer ownership of the majority of onshore lands or offshore lands, and only limited legislative powers are transferred. However, land and resource management boards and processes under the Nunavut Final Agreement have jurisdiction over offshore marine areas, including areas in the western Hudson Bay region.

Section 35 of the *Constitution Act, 1982* protects existing and future aboriginal and treaty rights. Subject to limited exceptions, these aboriginal and treaty rights can not be abrogated by federal or provincial legislation without the explicit consent of the aboriginal people. Section 35 explicitly refers to "modern treaties".

The Nunavut Final Agreement is a modern treaty, and contains internal provisions stating the Agreement supercedes inconsistent legislation. Manitoba First Nation rights occur pursuant to aboriginal rights and agreements. These rights and agreements are continually being defined, and protected by the courts under section 35 of the *Constitution Act, 1982*.

⁷ *Re Offshore Mineral Rights of BC* [1967] SCR 792; *Re Ownership of the Bed of the Strait of Georgia* [1980] 1 SCR 388; and *Re Newfoundland Continental Shelf* [1984] 1 SCR 79.

International agreements and conventions

The *United Nations Convention for the Law of the Sea* of 1994 describes countries' ownership and jurisdiction over offshore waters and resources. The Convention does not address or modify the constitutional division of powers between federal, provincial and territorial governments. The Convention defines the extent and limits of Canada's rights in the offshore.

The Convention confirms that international common law with respect to territorial sea and resources of the continental shelf, so that every coastal state has sovereignty over the sea adjacent to its coast for the distance of twelve nautical miles. These rights extend to the air space above, as well as the bed and subsurface resources. The Convention confirms that coastal states have the right to explore and exploit resources on the continental shelf.

The Convention also extends the existing international common law. The Convention provides for a contiguous zone, from twelve to twentyfour nautical miles offshore adjacent to the territorial sea. The Convention also establishes an economic zone that extends two hundred miles from the coastline and includes the territorial sea.

The Convention clarifies coastal rights of archipelago states such as Canada. Part IV of the Convention defines an archipelago as a group of islands that form an intrinsic geographical, economic or political entity, or which have been regarded as such. An archipelago state may draw straight baselines joining the outermost

points of the outermost islands, subject to ratios for land and water being satisfied and the rights of international navigation. At international law, Hudson Bay, James Bay and Hudson Strait are considered internal Canadian waters.

The definition of an archipelago state is relevant for the Canadian Arctic as there has been an ongoing dispute with the United States over whether waters in Canada's archipelago are international waters, or internal waters subject to the right of international navigation. As well, Canada has a dispute with the United States about national borders, and ownership of the seabed and oil and gas and mineral resources in the Beaufort Sea. Canada also has a dispute with Denmark over the Davis Strait and Baffin Bay, as to whether these waters are international or internal waters.

The United Nations Conference on Straddling Stocks and Highly Migratory Stocks occurred under the *United Nations Convention on the Law of the Sea*. The Conference on Straddling Stocks and Highly Migratory Species addressed fish species that migrated in and beyond the two hundred-mile exclusive economic zone established under the *Law of the Sea Convention*. The conference led to a *Straddling Stocks Agreement* which was adopted by Canada and other conference participants.

The main goal of the agreement is to achieve international co-operation for the conservation and management of straddling fish stocks - stocks that straddle international boundaries - and highly migratory fish stocks. Among other things, the Convention calls for minimization of pollution, waste, discards and fish taken unintentionally during efforts to catch

another type of fish. The agreement also contains monitoring and enforcement provisions to ensure compliance with fishing measures established by regional fisheries organizations. As well, there's a compulsory binding dispute settlement mechanism to provide for the peaceful resolution of conflicts. In Canada's case, the straddling and highly migratory stocks include cod, flounder, redfish, turbot, swordfish and tuna. Conflict over turbot is present in the eastern Arctic.⁸

The *Arctic Environmental Protection Strategy* resulted from a meeting in Rovaniemi, Finland in 1991. Canada and seven other Arctic countries signed this non-binding strategy. On 19 September 1996, Canada, Denmark (Greenland), Finland, Iceland, Norway, the Russian Federation and the US signed a declaration establishing the Arctic Council. The Arctic Council is a high level forum designed to identify priorities for regional cooperation for environmental and sustainable development in the Arctic. Organizations representing Arctic First Nations are included as Permanent Participants.

The Council is building on work undertaken on the Arctic Environmental Protection Strategy, and sponsors four subsidiary groups. These groups are Arctic Monitoring and Assessment Program; Conservation of Arctic Flora and Fauna; Emergency Prevention Preparedness and Response; and Protection of the Marine Arctic Environment.

In 1992, 154 countries at Rio de Janeiro signed the *United Nations Framework Convention on Climate Change*.

⁸ News release, "Canada ratifies UN fish stocks agreement" (Ottawa (CP), August 6, 1999).

The Convention came into force on 21 March 1994. The Kyoto Protocol was adopted in December 1997 by consensus. Industrialized countries entered legally binding commitments to reduce their greenhouse gas emissions by at least five percent compared to 1990 levels for the period 2008-2012. Further meetings of the parties are occurring to determine the mechanisms to implement these commitments. Canada is a signatory to both the Convention and the Kyoto Protocol.

At the Earth Summit in Rio de Janeiro, June 1992, governments from around the world agreed to *Agenda 21*. This workplan identifies what needs to be done to achieve sustainable development in the 21st century. *Agenda 21* recognizes the special importance of oceans and coastal zones in relation to sustainable development, and calls on coastal states to commit themselves to integrated management and sustainable development of the coastal and marine environment. Canada was a participant to the Conference and made a commitment to coastal zone management.

The *Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities* was adopted on November 1995 by the over one hundred governments who attended the international conference assembled for this purpose. Canada agreed to a national program of action to address the protection of the marine environment from land-based sources of pollution. This program includes an Arctic chapter that applies to the Canadian Arctic region. Canada is also a participant in an Arctic regional chapter formed of Arctic circumpolar countries.

Convention on Wetlands of International Importance especially as

Waterfowl Habitat (the *Ramsar Convention on Wetlands*) was signed in Ramsar, Iran on February 2, 1971, and came into force on December 21, 1975. The *Ramsar Convention on Wetlands* provides a framework for national actions and international cooperation for the conservation and use of wetland and resources. The *Ramsar Convention on Wetlands* is the only environmental treaty dealing with a particular ecosystem. In total, 977 wetland sites covering 71 million hectares are designated for inclusion on the Ramsar List of Wetlands of International Importance. Some sites occur within Canada, and are relevant for the western Hudson Bay region.

The McConnell River Bird Sanctuary was designated under the Convention in 1982. The sanctuary is 32,800 hectares and located on the west coast of Hudson Bay, approximately 25 km south of Eskimo Point in Kivalliq. The sanctuary is a complex of coastal marshes and inland wet meadows around the mouth of the McConnell River. The flat poorly-drained plain is dotted with shallow ponds and lakes with an average depth of 1 metre. This area is typical of much of the west Hudson coastline. The area is internationally important for breeding geese, together with large numbers of nesting ducks and shorebirds. No lands have yet been designated for the Manitoba coast.

Two areas have been designated in the western and southern reaches of James Bay in Ontario. Polar Bear Provincial Park was designated in 1987 and is 2,408, 700 square hectares. It is a vast wetland, and Canada's second largest Ramsar site. It is located on the coastal plain between Lake River on the northwest coast of James Bay, and the settlement of Winisk, which is on

the south coast of Hudson Bay. Southern James Bay was also designated in 1987 and is 25, 290 square hectares. It is composed of two separate migratory bird sanctuaries at the head of James Bay. One sanctuary is at the mouth of the Moose River. The other sanctuary is on the eastern shore of Hannah Bay, the southernmost extension of James Bay. Both sanctuaries are close to Ontario's border with Quebec.

Iqualuit Declaration.

International Convention for the Regulation of Whaling was negotiated in 1946. Membership is open to all whaling and non-whaling nations. The Convention established the International Whaling Commission which has instituted a commercial ban on whaling, though "scientific whaling" is still conducted by signatory nations like Japan.

Canada has withdrawn from the Convention, in part due to the Inuit and the Inuvialuit indicating their opposition to both the Convention and to Canada's participation. Inuit and Inuvialuit subsistence harvesting of beluga and bowhead whales, and narwhales continues.

Canada, the United States, Denmark, Greenland, Norway and Russia are members of the *Agreement on the Conservation of Polar Bears and Their Habitat, 1973*. The Convention provides that polar bears may be harvested by local people using local methods and in accordance with traditional rights. The Convention also provides for a joint management approach to polar bear management, and sharing research.

The Inuit and Inuvialuit in the Nunavut and Northwest Territories commercially harvest polar bears. Local communities receive quotas for polar bears, and transfer that quota to sport hunters for a

fee. Though the United States does not permits its citizens to harvest polar bears, it does permits the import of polar bear trophies from approved populations in the Northwest Territories and Nunavut Territory if certain requirements are met. These requirements include that Canada has a monitored and enforced sport hunting program, that populations are maintained at sustainable levels, and that actions occur consistently with the Convention.

Government departments and responsibilities

Department of Fisheries and Oceans

The Department of Fisheries and Oceans is responsible for the management of fish and protection of fish habitat in fresh and marine waters under the *Fisheries Act*; for marine management in Hudson Bay and Arctic waters under the *Oceans Act*; and for navigation and shipping through all these waters under the *Canada Shipping Act*.

The merger of the Canadian Coast Guard with the Department of Fisheries and Oceans was completed in 1996. Responsibility for Coast Guard functions was transferred to Fisheries and Oceans Canada, other than responsibilities for harbours and ports, ship safety, pilotage and Crown Corporations, which remained with Transport Canada. The Coast Guard regulates navigation and shipping under the *Canada Shipping Act*, while Transport Canada focuses on the reform of the Act.

The Canadian Coast Guard is responsible for the issuance of approvals under the *Navigable Waters Protection Act*. All works on navigable waters, including dredging and excavation, must be approved by the Coast Guard. This Act allows the Minister to authorize the removal of an abandoned vessel, and provides some control over ocean dumping resulting from dredging activities.

The *Fisheries Act* defines fish broadly to include shellfish, crustaceans, marine animals, and the eggs, spawn, spat and juvenile stages of fish, shellfish,

crustaceans, and marine animals. This expansive definition of fish ensures that marine mammals are considered in the protection of fish and fish habitat.

The *Fisheries Act* contains provisions that protect fish habitat by prohibiting activities that harmfully alter, disrupt or destroy fish habitat. This prohibition is not dependent on federal ownership of land, and can be used to control developments on land, the bed of a river or lake, or a seabed; or developments that in any way affect freshwater or coastal fish habitat. The prohibition may also to control upstream sources of pollution, as well as discharges in offshore operations. Finally, the Act authorizes regulations for the conservation and protection of fish and spawning grounds.

The *Oceans Act* domestically implements the *United Nations Convention on the Law of the Sea*. Section 2.1 of the *Oceans Act* states it does not modify aboriginal or treaty rights under section 35 of the *Constitution Act, 1982*. The Act binds the federal government, the government of the Nunavut Territory, and province of Manitoba.

The territorial sea of Canada is defined as being twelve nautical miles distant from the nearest point of the baselines. Internal waters are waters on the landward side of the territorial sea. Internal waters and territorial seas are part of Canada. The Act states the federal government owns the seabed and the subsoil below the internal and territorial sea of Canada, except if that sea is within a province.

Subject to other federal legislation and limits in the Act, the Act referentially incorporates provincial laws for these

internal waters and territorial seas. However, the Act does not support any offshore claims by provinces or territories, or provide these provinces and territories with jurisdiction to the sea or any natural resources.

The *Oceans Act* defines the contiguous zone of Canada as an area of the sea from the twelve nautical mile limit of the territorial sea to the distance of twenty-four nautical miles, and applies federal laws to the contiguous zone. The exclusive economic zone of Canada is the area from the outer limit of the territorial sea or twelve nautical miles, to a distance of two hundred nautical miles. Within that area, the federal government has rights to explore, exploit; conserve and manage natural resources in the waters adjacent to the seabed and in the seabed and subsoil, as well as any other economic activities. This federal jurisdiction extends to marine scientific research and the protection and preservation of the marine environment.

The *Oceans Act* describes Canada's jurisdiction over the continental shelf, which is the seabed and subsoil of the submarine areas and includes those areas that extend beyond the territorial sea through the natural prolongation of the land territory of Canada. Canada retains rights over the continental shelf for the purpose of exploring and exploiting mineral and non-living resources of the seabed and subsoil of the shelf, together with living organisms belonging to sedentary species. Finally, the Act applies provincial laws to the exclusive economic zone and the continental shelf, subject to the limitations described for inland waters and territorial seas.

The Canadian Coast Guard and Department of Transport implement the

Canada Shipping Act. The Act regulates the shipping industry including registration of ships, certification of officer and working conditions. The Act authorizes the enactment of regulations and over one hundred regulations have been enacted.

The *Canada Shipping Act*, Part XV, contains provisions for the protection of marine environment that apply to waters and fishing zones in Canada. Canada's Marine Oil Spill Preparedness and Response Regime is established under Part XV of *Canada Shipping Act* to address issues in relation to preparedness and response for oil spills. This regime is not exhaustive as it does not address the prevention of spills, which is the responsibility of many parties, including Canadian Coast Guard, Environment Canada and Transport Canada.

The regional offices of Fisheries and Oceans Canada for the Nunavut Territory are located in Iqaluit and Rankin Inlet, and contain fifteen persons. Fisheries and Oceans Canada nominates one board member to the Nunavut Wildlife Management Board, which has jurisdiction over terrestrial and marine species. The department receives the majority of money for research in the territory through the Board, and selects its research in accordance with priorities identified by the Board and local hunter and trapper committees. As well, the department implements many of its responsibilities in cooperation with the Board and Board staff. As the department has limited staff, officials in the territorial Department of Sustainable Development assist with the enforcement of offenses under the *Fisheries Act* and the *Navigable Waters Protection Act*.

The regional office of the Canadian Coast Guard for the Nunavut Territory is

located in Iqaluit. This office has six persons, and is primarily engaged in radio communications and referrals to other government departments during the shipping season. The shipping season now extends from the third week in June till the third week in December. This office is a focal point for emergency response and oil spill prevention service, which is provided on a twentyfour hour, seven day per week basis.

The Coast Guard has between one and two ice breakers that consistently patrol up and down the Kivalliq coast. Other than radio service, these patrols are the Kivalliq communities' principal interaction with the Coast Guard. One of the Coast Guard's priorities for the communities is developing and promoting safer boating practices. More boating accidents have been occurring in the communities as the ice free season extends and as the frequency and turbulence of storms increase.

Some other issues of interest to and affecting Coast Guard's operations include the diminishing ice cover, the lengthening the shipping season and increasing marine traffic of all forms. The season used to be considerably shorter, as, only eight years ago, the offices closed in early November. There is also less ice cover during many periods. For example, a sailboat recently did a circuit of the entire Arctic in thirty days, which is a historic record.

The Kivalliq region is experiencing increased traffic of commercial ships, passenger vessels, and French and Russian cruise ships. The passenger and cruise ships tend to enter and leave the Arctic through eastern passages, though there is at least one ship that enters from the west around Alaska and leaves to the east. These ships may drop off passengers in Churchill or Dorset Bay.

There is also a steady stream of marine traffic north of Churchill, though commercial shipping may not have increased markedly.

The Arctic Canada Traffic Zone includes those waters of Ungava Bay, Hudson Bay and James Bay south of the parallel of 60 north latitude and the waters to which the *Arctic Waters Pollution Prevention Act* apply. Ships in Hudson Bay adhere to Northern Canada Traffic Regulation System (NORDREG), so these ships report to the Coast Guard office in Iqaluit at least once a day. Their route is known and filed with federal offices. The ships are also under an obligation to notify Inuit organizations and contacts in different communities, if they intend to visit.

Department of Indian Affairs and Northern Development

The Department of Indian Affairs and Northern Development⁹ is the federal department with primary responsibility for the Northwest, Nunavut and Yukon Territories, and the Arctic Ocean. This department is important for the Kivalliq as it owns and manages the majority of the land, other than lands and subsurface rights transferred to the Inuit, and limited territorial and municipal lands.

The department is involved in many issues including land and resource management, negotiating and implementing northern land claims such as the Nunavut Final Agreement, fostering political and economic development, protecting the

⁹ This department is alternatively referred to as the Department of Indian Affairs and Northern Development, and Indian and Northern Affairs Canada. The former name will be used within this report.

environment, and encouraging environmentally sustainable development.

As the Nunavut Territory is not a province, it does not have the legislative authority of a province under the *Constitution Act, 1867*. Instead, the federal government delegates legislative authority to the territory under the *Nunavut Territories Act*, other legislation and administrative agreements.

The Department of Indian Affairs and Northern Development is involved in onshore and offshore mineral and energy developments in the Canadian Arctic, as it owns and manages land on behalf of the federal government. As owner and manager of these lands, the department allocates lands, oil, gas and mineral rights to the private sector. It also sets and collects royalties. This occurs under legislation such as *Canada Petroleum Resources Act*, the *Territorial Lands Act* and the *Federal Real Property Act*.

Mining and mineral development are the most important resource extraction activities for the Kivalliq region of the Nunavut Territory. Prospecting is occurring throughout Kivalliq on federal and Inuit lands.

The Department of Indian Affairs and Northern Development and the National Energy Board jointly manage development of oil and gas in the Nunavut Territory and offshore waters in the Arctic Ocean. The National Energy Board regulates industrial activity in interest of conservation of resources, protection of environment and safety of workers under the *Canada Oil and Gas Operations Act*. There has also been some recent discussion about opening the high Arctic up to energy development, but this has not occurred. Further, the

economics of development these energy supplies may not be too encouraging.

Subject to the requirements of the Nunavut Final Agreement, the Department of Indian Affairs and Northern Development is responsible for permits and regulation for land, water, and mineral resources. Permits and regulations for lands and water occur under the *Territorial Lands Act* and the *Northwest Territories Waters Act*. Many of the Department's functions under these Acts have been modified for the Nunavut Territory by the Agreement. However, the legislation has not yet been revised or amended to reflect these changes.

The *Arctic Waters Pollution Prevention Act* applies to offshore activities north of the 60th parallel, including marine shipping and offshore oil and gas activities. The Act is implemented by Transport Canada, the Department of Indian Affairs and Northern Development, and Natural Resources Canada. The Act incorporates the emergency response preparedness and oil spill prevention regime of the *Canada Shipping Act* to Arctic waters north of the 60 degree of parallel.

The Department of Indian Affairs and Northern Development has a key role in implementing the Nunavut Final Agreement, and is frequently cited in the implementation contract for that Agreement.¹⁰ The department is developing legislation to amend the *Territorial Lands Act* and the *Northwest Territories Waters Act*. The department is developing specific legislation to implement land and resource management boards under the Nunavut Final Agreement. The department has failed to do so in the

¹⁰ *A Contract Relating to the Implementation of the Nunavut Final Agreement* (DIAND, 1993).

initial two year time frame provided in the Agreement, or in the subsequent five year period.

The Agreement provides that land and resource management boards can come into effect and operate in the absence of this legislation, and this has occurred. However, the absence of specific legislation and complexity of rights under the Nunavut Final Agreement may make it difficult for private parties and government departments to readily understand the land, water, environmental and wildlife regime in the territory.

Environment Canada

Environment Canada regulates the environment under the *Canadian Environmental Protection Act*. The *Canadian Environmental Protection Act* addresses international air quality, ocean dumping and regulation of toxic substances. The Act was recently revised and includes sustainable development principles, including the precautionary principle or erring on the side of caution when making decisions.

The Act creates a national advisory committee made of representatives of the federal, territorial and provincial governments and First Nations. An environmental registry is created to distribute information on environmental prosecutions. Public consultation occurs for revisions to the Act and administrative agreements under the Act. Private parties may request an environment inspection and investigation, and launch private prosecutions.

The Canadian Wildlife Service of Environment Canada is responsible for the *Canada Wildlife Act*. The *Canada Wildlife*

Act describes the Canadian Wildlife Service's responsibility for wildlife. With the exception of polar bears, this wildlife consists of migratory birds and terrestrial species.

The department is active with the land and resource management boards established under the Nunavut Final Agreement. For example, the Canadian Wildlife Service nominates a member to the Nunavut Wildlife Management Board and provides scientific expertise for terrestrial wildlife for this board and other boards.

Canadian Environmental Assessment Agency

The *Canadian Environmental Assessment Act* describes the federal environmental assessment process applicable to the western Hudson Bay region. The Act establishes the Canadian Environmental Assessment Agency to implement the Act. That Agency reports directly to the Minister of the Environment and operates independently of any other federal department or agency, including Environment Canada.

The *Canadian Environmental Assessment Act* establishes a process to assess the environmental aspects of a project before that project is either authorized by a federal department, federal lands are used or federal money is provided. Government departments who are responsible authorities, usually because they approve some aspect of a project, are required to cooperate with the Canadian Environmental Assessment Agency in the assessment of that project.

Environment assessment under the *Canadian Environmental Assessment Act* functions independently of territorial and provincial environmental assessment, and

the processes of administrative agencies such as the National Energy Board. Environmental assessment in the Nunavut Final Agreement replaces the process under the Act when development and impacts from that development occur in the territory.

In May 2000, the federal and Manitoba government signed the Canada-Manitoba Agreement on Environmental Assessment Cooperation. This agreement acknowledges shared responsibilities for environment assessment, and focuses on a cooperative approach for the implementation of the federal and provincial responsibilities.

If an environmental assessment of a project is required under the *Canadian Environmental Assessment Act*, and the *Manitoba Environment Act*, the agreement states a cooperative environmental assessment will be undertaken to generate the type and quality of information required by parties making decisions on the basis of that assessment. One government will take the lead in administering the assessment, but both governments will be full participants.

No delegation or transfer of powers occurs under this agreement. From past experience, the federal and provincial government exchange information on approximately 100 projects of mutual interest every year. Of these, about 15 are likely to result in a cooperative environmental assessment. The remaining 85 projects would be subject to an environmental assessment by one level of government, or subject to approvals not

requiring an environmental assessment.¹¹ As this inter-governmental agreement is very recent, it does not apply to existing projects.

Environmental assessments are occurring the western Hudson Bay region. For example, Environment Canada is a responsible party as a result of an authorization for dredging activities in the Port of Churchill under the *Canadian Environmental Protection Act*. Though other federal agencies and authorizations are involved, Environment Canada is also the lead federal agency for the environmental assessment for this project.

Parks Canada Agency

Parks Canada was established as an agency of the federal government under the *Parks Canada Agency Act* in December 1998. Parks Canada's mandate is to protect and present nationally significant examples of Canada's natural and cultural heritage, and to foster public understanding, appreciation and enjoyment in ways that ensure the ecological and commemorative integrity of these places for present and future generations.

As a separate operating agency, Parks Canada reports directly to the Minister of Canadian Heritage and is responsible for national parks, national historic sites, historic canals, national battlefields, national marine conservation areas, heritage railway stations and federal heritage buildings.

¹¹ *Canada-Manitoba Agreement of Environmental Assessment Cooperation* (May 2000), as posted on the Canadian Environmental Assessment Agency's website (www.ceaa.gc.ca/act/Manitoba/manitoba_agre.html), and Information: Canadian-Manitoba Agreement of Environmental Assessment Cooperation (www.ceaa.gc.ca/act/manitoba/InfoSheet_e.html).

The *National Parks Act* authorizes the establishment and management of national parks and national park reserves. A 1988 amendment to the Act broadened the definition of "park" to include marine parks. Parks Canada has extensive powers over parks under the *National Parks Act*, including the management of fisheries, the control of renewable resource harvesting, and the protection of fish habitat. Framework legislation to establish and manage national marine conservation areas, the *Marine Conservation Areas Act* has been proposed but not enacted.

Parks Canada is required under the Nunavut Final Agreement to negotiate Inuit impact and benefit agreements for existing and new parks and marine conservation areas in Nunavut. The proposed Ukkusiksalik (Wager Bay) National Park is the only national park in the Kivalliq region of the Nunavut Territory. Negotiations on the Inuit Impact and Benefit Agreement to establish the park, involving Parks Canada, the Government of Nunavut and Inuit, are almost complete.

In Manitoba, Parks Canada manages Wapusk National Park. The Wapusk National Park occupies 11,475 square kilometres, and adjacent to the Manitoba coast and southeast of the Town of Churchill. This park is located within the Hudson Bay Lowlands and was established pursuant to a federal-provincial agreement in April 1996.

The park is the result of a partnership involving the federal and provincial governments, the local government in Churchill, and the Fox Lake and York Factory First Nations. The park is assisted by a management board formed of all these parties, and subject to interim management

guidelines pending development of a complete management plan.

Among other objectives, the Wapusk National Park was established to protect a polar bear denning area. Subsistence and aboriginal and treaty harvesting continues in the park. The park is surrounded on two sides by the Cape Churchill Wildlife Management Area, while the Cape Tatnum Wildlife Management Area is some distance to the southeast. Both wildlife management areas are subject to a provincial conservation regime. The park is also adjacent to resource management areas established under the Northern Flood Agreement, these areas being subject to joint management regime between Manitoba First Nations and the provincial government.

Parks Canada is also mandated to establish a system of national marine conservation areas under the National Marine Conservation Areas program to represent the full range of marine environments in Canada. Such areas could be established under the *National Parks Act* until the proposed *Marine Conservation Areas Act* is enacted.

National marine conservation areas are managed for sustainable use with smaller zones of high protection. The areas include the seabed and the waters above it, and may include wetlands, estuaries, islands and other coastal lands. The areas are protected from ocean dumping, undersea mining and oil and gas activities, though traditional fishing activities are permitted. Three marine conservation areas are currently in place, but Hudson Bay is not yet represented. The Churchill River/Nelson River area has been identified as a preferred site for consideration.

Department of Transport

The Department of Transport implements the *Canada Shipping Act* and the *Arctic Waters Pollution Prevention Act* in the western Hudson Bay region. The *Canada Shipping Act* is discussed in the context of Fisheries and Oceans Canada and the Canadian Coast Guard.

The *Arctic Waters Pollution Prevention Act* regulates marine shipping and oil and gas operations in waters north of the 60th parallel of latitude. Three departments implement the Act: Transport Canada, the Department of Natural Resources, and the Department of Indian Affairs and Northern Development.

The Act prohibits the deposit of waste in Arctic waters except as authorized by regulations. There are different regimes for oil and gas activities, and marine shipping. The Act incorporates aspects of the *Canada Shipping Act* for marine shipping including oil spill prevention, and emergency response once a spill has occurred.

In 1995, the National Marine Policy stated that the federal government should divest ownership of ports, and that its future role should be restricted to regulation. This policy resulted in the enactment of the *Canada Marine Act* in 1998, and the divestiture of the Port of Churchill to private ownership.

Government of the Nunavut Territory

The Nunavut Territory was established on 1 April 1999. Similar to other territorial governments, the government of the Nunavut Territory operates under delegated authority from the federal

government. Among other matters, the territorial government is responsible for education, health, community and social services, and wildlife in the Nunavut Territory.

The territorial government operates under the principle of decentralization, where government offices and functions are delivered at the regional and community level. The territorial government owns limited lands in the territory, including lands within the communities. Lands within the communities are being transferred to these communities. These lands are then managed at the community level with the assistance of the territorial government.

Several government departments deliver education, health, community and social services in the territory. The Department of Public Works, Telecommunications and Technical Services is involved in housing programs and related initiatives; maintaining an adequate fuel inventory and coordinating supply and delivery of this fuel; and operating information and telephone systems. In Baffin and Hudson Bay, bulk fuel supply is delivered by tanker ships from foreign refineries, at a substantial saving compared to Canadian supply.

The Department of Community Government and Transportation combines the functions of previous government departments of transportation, and municipal and community affairs. The department works with communities to enhance local growth and ownership of the delivery of essential services. The Department of Health and Social Services delivers health and social services. This Minister also has responsibilities for the Northwest Territories Power Corporation. As of 1 April 2001,

there will be an independent power corporation which is likely to be established as a Crown Corporation.

The Department of the Executive and Intergovernmental Affairs has some overarching responsibilities. In addition to ensuring dialogue exists within the territorial government, the department coordinates and manages relations with the federal government, the government of the Northwest Territories, and other governments. The department also coordinates implementation of the Nunavut Final Agreement and other aboriginal initiatives.

The Department of Sustainable Development is focused on healthy sustainable communities in the territory. The development of the economy is supported by traditional harvesting activities, tourism and mineral development, and occurs in partnership with communities, industry, government and Inuit organizations. The department develops and maintains parks and conservation areas, and protects the environment through public education, the *Environmental Protection Act* and the *Environmental Rights Act*.

Other legislative responsibilities include the *Wildlife Act*, the *Parks Act*, the *Tourism Act*, the *Nunavut Development Act*, the *Nunavut Business Credit Corporation Act*, the *Co-operative Associations Act*, and the *Credit Unions Act*.

The Department of Sustainable Development implements the government's responsibility for wildlife. It nominates a member to the Nunavut Wildlife Management Board, and assists the board with carrying out its responsibilities. The department and the Nunavut Wildlife Management Board have also indicated they

will work together to develop commercial harvesting opportunities.

The territorial department also assists Environment Canada and Fisheries and Oceans Canada with the implementation of their responsibilities for terrestrial and marine wildlife. The department's officials are present in every community in Kivalliq and lay charges as appropriate under the *Fisheries Act*, the *Navigable Waters Protection Act* and the *Canadian Environmental Protection Act*.

Land and resource management boards

The Nunavut Territory is subject to land claims agreements within and external to its territories, that recognize aboriginal rights and establish joint management regimes and processes. The Nunavut Final Agreement applies to the Nunavut Settlement Area. The Agreement recognizes Inuit rights, and establishes joint management processes and regimes that apply to the Nunavut Territory and Manitoba.

The Nunavut Final Agreement establishes institutions of public government for land and resource management within and beyond the territory. These institutions are joint management boards with nominees from the federal and territorial governments and the Inuit. These institutions are the Nunavut Planning Commission, Nunavut Wildlife Management Board, the Nunavut Impact Review Board, the Nunavut Water Board, and the Nunavut Surface Rights Tribunal. The federal and territorial governments, the Nunavut Tunngavik Inc. and designated Inuit organizations appoint representatives to joint management boards.

Certain boards may also jointly appoint members to the Nunavut Marine Council.

The land and resource management boards are "institutions of public government" with a duty to implement the terms of the Agreement in a fair and impartial way. The boards are required to respect Inuit proprietary rights under the Agreement, including lands, water and wildlife harvesting, and to provide compensation when these rights are affected. They are also required to consider the objectives of the Agreement, Inuit social, cultural and economic well-being, and Inuit traditional knowledge when making their decisions.

Federal and territorial governments may now implement their legislative responsibilities in the territory through the boards. As rights under the Nunavut Final Agreement are constitutionally protected, the actions and legislative responsibilities of federal and territorial government departments may increasingly be implemented in cooperation with Nunavut joint management boards.

For example, regional offices of Fisheries and Oceans Canada are now located in Iqaluit and Rankin Inlet. Fisheries and Oceans Canada nominates one board member to the Nunavut Wildlife Management Board, receives the majority of its research money through the Board, and implements many of responsibilities in cooperation with the Board and Board staff.

If one considers wildlife management for Kivalliq, it is possible to get an understanding of interjurisdictional interactions, and the role of the federal and territorial government for an "institution of public government" like the Nunavut Wildlife Management Board. The

government of the Nunavut Territory has been delegated the federal government's legislative authority for wildlife in the territory. This delegation is subject to requirements for wildlife in the Nunavut Final Agreement. Wildlife in the Nunavut Territory is managed in accordance with Inuit harvesting rights and wildlife compensation under the Agreement.

The Nunavut Wildlife Management Board is primarily responsible for wildlife management in the Nunavut Settlement Area, including the offshore. The Nunavut Wildlife Management Board is composed of nominees of Fisheries and Oceans Canada, Environment Canada, the Department of Indian Affairs and Northern Development, the territorial Department of Sustainable Development; and four nominees of the Nunavut Tunngavik Incorporated and Designated Inuit Organizations.

The Board's jurisdiction extends to marine region of the Nunavut Settlement area. It is assisted in the performance of its duties by local Designated Inuit Organizations, Hunter and Trappers Committees and different government departments. These departments may provide scientific expertise and conduct research on issues identified as being of priority to the Board and communities.

Government of Manitoba

The *Manitoba Natural Resources Transfer Agreement* was signed in December 1929 and became effective July 1930. It was designed to put Manitoba in the same position as the original provinces in the confederation of Canada with respect to the administration and control of land and resources. The Agreement transferred administration and control of lands and

resources from Canada to Manitoba, with the exception of federal lands such as national parks and Indian reserves. A 1938 amendment to the Agreement clarified water powers were included in the transfer.

The *Manitoba Natural Resources Transfer Agreement* also describes First Nation harvesting rights within the province of Manitoba. First Nations rights to wildlife include but are not limited to rights under the Agreement. The Agreement states First Nations have the right to hunt, trap and fish during at all seasons of the year on all unoccupied Crown lands and any other lands to which they may have right of access. Rights under this Agreement apply to all Indians in Manitoba, whether or not they are ordinarily resident or members of a band. Further, these parties are not required to have a hunting license, or observe bag limits or seasons.

At the end of 1999, the provincial Departments of Environment and Natural Resources were merged into the Department of Conservation. The resulting department has responsibility over environment, parks, water, wildlife, and energy for Manitoba. This department has the greatest responsibility in the Manitoba portion of the western Hudson Bay region.

Other departments are also important for this region. These departments include the Department of Industry, Trade and Mines; the Department of Culture, Heritage and Tourism; Manitoba Highways and Government Services; the Department of Aboriginal and Northern Affairs; and the Department of Intergovernmental Affairs.

Manitoba's water legislation substantially or totally replaces the common law and riparian rights. The *Water Rights Act* requires any person who wishes to use

or divert water to obtain a licence from the Minister of Conservation. The *Water Power Act* authorizes the cabinet to make regulations regarding the use and allocation of provincial water powers, waters and provincial lands relating to a water power undertaking. The combination of the *Water Power Act* and the *Water Rights Act* permits the Manitoba government to transfer the water rights to Manitoba Hydro necessary for hydroelectric projects.

Wildlife management is the responsibility of the Department of Conservation. Wildlife management is directed through regulations under various Acts and approved policy. Among other matters, the Department of Conservation is responsible for management of vertebrate animal species within provincial boundaries, and certain plants listed under the *Endangered Species Act*. Provincial wildlife is managed under the *Wildlife Act*, the *Endangered Species Act* and the *Conservation Agreements Act*. Other provincial legislation - such as the *Crown Lands Act*, the *Ecological Reserves Act* and the *Environment Act* - also affect wildlife.

The Department of Conservation is responsible for parks and natural areas. The department is engaged in a broad protected areas initiative. Manitoba's Network of Protected Areas is composed of provincially and federally designated lands, and includes 25 provincial parks and park reserves, sixteen ecological areas, over 32 wildlife management areas, two provincial forests and two federal parks.

Wildlife management areas are designated by the province for the management, conservation, and the protection of habitat and wildlife and resources. Two wildlife management areas

are designated adjacent to the Wapusk National Park in order to protect polar bear denning areas outside the park. These are the Cape Churchill Wildlife Management Area and the Cape Tutnam Wildlife Management Area. The York Factory Resource Management Area is established pursuant to the Northern Flood Agreement, and is immediately adjacent and overlain by the Cape Tutnam Wildlife Management Area. This area is subject to a joint management regime composed of the provincial government and First Nations.

breakers, and improvements to existing port facilities and transportation services are underway or being planned.

Town and Port of Churchill

The Town of Churchill is the northern terminus of the Hudson Bay Railway, and possesses an airport, a deep-water marine port, and a grain elevator. As a result of these facilities, Churchill has traditionally been a transport for supply barges for the Keewatin district in the Nunavut Territory, and for the movement of grain on ocean-going vessels. Formerly, Churchill was a military base and staging area. These sites are now being cleaned up and used for other purposes. Churchill is now focused on tourism and scientific research, marine shipping and rail transportation, and is a regional centre for northern Manitoba.

The Port of Churchill was previously operated by the federal government as a Crown corporation. The port was privatized under the National Marine Policy and the *Canada Marine Act*. Omni Trax Canada acquired the Port of Churchill. Omni Trax has also acquired the Hudson Bay Railway, which it operates in close coordination. The port is available for shipping and receiving ocean vessels from July until early November. Earlier or later scheduling is available using ice-class vessels or ice

SECTION 3: MANITOBA FIRST NATIONS RIGHTS

Introduction

This section of the report examines Manitoba First Nation rights to determine their impact on marine protection and integrated coastal management for the western Hudson Bay region. Manitoba First Nations affect marine protection and coastal management through aboriginal rights, numbered treaties and other agreements.

This section also examines some specific resource management arrangements in place and affecting the Manitoba coast, and First Nation participation in those arrangements. These arrangements include the Wapusk National Park, the provincial Cape Churchill and Cape Tatnum Wildlife Management Areas, and the York Factory and Split Lake Resource Management Areas established under the *Northern Flood Agreement*.

Lastly, this section examines interjurisdictional species management for the Beverly and Qamanirjuaq barren ground caribou herds. This can be considered a successful example of a multi-party and multi-jurisdictional arrangement.

Manitoba First Nations rights and their impacts on the Hudson Bay coast have not been extensively examined. Given the range of Manitoba First Nation rights in the western Hudson Bay region, First Nations will actively participate in coastal and marine management. Manitoba First Nation interests are focused in Manitoba, with lesser interests in the Kivalliq region of the

Nunavut Territory. For the purpose of this analysis, Manitoba First Nations rights may be defined to include Metis rights.

The federal government and Manitoba First Nations entered into numerous agreements over the past century. These agreements include numbered historic treaties from the 19th century between First Nations and the federal governments; specific and general agreements for treaty land entitlement; and the *Northern Flood Agreement* between Manitoba First Nations, Canada, Manitoba and Manitoba Hydro.

Reserve lands on or near the Manitoba coast were transferred under *Treaty 5*, under the Treaty Land Entitlement process to satisfy unfulfilled treaty land obligations, or through the *Northern Flood Agreement* in substitution for lands flooded by hydro development. Land selection under the *Northern Flood Agreement* is quite extensive, and has resulted in the transfer of reserve lands on or near the Manitoba coast. Quite extensive lands are being transferred under Treaty Land Entitlement process, including lands on the coast. However, these land selections have not been finalized. First Nations beneficially own and manage reserve lands, so these lands can be viewed as similar to private lands.

First Nation rights may also arise under other agreements. The *Manitoba Natural Resources Transfer Agreement* is a constitutional document that transferred natural resources to the province of Manitoba, and recognizes First Nation harvesting rights on unoccupied Crown lands. First Nations also have rights under a variety of federal and provincial government and policy initiatives. In the absence of a comprehensive agreement for Manitoba,

aboriginal rights, including Metis rights, may also affect this region.

The political demarcations of Manitoba and the Nunavut Territory do not reflect the traditional territories and uses of the Inuit and Manitoba First Nations. The *Nunavut Final Agreement* recognizes and provides some description of Inuit rights in Manitoba. Other initiatives are underway to determine First Nation rights in the Nunavut Territory. The existence of Manitoba First Nation rights in Kivalliq is recognized, though not yet defined, under the 1999 memorandum of understanding between the federal government and the Manitoba Denesuline. This is an agreement to define these rights and resolve several outstanding issues.

Resource management arrangements involving First Nations and a range of government entities are in place throughout the Manitoba coast. The federal and Manitoba governments and First Nations have cooperated in the establishment and the management of the Wapusk National Park on the Manitoba coast. The park, provincial wildlife management areas, and resource management areas are all subject to First Nation harvesting rights.

Manitoba First Nations participate in provincial arrangement. They are participating in the provinces protected areas initiative, and have entered into agreements for provincial wildlife management areas and mining policy and exploration.

Resource management areas are established under agreements implementing the *Northern Flood Agreement*. The York Factory Resource Management Area, the Split Lake Resource Management Area and the Nelson Resource Management Area are

situated on the Manitoba coast or on rivers flowing to the coast. Further resource management areas, such as the Fox Creek Resource Management Area, are being established in relation to the coast. These resource management areas are subject to a joint management regime between First Nations and the Manitoba government.

Lastly, the federal, territorial and provincial governments and Inuit and Manitoba First Nations participate in inter-jurisdictional arrangements for Beverly and Qamanirjuaq barren ground caribou herds.

In summary, Manitoba First Nation rights have significant impacts on the western Hudson Bay region. Considering wildlife harvesting rights as an example, Manitoba First Nations have the right to harvest wildlife under aboriginal rights, the *Manitoba Natural Resources Transfer Agreement*, numbered treaties and under the different parks and conservation arrangements. Recent jurisprudence suggests that Metis hunting and fishing rights may have similar protection as aboriginal hunting and fishing rights under the *Canadian Constitution Act, 1982*.

ABORIGINAL RIGHTS AND FIRST NATION AGREEMENTS

Aboriginal rights

Aboriginal rights do not arise by treaty or agreement, but are protected under section 35(3) of the *Constitution Act, 1982*. This category includes such matters as aboriginal rights of Manitoba First Nations, and wildlife harvesting rights under to the *Manitoba Natural Resources Transfer Agreement*. Metis hunting and fishing rights under section 35(3) of the *Constitution Act, 1982* are being recognized by the lower courts in several provinces. These rights will be briefly canvassed below.

Aboriginal rights are protected under section 35 of the *Constitution Act, 1982*. These aboriginal rights evolve over the time, and are subject to inherent limitations. Section 35 states:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in

subsection (1) are guaranteed equally to male and female persons.

A number of cases have explored the meaning and extent of section 35 for aboriginal right. Three cases are briefly discussed: *Guerin*, *Sparrow* and *Delgamuukw*.

The *Guerin* case predates 1982 and established a "trust-like" duty upon the federal government in its handling of matters for Aboriginal people. The Supreme Court of Canada held the Crowns actions were in law reviewable by the court and subject to certain legal standards akin to the standards of trust law. This decision laid the foundation for a subsequent expansion of the federal (and provincial) trust responsibility. The relationship is now characterized as a "fiduciary" responsibility.

Sparrow was the first Supreme Court of Canada case to consider the meaning of section 35 of the *Constitution Act, 1982*, which recognized and affirmed "the existing aboriginal and treaty rights" of the "aboriginal peoples of Canada". The Court held that existing rights were not frozen in their pre-1982 state but that section 35 does not exempt aboriginal peoples from government regulation. The case considered an aboriginal fishing right, reinforced the historic fiduciary relationship between the federal government and aboriginal peoples, and imposed a requirement that any regulation that limits the exercise of aboriginal rights must be justified.

The court held that the Crown must prove a "clear and plain intention" to extinguish an aboriginal right. In *Sparrow*, the Court recognized that government had an obligation to exercise its regulatory powers over a fishery in a manner consistent with the honor of the federal government

and the constitutional protection of aboriginal and treaty rights.

The *Delgamuukw* case confirmed that aboriginal title had not been extinguished in British Columbia. It also outlined the requirements for aboriginal people to prove their title, and rules of evidence for oral history and tradition. The Supreme Court indicated that aboriginal title is unique. It cannot be transferred to anyone except the federal government. It is based on the occupation of the land by aboriginal peoples prior to the arrival of the British and aboriginal customary law. Finally, it is a communal right. Aboriginal title includes the right to the use of land for a variety of purposes. These purposes need not be aboriginal rights in themselves, but they must not be irreconcilable with the aboriginal peoples' attachment to the land. The case also provide support for co-management initiatives between government and First Nations.

The *Manitoba Natural Resources Transfer Agreement* of 1930 is a constitutional document which describes the transfer of land, waters and resources from Canada to the province of Manitoba. This transfer was subject to the province's responsibility to provide lands to satisfy Canada's treaty obligations, and to accommodate First Nation harvesting rights on 'unoccupied Crown lands" within the province.

Sections 11 and 13 of the *Manitoba Natural Resources Transfer Agreement* state:

11. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall

continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the Minister of Mines and Natural Resources of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof. . . .

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 hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

Despite the explicit requirement in the Agreement, Manitoba did not transfer further lands to Manitoba First Nations in or around 1930. Instead, the transfer of land to satisfy treaty obligations is now occurring

under the Treaty Land Entitlement process. This process is discussed elsewhere.

The aboriginal rights of Manitoba First Nations could be broad in scope and take on different aspects. This analysis does not comprehensively examine the scope or nature of these aboriginal rights. Instead, the following discussion is restricted to the narrow area of subsistence wildlife harvesting rights. Even these wildlife rights could be more extensive and include such as commercial applications such as commercial harvesting, tourism and guiding opportunities.

First Nation wildlife harvesting rights under section 13 of the *Manitoba Natural Resources Transfer Agreement* continue in Manitoba, though these rights have been subject to extensive litigation as to their meaning and scope. It is interesting that these First Nation harvesting rights have been recognized and incorporated into the management regimes for the Wapusk National Park, provincial wildlife management areas, and resource management areas established under the Northern Flood Agreement.

Harvesting rights under the *Manitoba Natural Resources Transfer Agreement* are not restricted to First Nations individuals in the immediate vicinity of their reserve, or even resident within Manitoba. Therefore, any party who falls under the constitutional definition of "Indian" is able to hunt, trap and fish for game and fish for food purposes throughout the year. Thus, the range of individuals with harvesting rights for the Manitoba coast is extensive. The range of individuals with these rights is not a significant issue at the present time given the difficulties of accessing that region. For example, in the

absence of any continuous highway, parties must arrive by plane, train or boat. However, it could be an issue in the future if a highway is constructed, or access becomes easier.

Metis harvesting rights may become a significant issue in Manitoba, and there are Metis in northern Manitoba. Along with Inuit and Indians, the Metis are constitutionally recognized as an aboriginal people. Unlike status Indians, Metis have no legislated right to federal government support and no federal tax-exempt status. The issue of Metis rights is longstanding in Saskatchewan, Manitoba and Ontario.

R. v Powley [1998 O. J. No. 5310] (Ont Prov Div), [2000 O.J. No 99] (Ont. S.C) addressed Metis hunting and fishing rights under s. 35 of the *Constitution Act, 1982*. The case involved two men charged in 1993 under Ontario's *Game and Fish Act* with unlawfully hunting and possessing moose. The issue was whether the Metis, people of mixed Indian and European blood, have the right to hunt for food under the *Constitution Act, 1982*. In dismissing the charge, Vaillancourt J. from the Ontario Court Provincial Division ruled in 21 December 1998 that the Metis do indeed have such rights, and that the Ontario's *Game and Fish Act* violates their aboriginal right to hunt moose and other game. O'Neil J. decision of 19 January 2000 in the Ontario Supreme Court upheld the lower court's decision

The Ontario government subsequently filed a notice of motion for leave to appeal in the Court of Appeal for Ontario. In filing their appeal, the Ontario government stated that the appeal judge erred in law in finding that there was not a valid conservation concern. The Ontario

government asserted there was a valid conservation purpose. This was due to the fact that the Metis eligible to hunt could be so numerous as to take all available game and fish in the area pursuant to these rights, to the exclusion of equitable access by members of the public other than themselves. This case and other similar cases are still not resolved, Due to their importance, they are likely to be litigated to the Supreme Court of Canada.

There are contrary cases concerning Metis rights. One Manitoba case is *R. v Blais* [1998] M. J. No. 395 (Man Q.B.). In this case, a Metis was charged with hunting contrary to provincial wildlife regulations. It was argued that he had an aboriginal right to hunt and was an "Indian" for the purposes of section 91 (24) of the *Constitution Act, 1982* and the *Manitoba Natural Resources Transfer Agreement*. In this case, a judge of the Manitoba Court of Queen's Bench rejected the argument that Metis are Indians. This case was not appealed.

Historic numbered treaties

Manitoba First Nations signed or adhered to *Treaties 1, 3, 4, 5 and 10* between 1871 and 1910. These agreements are often referred to as “historic or numbered” treaties to distinguish them from more recent agreements.

There is outstanding treaty land entitlement for the numbered treaties, as approximately half the lands required under the treaties were not transferred. As a result of this treaty land entitlement, seven specific agreements and land selection were completed between 1994 and 1996. These matters are discussed elsewhere.

Treaty 5 is relevant for the Manitoba coast as First Nations along the coast adhere to this treaty. In the early 1900s, Split Lake adhered to Treaty 5 on June 26, 1908; Churchill adhered on August 1, 1910; and York Factory adhered on August 10, 1910.

Treaty 5 sets aside reserves; provided annuities to each person, the Chief and some band council; included a requirement of schools on reserves; and provided a right to fish and hunt through ceded territories, subject to regulations and excluding certain lands.

Manitoba Treaty Land Entitlement Framework Agreement

The *Manitoba Treaty Land Entitlement Framework Agreement* was negotiated in 1997 between Canada, Manitoba and the Treaty Land Entitlement Committee. This framework agreement extends to nineteen First Nations, and will result in individual agreements and the selection of up to 1,100,626 acres of reserve land. These land selections include lands along the Manitoba coast.

Treaty Land Entitlement (TLE) refers to land owed to certain First Nations under the terms of the numbered treaties signed by the First Nations and Canada between 1871 and 1910. Each treaty provided that Canada would provide reserve land to the First Nations based on population size. Treaties 1, 2 and 5 stated 160 acres of land were to be provided to each family of five, or 32 acres per person. However, not all First Nations individuals or communities received their allocation of lands.

When Manitoba entered Confederation in 1870, Canada government retained control over unallocated Crown lands in the province along with other natural resources. The *Manitoba Natural Resources Transfer Agreement* of 1930 transferred control and administration of these resources and lands to Manitoba, but required the province to provide Canada with sufficient unoccupied Crown land to fulfill outstanding treaty land obligations to Manitoba First Nations. This did not occur, necessitating the TLE process.

In 1977, the Treaty Land Entitlement Committee of Manitoba Inc. (TLE Committee) was formed to begin negotiations on behalf of Manitoba First Nations to settle outstanding TLE's with Canada. In 1983, Canada, Manitoba and the TLE Committee began negotiations. A draft agreement in principle covering 23 First Nations provided 640,000 acres of land and \$40 million to be distributed to affected First Nations. Three First Nations did not finalize the agreement. In the early to mid-1990's, individual TLE settlement agreements were finalized by seven Manitoba First Nations not represented by the TLE Committee.¹²

In October 1993, a protocol containing rules for negotiations was signed by the TLE Committee, Canada and Manitoba. At the time, the TLE Committee represented 22 First Nations, but only 19 had their TLE claims validated by Canada. This protocol established a bilateral negotiation process. Canada and the TLE Committee would negotiate on matters relating to the Treaties, and Manitoba and Canada would negotiate on matters relating to the *Manitoba Natural Resources Transfer Act* of 1930.

On June 21 1996, an agreement in principle was signed by all parties outlining the main components of a *Manitoba Treaty Land Entitlement Framework Agreement*. On 29 May 1997, the *Manitoba Treaty Land Entitlement Framework Agreement* was signed by the TLE Committee representing twenty First Nations, Canada and Manitoba. This framework agreement is intended to

¹² These are: Garden Hill, Red Sucker Lake, St. Theresa Point and Wasagamack First Nations (March 1994); the Long Plain First Nation (August 1994); the Swan Lake First Nation (March 1995); and the Roseau River First Nation (November 1995).

transfer outstanding lands to the twenty First Nations.

As of 1999, thirty-one First Nations have TLE claims. Seven First Nations have signed individual TLE agreements. A framework agreement has been signed with Treaty Land Entitlement Inc. representing nineteen First Nations. Under the framework agreement, population figures from 14 October 1993 are used to calculate the amount of land owed.

One outstanding issue is federal legislation that will ease the transfer of selected land from the province to the First Nations. The *Manitoba Claims Settlements Implementation Act* implements the *Northern Flood Agreement* and other land claims agreements. In the past, the province of Manitoba also asserted a claim to fifty percent of the minerals found on Indian reserves. The province has renounced this claim for lands transferred under the TLE process.

There are several First Nations which have, or may in the future, make TLE selections within two hundred kilometres of the Manitoba coast. Some of the land selections for York Factory First Nation and Shamattawa First Nation are indicated in Figure 1, which is a map for the western Hudson Bay region. These land selections have not been completely finalized.

The York Factory First Nation ratified their TLE agreement on December 3rd, 1998. However, they have not yet signed their agreement. Pursuant to the framework agreement, they are entitled to select 29,173 acres of land. Tentatively, they have selected 5 parcels totaling 10,881 acres. All of their current proposed selections are within two hundred kilometres of the coast. However, they will not proceed

further until their agreement has been signed and other outstanding concerns have been resolved.

The Shamattawa First Nation has not yet ratified or signed their TLE agreement. Pursuant to the framework agreement, they are entitled to select 24,192 acres of land. Tentatively, they have selected 17 parcels totaling 19,350 acres. Many of these selections are within the two hundred kilometre zone. However, nothing will be finalized until the Shamattawa First Nation has signed the agreement and confirmed their selections.

The War Lake First Nation signed their TLE agreement on May 26, 1999. They are entitled to 7,156 acres. To-date, they have made limited selections. These selections are in progress, and may be transferred depending on identified concerns being resolved.

The Fox Lake First Nation has not yet signed their TLE agreement. They are entitled to 26,391 acres. Since their community is located within two hundred kilometres of the coast, it is likely that their selections will be located within this area.

The Sayisi Dene Nation (Tadoules Lake) First Nation has also not yet signed their TLE agreement. They are entitled to 22,372 acres. No selections have been made to-date however since their traditional use area is within two hundred kilometres of the coast. It is expected that many of their selections will fall within this area.

Northlands First Nation (Lac Brochet) First Nation signed their TLE agreement on Nov. 9, 1999. They are entitled to select 94,084 acres and are currently undertaking a land selection study. Land selections are expected to be forthcoming in the near future. Although

they are located over two hundred kilometres from the coast in the north-west corner of Manitoba near the Saskatchewan border, they may make some selections within two hundred kilometres of the coast.¹³

¹³ Summary information on potential lands selection within 200 kilometers of the Manitoba coast derived from an email dated November 30, 2000 from Ken Vipond, Development Coordinator, Aboriginal Affairs and Northern Development, Manitoba Government .

Northern Flood Agreement

In 1963, the governments of Canada and Manitoba entered into an agreement to investigate hydroelectric development on the Nelson River. A subsequent development agreement was signed between the two governments in 1966. Under this agreement, the two governments would cooperate and proceed with the first phase of a development on the Nelson River. The federal government agreed to provide a long-term loan to cover the costs of erecting transmission lines. Atomic Energy of Canada Limited was designated as the federal government agency and Manitoba Hydro as the province's representative.

In 1971, terms of reference for a federal-provincial Study Board (Lake Winnipeg, Churchill and Nelson Rivers Study Board) were developed. The governments initiated the Study Board's work to determine the effects which the regulation and diversion projects were likely to have on other water and related resource users, to indicate ways in which the projects may be more beneficial to such other users, to recommend modifications in the design and operation of the works, and to recommend remedial measures where considered necessary to lessen undesirable effects. The report focussed on these potential effects, particularly on the five First Nations located along the Nelson and Burntwood rivers.

The primary objectives of phase one was to dam and construct hydroelectric facilities on the Nelson River to generate electricity for industrial and economic development in Manitoba, and to sell electricity outside of Manitoba. The first

phase of the development of the Nelson River included four main components: construction of Kettle Generating Station; a high voltage direct current transmission system from the Kettle Generating Station to Winnipeg; the Churchill River Diversion Project and Lake Winnipeg Regulation. Construction of Kettle Generating Station began in 1966 and was completed in November 1974. The 1,272-MW generating station consolidated a series of rapids into a 30 metre operating head, or the waterfall created by Kettle Generating Station. At that time, Kettle Generating Station was the largest generating station in Manitoba.

In 1974 as construction began, five First Nations formed an organization to have joint consultations with Manitoba Hydro and the governments about the project. The five First Nations are: Cross Lake, Nelson House, Norway House, Split Lake, York Factory. Their organization (the Northern Flood Committee) negotiated the *Northern Flood Agreement* over the following three years. This Agreement was signed by Canada, Manitoba, Manitoba Hydro and the five First Nations in 1977.

The *Northern Flood Agreement* was intended to address the impacts of Manitoba Hydro's Churchill-Nelson hydro project on five First Nations. It provided for the acquisition of the reserve lands, and was intended to address environmental impacts and provide the First Nations with compensation for losses attributed to the projects.

The Northern Flood Agreement recognizes impacts on Manitoba First Nations and their lands. These impacts included flooding of reserve lands, damage to recreational areas, decrease in quantity and quality of fish including increases in

mercury, lessening of availability of wildlife, contamination of drinking water, and greater difficult in water and winter travel.

The *Northern Flood Agreement* proved difficult to implement because of significant differences among the parties about its intent. Instead, individual implementation agreements have been negotiated under the *Northern Flood Agreement*. Of the five First Nations that are signatories to the Northern Flood Agreement, four have signed comprehensive implementation agreements.

Manitoba Northern Affairs has completed a comprehensive settlement process with the Split Lake Cree First Nation, the York Factory First Nation, the Nelson House First Nation, and Norway House First Nation identifying specific financial and program responsibilities. These implementation agreements transfer land and money, and establish resource management boards and environmental and resource management regimes.¹⁴ The York Factory Final Agreement is a representative implementation agreement, and is discussed extensively in the context of resource management areas under the *Northern Flood Agreement*.

Other parties have also been impacted by hydroelectric development in northern Manitoba. Agreements have been negotiated with communities such as the Town of Churchill where, in addition to compensatory funds, a rock weir was built to facilitate fishing and boating opportunities in the area along with a marina and wayside picnic and interpretative area.

¹⁴ Information on the Northern Flood Agreement provided on Manitoba Hydro website at www.hydro.mb.ca.

Other initiatives

There are a variety of federal, provincial and multi-party arrangements with Manitoba First Nations that may impact on the Manitoba coast. These initiatives are briefly summarized below.

The *Manitoba Framework Agreement Initiative* was executed by the Assembly of Manitoba Chiefs and the federal government on 7 December 1994. Under this agreement, the parties agreed to dismantle the Department of Indian Affairs and Northern Development for Manitoba, recognize First Nation governments and institutions in Manitoba, and transfer jurisdiction from other federal departments to First Nation governments and institutions. The *Manitoba Claims Settlements Implementation Act* implements the *Northern Flood Agreement* and sets a framework for the implementation of future land claim agreements.

The Natural Resources Secretariat was established in September 1988 by the Manitoba Keewatinowi Okimakanak (MKO). The Natural Resources Secretariat (NRS) provides MKO and the First Nations with research and information on land and natural resources for the region represented by the combined traditional territories of the 27 member First Nations, or approximately three-quarters of the province. The primary purpose of NRS is to assist the MKO Executive Council to represent members in economic development, land and natural resource use and protection. NRS documents traditional land use territories, participates in cooperative management initiatives; designs resource development and management frameworks; conducts

environmental assessments and analyzes environmental impact statements; participates in public consultation forums; assists in the development of community plans; provides policy analysis and supporting legal analysis; assists in negotiations and court challenges and developing presentations before government for natural resources and environmental issues; and provides information for outstanding claims for compensation. This results in presentations, written reports, memoranda of understanding, agreements, litigation support, project proposals and maps.

The *Samuel v. The Queen* case was filed in March 1993 to challenge the claim of the Inuit of Nunavut to Denesuline traditional lands and to recognize aboriginal and Treaty rights of the Manitoba Denesuline for up to 80,000 square kilometers of Denesuline traditional territory in the Nunavut Territory. On 12 July 1999, the Chief of the Sayisi Dene First Nation, the Chief of the Northlands First Nation and the Minister of Indian and Northern Affairs signed two memoranda of understanding to establish a process to resolve through negotiations the issues raised before the Federal Court of Canada in *Samuel v. The Queen*.

The memorandums represent efforts by the Sayisi Dene First Nation, the Northlands First Nation, and MKO to resolve the territorial and treaty disputes between the Manitoba Denesuline First Nations, Canada and the Inuit. Under these memorandums, the parties have agreed to negotiate wildlife harvesting north and south of the 60th parallel, consider land selection in Manitoba, and address Manitoba Denesuline concerns with respect to the Nunavut Final Agreement.

On 18 November 1999, the Manitoba Minister of Industry, Trade and Mines and MKO signed a memorandum of understanding between the MKO and Manitoba with respect to the activities of the mines and minerals sector and the Manitoba minerals industry in the traditional territories of the MKO First Nations. The memorandum describes the commitment of the province to establish and fund a working group.

This working group is to provide a forum for the province and the MKO leadership to address issues related to the mines and minerals industry, including the protection and recognition of aboriginal and treaty rights; access by MKO and the First Nations to information regarding prospecting, exploration and development proposals and activities; review of the environmental status of existing mines and smelters; and review of opportunities for aboriginal participation and employment in the mining sector.

On 5 March 1998, MKO, the Assembly of Manitoba Chiefs and the Manitoba Department of Natural Resources entered into a memorandum of understanding for an Assembly of Manitoba Chiefs - MKO - Manitoba Department of Natural Resources Working Group on Manitoba's Network of Protected Areas. The memorandum states that the province must directly consult with First Nations affected by any proposed protected area. In addition, the memorandum provides that the affected First Nation must agree to the proposed designation before the province will designate the site. A protected area designation would prohibit industrial development such as mining, logging and hydroelectric development on the designated lands, but would encourage other activities

such as ecotourism. The memorandum also confirms that the designation of a protected area will not infringe upon the aboriginal or treaty rights of the First Nations, and that the First Nations shall continue to have a right of access to protected areas for the purposes of exercising existing rights.¹⁵

¹⁵ Information provided at the Manitoba Keewatinowi Okimakanak website: http://www.mko.mb.ca/mko_natural_resources.htm.

RESOURCE MANAGEMENT ARRANGEMENTS

Introduction

There are a variety of interesting parks, conservation and special designations for the Manitoba coast. Many of these designations are illustrated in the map of the western Hudson Bay region. Some of the resource management arrangements discussed in this portion of the report are the Wapusk National Park, the Cape Churchill and Cape Tatnum Wildlife Management Areas, and the York Factory and Split Lake Resource Management Areas.

Specific aspects of these resource management arrangement are highlighted, including the role of First Nations. Overlaps and integration between these designations is discussed in the course of this analysis. This analysis of resource management arrangements provides a sense of Manitoba First Nation rights and responsibilities for coastal management. It also suggests some existing means and models for integrated coastal management.

Interjurisdictional initiatives are also being successfully implemented for the Manitoba coast. One such example is the Beverly and Qamanirjuaq herds of barren ground caribou. Interjurisdictional caribou management, across several provinces and territories and involving Inuit and First Nations, can considered a successful example of multiple party and multi-jurisdictional arrangements. The underlying

agreement, history and recent initiatives are considered.

Several themes should become apparent from this analysis of resource management. The first theme is the existing involvement of the federal, provincial and local government and Manitoba First Nations in land and resource management for the Manitoba coast. Unlike more traditional structures, the resource management arrangements discussed, and the structures they establish, recognize the multiplicity of parties and interests in the Manitoba coast. Manitoba First Nations in particular have an integral role in these arrangements given the allocation of reserve lands, co-management rights and their pre-eminent interest in wildlife. Given these structures and arrangements, the participation of all parties is extensive and ongoing. Given new arrangements that are being negotiated and implemented, this involvement will continue and is likely to increase, rather than diminish, over time.

The next theme is the overlap between the different arrangements and the management of a resource or activity for the Manitoba coast. This is true whether the resource or activity is land, water or species management; mineral exploration and production; or developing suitable transportation. This overlap necessitates cooperation between the federal, provincial and territorial governments. Much of this cooperation is already happening, but more will be required in the future as the number and complexity of arrangements and interest increase.

The last theme is the scope of resource management arrangements. The scope of these arrangements can not be geographically limited to the Manitoba

coast, or even the western Hudson Bay region. Instead, the scope is likely to be defined by the range of a species, the extent of an impact, or the size of an underlying watershed or geologic feature. For example, the Beverly and Qamanirjuaq caribou herds migrate over the Northwest and Nunavut Territories, Manitoba and Saskatchewan, and support Inuit and First Nation subsistence harvesting throughout this area. Similarly, the Manitoba coast experiences impacts from activities and pollution originating throughout the globe. Finally, the geologic features and watershed underpinning the Manitoba coast are parts of a formation and watershed that include substantive portions of the North American continent.

All these themes have implications for integrated coastal management for the Manitoba coast and the western Hudson Bay region. Existing resource management arrangements in the Manitoba are both models for and islands of cooperative efforts. While the shape of integrated coastal management is not yet confirmed and will only arise from a future consensus of the parties and interests, integrated management is likely to be derived from and include these types of resource management arrangements prevalent in Manitoba and Kivalliq. Manitoba arrangements are more piecemeal, arising from a panoply of First Nation rights and federal and provincial initiatives. Kivalliq has a more unified approach arising from the dominant role of the Nunavut Final Agreement.

National parks

The Wapusk National Park is a national park established near Churchill and on the coast of Manitoba. The park has an area of 1,475 square kilometres, and consists largely of the low swampy plain along the shore of Hudson bay between Churchill and York Factory. The park, along with adjacent wilderness areas, protects a major polar bear denning area. Its location is indicated on the map of the western Hudson Bay region.

The Wapusk National Park was formed as a result of memorandum of agreement signed between the federal and Manitoba government on 24 April 1996 after seven years of negotiation between Parks Canada and Manitoba. The park is the result of a partnership involving the federal and provincial governments, the local government district of Churchill, and the Fox Lake and York Factory First Nations. The park also broke new ground in national park management by establishing a ten member management board.

The Wapusk National Park is surrounded by the Cape Churchill Wildlife Management Area and the Cape Tatnum Wildlife Management Area. The park itself was removed from the Cape Churchill Wildlife Management Area in 1996. Most ecotourism and research activities occur in the Cape Churchill Wildlife Management Area, and not in the park.

The park is subject to the Wapusk Park Management Board. This Board is formed of ten representatives. Parks Canada has two representatives. One of those representatives is non-voting and is held by the Park Superintendent. Parks Canada opened up its voting position to nomination

by the Manitoba chapter of the of the Canadian Parks and Wilderness Society. The other board members are two representatives each from the provincial government, the Local Government District of Churchill, York Factory First Nation and Fox Lake First Nation. One of the two provincial representatives must be the official responsible for the Cape Churchill Wildlife Management Area.

The memorandum of agreement requires that the board meet a minimum of twice a year, and more frequently if necessary. Parks Canada provides and pays for the costs of the Board. The Board has operational and procedural autonomy, including the election of the chair. Dissolution or alteration of the Board requires an amendment to the underlying agreement with the mutual consent of the federal government, and prior consultation with the local government of Churchill and First Nations.

Recommendations of the Board to the Park Superintendent must be considered. If rejected, there is an appeal process that extends to the Minister of Canadian Heritage. The Board also participates in the appointment of the Park Superintendent, as two members of the Board and two members of Parks Canada form the committee that recommends the appointment.

The Board is involved in all aspects of parks management, and activities which may impact on ecosystems, wildlife habitat, populations or cultural resources are specifically identified. When developing management plans, the board may request Parks Canada to arrange for and pay the cost of other agencies and persons, including costs of the provincial government, the local

government of Churchill and First Nations. The Board also has the final authority to recommend the Park Management Plan, and subsequent reviews of the plan, to the Minister. However, the Board must operate within the *National Parks Act*, and Park Canada's Guiding Principles and Operation Policies. The Board may also work with other boards that manage lands and resources outside the park.¹⁶

Some of the Board's responsibilities are highlighted. The Board is responsible for the development of interim management guidelines and management plans, recommending these guidelines and plans to the Minister, and monitoring their implementation. Interim guidelines dated 6 February 1998 are in place, but the management plan has not yet been finalized. Under the memorandum of agreement, this management plan must be prepared within five years of signing the agreement, or April 2001.

The Board is also responsible for considering other matters relating to the planning, management and operation of park land, which includes management and protection of lands and natural resources; and local uses and criteria and procedures for those uses. "Local users" are those parties who have been resident in or around the district of Churchill for at least five years prior to the signing of the memorandum of agreement. "Local uses" include gathering berries and plants, caribou hunting and trapping in a community

¹⁶ Williams, Harvey, "The Wapusk National Park Board Management Board" Mr. Williams is a Board member, and was nominated by the Canadian Parks and Wilderness Society. This article is located on the website of the Manitoba Naturalist Society at www.mbnet.mb.ca/mms/parks.

trapping area or on a registered trapline. The Board regulates local uses within the park by issuing local use permits. These are issued and renewed free of charge, and will not be issued or renewed after 2031.

Treaty Indians, including Manitoba First Nation individuals, may hunt, trap and fish in the park in accordance with the *Manitoba Natural Resources Transfer Agreement*, and these rights will be respected in any management plan for the park. Activities incidental to these rights are also permitted in the park to the extent they are consistent with the park purpose. These activities do not appear to be regulated by the park or the Board.

Commercial trapping is permitted on registered and community traplines. At the request of the First Nations, these activities are regulated consistent with the Manitoba Wild Fur Policy. First Nations exercising these rights within the park are only restricted by regulations for public safety, national park and other conservation objectives.¹⁷

Interestingly, the memorandum of agreement for the park also provides that First Nations rights to hunt, fish and trap under the *Manitoba Natural Resources Transfer Agreement* will also be respected with the Cape Churchill Wildlife Management Area, and that any management plan for this area will also respect these rights. Additionally, lands within the park are still open to land selection under the Treaty Land Entitlement process.¹⁸

¹⁷ *Wapusk National Park Interim Management Guidelines* (February 6, 1998), section 7.5.

¹⁸ *Federal-Provincial Memorandum of Agreement for the Wapusk National Park* (April 24, 1996), sections 5 and 13.

In addition to the recognition of rights of local users and First Nations, the interim management guidelines provide for preferential employment, training and economic opportunities for northern residents. Northern residents are defined to include individuals for the Fox Lake and York Factory First Nations.¹⁹

The Board also has responsibilities for land use planning and resource management of adjacent wildlife management areas, and to develop regional integration and partnership. Under the memorandum, the province agrees to consult in writing with the Board on land use planning and resource management issues within the Cape Churchill Wildlife Management Area that may affect the park and its resources. This includes changes to the boundaries or legal status of the areas. The province will confer with the Board to identify the nature and scope of these issues. If the Board decides to reply, it shall do so within 60 days. This consultation should occur expeditiously, given that one of the Board members is the Manitoba officer responsible for the Cape Churchill Wildlife Management Area.²⁰

The interim management guidelines also discuss regional integration and partnerships. The guidelines indicate that Parks Canada will manage the park within the context of the surrounding area, and that ecosystem management principles require consideration of ecosystems within and beyond park boundaries, including involvement of adjacent land managers.

¹⁹ *Wapusk National Park Interim Management Guidelines* (February 6, 1998), section 7.8.

²⁰ *Federal-Provincial Memorandum of Agreement for the Wapusk National Park* (April 24, 1996), sections 10 and 11.

This includes considering actions within the Cape Churchill Wildlife Management Area, and by the Fox Lake and York Factory First Nations, Town of Churchill, Split Lake and York Factory Resource Management Boards and the Nunavut Wildlife Management Board.

Parks Canada agrees to collaborate in areas of common interest with the Split Lake Resource Management Board, York Factory Resource Management Board, the Nunavut Wildlife Management Board, and others who manage land and resources in the vicinity of the park. Further, Parks Canada and the government of Manitoba agree to coordinate their use of human and financial resources, particularly for visitor activities and safety.²¹

It is not clear how regional integration has operated in practise. Uses and eco-tourism tend to occur in the northern reaches of the Cape Churchill Wildlife Management Area, rather than within the Wapusk National Park. Therefore, there may be more pressures on the wildlife management area rather than the park.

The park is intimately related to both the Cape Churchill and Cape Tatnum Wildlife Management Areas. The park and these areas have been established to protect polar bear denning areas and habitat. Neither, the Wapusk National Park nor the Cape Churchill Wildlife Management Area have a marine or offshore component, despite the importance of landfast and offshore ice for polar bears. Interestingly, provincial mapping data for the Cape Tatnum Wildlife Management Area

²¹ *Wapusk National Park Interim Management Guidelines* (February 6, 1998), section 8.

indicates this area extends into the offshore. However, this extension into the offshore appears to be an error in the description of the area and not a reflection of an actual boundary, which is restricted to the coastline.

Given federal jurisdiction over marine species, offshore waters and the seabed, any adjacent marine area will have to be established by Parks Canada, Fisheries and Oceans Canada or another federal department.

Migratory herds of caribou, including the Beverly and Qamanirjuaq herds of barren ground caribou, also seasonally use the park. This use, and related implications for interjurisdictional species management, is discussed subsequently.

Wildlife management areas

This discussion focuses on Manitoba wildlife management areas, and in particular the Cape Churchill Wildlife Management Area. It begins by describing the province's protected areas initiative and the role of First Nations and other sectors. It then examines the specific regime for the Cape Churchill Wildlife Management Area

Manitoba has a Protected Areas Initiative. Under this initiative, a network of protected areas is created from provincial and federally designated lands in the province. This network includes 25 provincial parks and park reserves, 16 ecological reserves, 32 wildlife management areas are protected in whole or in part. The network also includes provincial forests and two federal parks, being Riding Mountain and Wapusk National Parks. In the future, private lands, including those lands owned by conservation groups, may also contribute to this network through the use of the *Conservation Agreements Act*.

Protected areas prohibit, through legal means, logging, mining, oil, petroleum, natural gas and hydro-electric development. Protected areas may remain open for activities such as hunting, trapping or fishing. As well, the protected areas respect First Nation's rights and agreements.

Under this initiative, the provincial government works with First Nation communities and agencies, as well as northern communities and towns, to review areas of special interest. A formal First Nation Community Participation process has been created with the First Nations and Manitoba Government Memorandum of Understanding on the Establishment of

Protected Areas. The Assembly of Manitoba Chiefs, Manitoba Keewatinowi Okimakinak and Manitoba Conservation have formed a working group of First Nation and government representatives to provide advice about community participation and guidance in applying the memorandum.

New protected areas are identified and designated only after full consultation with directly affected First Nations. Areas respect existing aboriginal and treaty rights of First Nations peoples, and rights under the *Manitoba Natural Resources Transfer Agreement*. The memorandum states it interpreted consistently with agreements between First Nations in Manitoba and the government respecting lands, waters and natural resources.

The provincial government also works with the environmental, forestry and mining sectors to implement the Network of Protected Areas. They are working with environmental groups and individuals to identify and select areas that could contribute to the network.

The province is working with the Forest Industry Association of Manitoba and its member groups to review areas of special interest and evaluate opportunities for protecting areas to complete representation of forested natural regions. This work is consistent with the Canadian Council of Forest Ministers' commitment in the National Forest Strategy to complete a network of ecologically representative forest protected areas. Consultation provides information to industry on the establishment of new protected areas and allows for the sharing of information on wood supply requirements and infrastructure developments.

In Manitoba, the mining industry has become involved in the protected areas initiative through the Whitehorse Mining Initiative, and the World Wildlife Fund Canada's Endangered Spaces Campaign. Since 1997, the mining and energy industries have reviewed areas of special interest. A significant number of these areas have been ranked by industry for protection status, in order to provide information to industry respecting this process, and gain feedback.

The Manitoba mining sector also interacts with First Nation in other fashions. Community Interest Zones are established around First Nation communities. Parties exploring for minerals may stake, develop mineral claims and obtain leases within these zones. However, exploration permits must be reviewed and approved by the First Nations.

In May 1998, Manitoba Industry, Trade and Mines began a process to bring together First Nations, Metis Nation, and northern communities and the mining industry, and strengthen links between these parties. In March 2000, this process resulted in the following policy document, *Building Relationships and Creating Opportunities: Guiding Principles for Success between the First Nations, Metis Nation, Northern Community Councils, the Minerals Industry and the Province of Manitoba*.

Wildlife management areas are provincial lands designated under the *Wildlife Act* for the conservation, protection and enhancement of wildlife habitats. These areas are managed to maintain biodiversity and biological integrity and to provide for wildlife-related forms of recreation. Other activities are permitted if they do not compromise primary wildlife values.

The Cape Churchill Wildlife Management Area was created in 1978 to protect polar bearing staging and denning areas, nesting grounds for geese, and caribou habitat. This area was and still is the province's largest wildlife management area at 1.88 million hectares, protecting a significant portion of the Hudson Bay coast and associated lowlands between Cape Churchill and the Nelson River. The Cape Tatnum Wildlife Management Area is immediately south of this area, and is a narrow strip adjacent to Manitoba coast to the Ontario border. Both these areas are indicated in the map for the western Hudson Bay region in Figure 1.

An initial plan for the Cape Churchill Wildlife Management Area was produced in 1983, and management guidelines were developed and published for 1988. The guideline provided information of the geography and wildlife of the area, documented uses, and outlined a zoning scheme. The zoning scheme identified eight different zones, some which accommodate multiple uses and others which restrict use. Uses are permitted close to Churchill and along the Nelson River. Other agencies also have a role in managing activities in the area. For example, Manitoba Industry, Trade and Mines administers mineral rights in the area.

In 1993, the area within the Cape Churchill Wildlife Management Area considered for national park status was protected from uses that would compromise its future designation. In 1996, the agreement to establish the Wapusk National Park was signed. In 1998, 1.06 million hectares of the Cape Churchill Wildlife Management Area were transferred for the creation of the park, leaving 843,813 hectares in area. Despite its reduction in

size, the Cape Churchill Wildlife Management Area continues to provide an important habitat for waterfowl and shorebirds. The area still includes about 40 % of the polar bear denning area.

Beginning in 1999, the development of a contemporary management plan was initiated for the Cape Churchill Wildlife Management Area. A draft management plan for the area was revised and released in May 1999, and is discussed.

The management goals under the plan are as follows:

- the protection and conservation of native wildlife include plants, insects, animals and habitat,
- scientific research and visitor services for management of wildlife and habitats, public education, and
- respect and accommodation of First Nations' constitutional and treaty obligations.

These goals are achieved by setting and realizing management objectives. Some of these objectives are:

- develop a current inventory of species, habitats and communities,
- develop legislation to protect important and critical habitat, and limit habitat disturbance and damage,
- manage visitor services and tourism to limit acceptable damage to habitat,
- maintain major portion of wildlife habitats in pristine conditions,
- minimize human activities and prohibit activities in critical wildlife habitats,
- develop tourism operating conditions and guidelines that limit damage and foster high standards of conduct,

- maintain a liaison with Wapusk National Park to ensure that management of lands and visitor services in the park and the area are complementary, and
- allow consumptive use of wildlife within sustainable limits based on wildlife allocation policy of Manitoba Conservation.

In 1988, the management plan established a set of management zones. These zones include high use commercial tourism, low use commercial tourism, polar bear denning, bird habitat protection, developments and unrestricted day use. The plan contains specifications for vehicles, adventure and eco-tourism, roads and trails, research, cabins and other permanent structures, and fees.

As there has been damage to land and vegetation, the plans contain restrictions on motor vehicle and aircraft use to limit damage to tundra. Roads have been developed, and restrictions are placed on use of other areas. Cabins and permanent structures are prohibited, with the exception of existing structures and approved lodge development. Finally, parties are considering the imposition of fees for commercial users on a user pay basis, with fees being directed for maintenance and habitat reclamation.

The interaction between Cape Churchill Wildlife Management Area and the Wapusk National Park has been addressed in the discussion of the Wapusk National Park. The south aspect of Cape Churchill Wildlife Management Area, and the central region of the Cape Tatnum Wildlife Management Area are also overlain by the York Factory Resource Management Area.

The York Factory Resource Management Area extends to the Manitoba coast. The Split Lake Resource Management Area is adjacent to the west side of the Cape Churchill Wildlife Management Area. Both of these resource management areas are indicated on the map of the western Hudson Bay region in Figure 1.

Resource management areas under the Northern Flood Agreement

Implementation agreements have been finalized under the *Northern Flood Agreement*. The implementation agreements are intended to redefine and implement the obligations of parties under that agreement. The implementation agreements are each unique, but share common elements for matters such as land quantum, land use, navigation, wildlife and land management and planning, and environmental impact policy. The York Factory Final Agreement has been ratified by the parties, and legislatively implemented.

The land selection is complete under the York Factory Final Agreement, and resulted in the selection of reserve lands, fee simple lands and establishment of resource management areas in proximity to the coast. York Factory First Nation has selected reserve lands adjacent to the coast at French Creek and Machichi River. Their lands are indicated in the map of the western Hudson Bay region.

York Factory First Nation also has land in the Town of Churchill. This land is transferred as fee simple lands. Parcels "E" and "K" are within the town boundaries of Churchill. Parcel "K" was not included along with parcel "E" in the original agreement, and an amendment to a schedule being made to include it.

Resource management areas are finalized in proximity to the coast, and include the York Factory Resource Management Area, the Split Lake Resource Management Area, and the Nelson House

Resource Management Area. These three resource management areas are indicated on the Figure 1, which is map of the western Hudson Bay region. The first two areas are of significance to the coast and are considered further. For the resource management boards, Split Lake Resource Management Board has been operational since 1992, and the York Factory Resource Management Board has been operational since 1996.²²

The York Factory Final Agreement is examined as a representative implementation agreement, and because of the regime it establishes for the York Factory Resource Management Area. The Agreement contains provisions providing land in exchange for lands flooded by hydro development, cash compensation, resource management, environmental assessment, future development, arbitration, and general legal provisions. The Agreement also establishes the York Factory Resource Management Area, which overlaps the Cape Churchill and Cape Tatnum Wildlife Management Areas, and the York Factory Management Board.

Article 1.1 of the Agreement defines terms used throughout. Canada is represented by the Minister of Indian Affairs and Northern Development, and Manitoba is represented by the Minister of Northern Affairs. The remaining parties are Manitoba Hydro Electric Board and York Factory First Nation.

Resources are defined to include fish, wildlife, forests, plants, land and water.

²² Information on York Factory First Nation fee simple lands, and status of resource management boards provided in email dated 30 November 2000 from Ken Vipond, Development Coordinator, Aboriginal Affairs and Northern Development, Manitoba Government.

The resource management area is the area described in the schedule and includes rivers, lakes and any reserve lands in that area.

Article 4 states procedures for establishing and operating the Resource Management Board. The Board is formed of eight persons, with Manitoba and York Factory First Nation each appointing four members. The Board establishes its own rules and procedures, with decisions being made by consensus unless the majority agrees that the decision be made by vote. The Board may investigate resources, their uses and influences upon them; monitor activities within the resource management area; and develop and recommend resource management plans and land use plans.

The resource management plan may include quotas, species enhancement, methods of harvesting and enforcement. It also includes measures to protect and enhance resources and their environment, establishes priorities, allocation and resolves conflicts for resources. The plan may be quite extensive, given the broad definition of resources. The resource management plan applies within municipalities to the extent it does not conflict with any existing municipal planning.

The land use plan extends to zoning lands, prescribing lands and water in order to regulate use, regulating land use, recognizing and preserving areas of ecological, cultural or historical significance, and resolving land use conflicts. The land use plan does not apply in municipalities to the extent it is inconsistent with any existing municipal planning. Lands used for residential, commercial or industrial purposes within

municipalities or in reserve lands are exempted from the plan.²³

The Agreement does not address the situation where a resource management plan or a land use plan is approved prior to the completion of municipal planning, or before the zoning of municipal or reserve lands for residential, commercial or industrial purposes. This issue, and the future flexibility of these plans to amendment and change, will be quite important if there is significant development and commercial activity in Churchill or along the Manitoba coast.

The Resource Management Board forwards resource management and land use plans to York Factory First Nation, Manitoba and Manitoba Hydro. York Factory and Manitoba then have ninety days to determine whether they will accept or reject the plan. If the plan is unacceptable, the Board has sixty days to resubmit a revised plan, or request that the rejected plan be reconsidered. Before recommending a plan, the Board is required to consult with the public and hold public meetings.²⁴

Article 4.7.3 provides that the Board will consult with the Fisheries and Oceans Canada when any recommendation concerning fish or marine mammals in estuaries or rivers or creeks flowing into, or along the shore of Hudson Bay is considered. This provision is somewhat ambiguous as it suggests the Board's jurisdiction may extend into offshore waters and species, in addition to inland waters and species. Article 4.8.2 generally states that nothing in article 4 shall derogate from the

²³ York Factory Final Agreement, article 4.5 and schedule 4.1.

²⁴ York Factory Final Agreement, articles 4.6 and 4.7.

authority of Canada, Manitoba or York Factory First Nation. However, the definition of resource management area includes both land and water, and refers to a map in schedule 4.1 for a geographical description of the area.

Therefore, the York Factory Management Board's jurisdiction could extend to offshore waters if the resource management area is geographically defined to include the offshore land and water. The resource management and land use plans could also extend to and include offshore measures if recommendations to that effect are accepted by Manitoba and the York Factory First Nation. As the federal government is a party to the Northern Flood Agreement and the York Factory Final Agreement, it is possible to have a transfer of federal jurisdiction in the inland and offshore waters and species, and the transfer of that jurisdiction to boards and processes that are primarily responsive to Manitoba and First Nations.

Article 6 addresses environmental monitoring and investigation. This provision describes arrangements to coordinate environmental monitoring and share information. York Factory First Nation may undertake this monitoring. Article 6 also provides for annual meetings of Canada, Manitoba, York Factory First Nation and Manitoba Hydro to share existing information and to discuss future investigations or contemplated monitoring.

The York Factory Final Agreement addresses compensation and measures to ameliorate the impacts of existing hydroelectric development. Article 9 also provides for a process to address and consider the impacts of future hydroelectric development. The process is complex, and

involves advance information, consultation, undertaking studies and investigations to understand possible effects and to ameliorate them, and consultation. York Factory First Nation is required to cooperate with Manitoba Hydro. Arbitration occurs under the Agreement if the parties are unable to reach an agreement on future development. Nothing in article 9 implies approval by York Factory or Canada of existing or future development affecting the York Factory First Nation, reserve lands, or the resource management area.

Unlike most agreements, the York Factory Final Agreement has an extensive arbitration process. Article 10 states arbitration applies to defined matters under the Agreement, and any dispute between parties which involves interpretation of the Agreement. The Manitoba *Arbitration Act* governs to the extent it is not inconsistent with article 10. The decision of the arbitrator is final subject to an appeal to the Manitoba Court of Appeal on a matter of law or jurisdiction.

Though the York Factory Resource Management Board has been operational since 1996, it has not been very active. The agenda for the January 8, 2001 meeting of the Board in York Landing states the prior meeting was on March 7, 2000. Topics for the January 8 meeting include polar bear management and administration, moose survey and management, a report from the Wapusk Park Management Board, and licences and permits within the area. No resource management plan or land use plan is in place, or being actively developed.

In contrast, the Split Lake Resource Management Board has been meeting since 1992. The annual report for that Board for the year ending March 21, 2000 states it met

on seven occasions in the prior year. The Split Lake Resource Management Board was developing guiding principles for land and resource plans in the Split Lake Resource Management Area. An initial draft report, Land and Environmental Overview, had been reviewed by the Board and the community. The Board is developing a database of reports, minutes and information on resources in the area. The Board is also involved with requests for licences, permits and resource uses.²⁵

Given the recent nature of the York Factory Resource Management Area and Board, it is difficult to determine the interaction between this area and the Cape Churchill and Tatnum Wildlife Management Areas, and the Wapusk National Park. Issues of overlap are likely to be addressed in the future as all parties finalize their respective plans and institutional links.

The greatest overlap occurs between the resource management area and the wildlife management areas. First Nations harvesting rights are recognized in both areas, with First Nations having a greater role in the management of the resource management area. The Manitoba government is also active throughout, thus minimizing the possibility of inconsistency. The Department of Aboriginal Affairs and Northern Development is active with the resource management areas, while the Department of Conservation is active with the wildlife management areas. Given the varying state of planning, it is likely the regions and boards at a more advanced states of planning will assist regions and boards at a less advanced state of planning.

The federal government continues with its existing roles for provincial wildlife management areas. The federal government has a less clear role in the resource management areas under the *Northern Flood Agreement*, due in part to the management board and processes established under implementation agreements, such as the York Factory Final Agreement.

There is a lesser degree of overlap between the Wapusk National Park and the resource management areas, as the park and these areas are contiguous instead of overlapping. However, Manitoba First Nation rights are recognized in the park and the resource management areas. The Manitoba government and First Nations also participate extensively in the Wapusk Management Board and the York Factory Resource Management Board. This participation by Manitoba and First Nations assures that their concerns are considered, and that there is continuity throughout the region.

The Wapusk Management Board also has recognized input in wildlife management areas, and provides information to both the Split Lake and York Factory Resource Management Boards. Federal interests are only addressed by Parks Canada through its participation in the Wapusk National Park and Management Board.

²⁵ Information contained in the Split Lake Resource Management Board Annual Report for the year ending March 31, 2000.

Interjurisdictional species management

The section discusses interjurisdictional arrangements for the Beverly and Qaminirjuaq herds of barren ground caribou. Management arrangements for these herds include Manitoba First Nations and Inuit, and federal, provincial and territorial governments. These arrangements are reviewed here to serve as a basis for comparison and a model for future cooperation in the western Hudson Bay region.

Interjurisdictional arrangements are also in place for other species in the western Hudson Bay region, though these arrangements are not discussed here. For example, there are international, regional and provincial arrangements for polar bears. These arrangements recognize Inuit harvesting rights for polar bears in the territories, and the value of polar bears for tourism in the Wapusk National Park and the wildlife management areas in Manitoba. Other interjurisdictional arrangements which include or consider aboriginal peoples exist for other fish and marine species in the western Hudson Bay region.

Interjurisdictional management of the Beverly and Qaminirjuaq herds of barren ground caribou began due to a perceived crisis in the herd sizes. The herds are two of six major herds of barren ground caribou in northern Canada. The herds are named after lakes in proximity to calving grounds. The herds are nomadic and range in northern Manitoba, northern Saskatchewan, and the Northwest and Nunavut Territories. Both herds spend from April to October on the

tundra, before moving past the tree line between November to march to winter in the southern regions of the territories and northern Manitoba and Saskatchewan.

In the late 1970's, there was concern that the Qaminirjuaq herd faced possible extinction within a decade as the herd was estimated at 39,000 in 1980, down from 145,000 in the 1950's. The Beverly herd was also in decline at an estimated 94,000 animals in 1980's, down from 177,000 in the 1974 census. In response to the perceived crisis, an interim group representing government agencies was established in 1979. Inuit, Dene and Metis users of the herd did not accept population data in light of their traditional knowledge and experience. Inuit and First Nations believed instead that the animals had moved and the federal surveys were deficient. In the winter of 1979-80, the Beverly herd wintered in northern Saskatchewan in an area accessible by winter road, and between 15,000 and 20,000 animals were killed. This slaughter resulted in public outcry and pressure to coordinate management and ensure First Nation participation.

An agreement was reached in October 1981 to form a management board with representatives of the Inuit, First Nations and the federal government and the governments of Manitoba, Saskatchewan and the Northwest Territories. Since that time, the board has been viewed as a model of co-management. The herds have also rebounded. In 1988, the Qaminirjuaq herd was estimated at 220,000 animals, and the Beverly herd at 200,000 animals. A survey

in the late 1990's estimated a present total of 500,000 in both herds.²⁶

The most recent agreement between the parties is the Beverly-Qamanirjuaq Barren Ground Caribou Agreement dated 4 June 1992 between the governments of Canada, Manitoba, Saskatchewan and the Northwest Territories. This agreement supercedes an earlier agreement, extends to 2002, and may be lengthened. It states the objectives of the advisory board, its responsibilities, membership of the board, its rules and procedures, and finances.

The agreement provides the objectives of the board are as follows:

- to co-ordinate management of the Beverly and Qamanirjuaq herds in the interests of traditional users and their descendents, who are or may be residents on the range of the caribou, while recognizing the interests of all Canadians in the survival of the resource
- to establish a process of shared responsibility for the development of management programs between the parties hereto and the traditional users of the Beverly and Qamanirjuaq herds
- to establish communications amongst traditional users, between traditional users and the parties hereto, and amongst the parties hereto in order to ensure co-ordinated caribou conservation and caribou habitat protection for the Beverly and Qamanirjuaq herds
- to discharge the collective responsibility for the conservation and management of

caribou and caribou habitat within the spirit of this Agreement.

The Beverly Qamanirjuaq Caribou Management Board (the Board) was created in 1982 to help manage two caribou herds whose migratory routes straddle two territories, two provinces and several native cultures. The Board has 12 members including a chair and a vice chair. As the main purpose of the Board is to safeguard the caribou herds in the interest of aboriginal peoples who have traditionally relied upon the caribou, the majority of board members represent aboriginal communities.

As of the 1998, the Board consists of:

- two members from communities in the southern Kivalliq region of the Nunavut Territory
- one Dene member and one Metis member from communities in the South Slave region of the Northwest Territories
- two members from communities in northern Saskatchewan
- two members from communities in northern Manitoba
- a member from Manitoba Conservation
- a member from Saskatchewan Environment and Resource Management
- a member from Resources, Wildlife and Economic Development, Government of the Northwest Territories and
- a member from the Department of Sustainable Development, Nunavut Territory.

The Board meets twice a year, once in a caribou range community and once in a central location. The Board is advisory, and spend much of their time discussing issues

²⁶ Information from presentation by Gunther Anderson, Beverly and Qamanirjuaq Management Board to House of Commons Standing Committee on Aboriginal Affairs and Northern Development, November 15, 1995.

that relate to conservation of the herds. Most of its decisions are made on a consensus basis. The other function of the Board is education, in caribou range communities, with government departments and at conferences across Canada.

The Board has a purpose, and operates under specific goals and principles. The purpose of the Board is "to safeguard the caribou of the Beverly and Qamanirjuaq herds for traditional users who wish to maintain a lifestyle that includes the use of caribou, as well as the for all Canadians and peoples of other nations.

This purpose is implemented through a series of goals. These goals include ensuring caribou are accessible and available to traditional users, encouraging the wise use of caribou, cooperating with other northern wildlife management boards and involving local individuals and organizations, monitoring population levels and recommending management action to maintain minimum levels, and protecting caribou and their habitat from human disturbance.

Several principles reflect specific concerns for interjurisdictional species management, and could be applicable to interjurisdictional efforts for the western Hudson Bay region. First, effective caribou management must be based on cooperation and communication among traditional users and government. Second, governments of Canada, Manitoba, Saskatchewan, and the Northwest Territories, as well as the Nunavut Wildlife Management Board, recognize their complimentary mandates to administer, manage and allocate caribou with users so viable populations are maintained. Further, to aid organizations, governments and user groups, the Board will

be a clearinghouse in matters respecting caribou.

Since 1982, the Board has had a number of achievements, three of which are highlighted below. One of these achievements is the Beverly and Qamanirjuaq Caribou Management Plan. Following public consultation, the Board published a plan in 1987 for its first 10-year mandate. A revised plan was issued in 1996 for its second 10-year mandate. The plan provides a framework for management decisions, and calls upon teamwork from all relevant groups.

In 1998, the Board updated its methodology for determining allowable harvest of caribou. In descending order of priority, these categories are: traditional users (domestic use), residential users (domestic use), traditional users (intersettlement trade), local use for commercial purposes, outfitting, traditional users, and non-residents.

Finally, in 1999, the Board completed a multi-year project that identifies land and water that is important to the Beverly and Qamanirjuaq caribou. The resulting report and cd-rom used government records and mapping files to create a portrait of the sensitivity of caribou at different times of the year on different parts of the range. The report and the cd-rom have been broadly distributed to members, government, communities, resource managers and industry, as well as schools and libraries.²⁷

²⁷ Information from Board website including annual reports and publicity releases, the *Beverly and Qamanirjuaq Caribou Management Plan 1996 to 2002*, and the report, *Protecting Beverly and Qamanirjuaq Caribou and Caribou Range* (1999).

SECTION 4: INUIT RIGHTS

Introduction

This section of the report discusses Inuit rights in western Hudson Bay region. Inuit rights in the Nunavut Territory, including Kivalliq, are provided with the Nunavut Final Agreement. The Inuit also have some rights in Manitoba, which are also referred to in the Agreement. This section considers Inuit rights, and land and resource management in the western Hudson Bay region, where these rights are defined under the Agreement.

The Nunavut Territory is Canada's most recent political entity, being established in April 1999. The territory was established contemporaneously and in satisfaction of commitments made in the Nunavut Final Agreement.

The relationship between the Inuit, the Nunavut Final Agreement, and the role of federal and territorial governments is unique. Government structures and land ownership in the Nunavut Territory closely reflect the Nunavut Final Agreement. Similarly, Inuit rights and joint management boards and processes under the Agreement influence the structures and priorities of the federal and territorial governments.

Other land claim agreements and treaties also impact upon the territory. These agreements include the Inuvialuit Final Agreement, the Gwich'in Final Agreement and the Sahtu Dene and Metis Final Agreement. These agreements apply primarily to the Northwest Territories, but

have processes and regimes, such as environmental assessment and water and wildlife compensation, that apply beyond those boundaries.

Most recently, the federal government and the Manitoba Denesuline also signed a memorandum of understanding on 12 July 1999 to negotiate wildlife harvesting north and south of the 60th parallel, to consider land selection in Manitoba, and to address Manitoba Denesuline concerns with respect to the Nunavut Final Agreement. Similar discussions are underway with the Saskatchewan Dene.

Within "Taking Stock: A Review of the First Five Years of Implementing the Nunavut Land Claim Agreement" (afterwards "Taking Stock"),²⁸ there is a discussion of the relationship between Inuit, government and the Agreement. This discussion provides an context for an overall discussion of Inuit rights in the Nunavut Territory.

"Taking Stock" notes the special relationship between the Inuit and the federal government, which can be characterized as a fiduciary relationship. It notes the Nunavut Final Agreement is an important part of this relationship but not the only part. For example, there is the outstanding issue of Inuit self government which may lead to greater Inuit autonomy and regulation making powers.

²⁸ An independent review was also conducted pursuant to the requirements of the Nunavut Final Agreement. This report will also be referred to subsequently: Vertes N L et al., *Five Year Review 1993 to 1998: Implementation of the Nunavut Land Claims Agreement An Independent Review* (October 1999).

"Taking Stock" observes that the Nunavut Final Agreement is a multi-faceted instrument, and the foundation and guarantee of the Nunavut Territory and its government. The Inuit had made the formation of the territory a precondition to their acceptance of the Agreement. The Agreement determines the basic institutions of land and resource management in the territory through the establishment of different boards as institutions of public government.

The Agreement affects the operation of government within the territory as the federal and territorial governments must hire a representative level of Inuit employees, and provide Inuit firms with fair access to government contracts. Inuit Impact and Benefit Agreements impose similar obligations on activities and projects within the territory.

Finally, the Agreement provides the Inuit with entrenched proprietary rights that will continue into the distant future. These rights include lands, wildlife harvesting rights, and an entitlement to royalties from mineral development.

Based on these factors and other federal policy documents such as "Gathering Strength",²⁹ "Taking Stock" argues that the Inuit, the federal government and the territorial government are in a three way partnership. This partnership may have a variety of goals including the implementation of Inuit benefits and rights under the Agreement, and the promotion of

²⁹ In 1998 the Government of Canada responded to the Royal Commission on Aboriginal Peoples with a long-term, broad-based policy approach designed to increase the quality of life of Aboriginal people and to promote self-sufficiency. It is called Gathering Strength -- Canada's Aboriginal Action Plan.

the social and economic well being of the Inuit.³⁰ This perspective of "Taking Stock" is used to inform and provide contexts to a discussion of Inuit rights in the western Hudson Bay region.

The Nunavut Final Agreement is an agreement that is oriented towards marine areas within and external to the Nunavut Settlement Area. This may be due to Inuit and traditional Inuit uses of lands, water and resources being concentrated on the coast and rivers. The Agreement may also reinforce Canadian sovereignty to Arctic waters.

The preamble to the Agreement lists four objectives, including its application to marine waters. The first objective is to provide for certainty and clarity of rights to ownership and use of lands and resources, and the rights of the Inuit to participate in decision-making for the use, management and conservation of lands, waters and resources, including the offshore. Another objective of the Agreement is to provide Inuit with wildlife harvesting rights and rights to participate in decision making for wildlife harvesting. A third objective is to provide Inuit with financial compensation and means of participating in economic opportunities. The final objective is to encourage Inuit self-reliance and cultural and social well-being. These four objectives provide a context for the Agreement, and will be referred to assist in understanding specific articles of the Agreement.

Article 15: Marine Areas is one of the crucial chapters for understanding the regime applicable to the western Hudson

³⁰ *Taking Stock: A Review of the First Five Years of Implementing the Nunavut Land Claim Agreement*, (NTI, 1999) at 7-10.

Bay region. Section 15.1.1 states the following principles that guide this article:

- the Inuit are traditional and current users of certain marine areas, especially the land fast ice zones;
- the legal rights of Inuit in marine areas flowing from the Agreement are based on traditional and current use;
- Inuit harvest wildlife that migrate beyond the marine areas;
- an Inuit economy based on marine resources is both viable and desirable;
- there is a need for Inuit involvement in aspects of Arctic marine management, including research.

Article 15 explicitly discusses the regime applicable to marine areas. It provides that the following articles and process apply to marine areas, subject to restrictions contained in those articles and processes:

- Article 5: Wildlife,
- Article 6: Wildlife Compensation,
- Article 8: Parks,
- Article 9: Conservation Areas,
- Article 11: Land Use Planning,
- Article 12: Development Impact,
- Article 23: Inuit Employment Within Government,
- Article 24: Government Contracts,
- Article 27: Natural Resource Development,
- Article 33: Archeology, and
- Article 34: Ethnographic Objects and Archival Materials.

The analysis in this section of the report is quite restrictive, given the breadth

and extent of Inuit rights under the Agreement. The analysis discusses the impact of certain Inuit rights on the western Hudson Bay region. The definition and interpretation of the Nunavut Settlement Area is discussed first, followed by a discussion of Inuit Owned Lands and water rights. The Agreement transfers extensive Inuit Owned Lands adjacent to the coast, including the coast of Kiviliq. The Inuit have rights to compensation when water quality, quantity and rate of flow on or adjacent to these lands are affected by development.

Following this, Inuit wildlife rights are discussed. The Inuit have rights for wildlife harvesting and compensation when that harvesting is affected. Articles in the Agreement for parks and conservation areas are then discussed.

The Agreement establishes land and resource management boards as "institutions of public government". The institutions include the Nunavut Wildlife Management Board, the Nunavut Planning Commission, the Nunavut Impact Review Board, the Nunavut Water Board and the Nunavut Surface Rights Tribunal. Some of these boards appoint members to the Nunavut Marine Council, an advisory board for offshore marine waters. These institutions are briefly examined to determine their impact on coastal lands and offshore waters. Finally there is an overview of the impact of Agreement external to the Nunavut Settlement Area and within Manitoba as a number of Inuit rights and resource management processes extend beyond the Nunavut Settlement Area.

The Nunavut Settlement Area

The Nunavut Final Agreement applies to the Nunavut Settlement Area and beyond, including the western Hudson Bay region. The initial observation is that the boundary of the Nunavut Settlement Area is not identical to the boundary of the Nunavut Territory.

The Nunavut Settlement Area is defined in article 3.1.1 to be composed of Area A and Area B. Area A is the Arctic Islands and mainland of the Eastern Arctic and adjacent marine areas. Area B is the Belcher Islands, associated islands and adjacent marine areas in Hudson Bay. The Nunavut Territory includes all these areas, plus the islands of Hudson Bay, the Hudson Strait, James Bay and Ungava Bay.³¹

As a result of these definitions, the Nunavut Territory and the Nunavut Settlement Area include the offshore marine areas of Hudson Bay north of 60th parallel. Figure 1 which is the map of the western Hudson Bay region illustrates the boundaries of the Nunavut Territory and the Nunavut Settlement Area.

In the Agreement, the Inuit cede aboriginal rights and title to lands, waters and the offshore in the Nunavut Settlement Area. Inuit rights are then those rights under the Agreement. Article 2.7.1 addresses the cessation of Inuit title:

2.7.1 In consideration of the rights and benefits provided to the Inuit by the Agreement, Inuit hereby:

(a) cede, release and surrender to Her Majesty The Queen in Right of Canada, all their aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada ...

Therefore, other than lands and waters in Manitoba, Inuit rights are restricted to those rights described in the Nunavut Final Agreement, and apply to the Nunavut Settlement Area. The only exception to the Inuit release of aboriginal rights and title is for lands and waters in Manitoba. Article 42.1.1 of the Agreement specifies the cessation of aboriginal rights and title does not apply to lands and fresh waters within Manitoba.

³¹ Nunavut Act, section 3.

Inuit Owned Lands and water rights

Inuit Owned Lands are located throughout the Nunavut Territory, including the Kivalliq region. These are located primarily along the coast and rivers. The location of these lands is illustrated in the map of the western Hudson Bay region. Other significant private lands in the territory are Commissioners Lands, which are located within municipalities and local communities and being transferred to these municipalities and communities.

Inuit Owned Lands include lands covered by water, except if the title states otherwise or water is a boundary of the lands or if the lands do not enclose the lake or water body. Inuit Owned Lands do not include marine lands or waters.³²

Some definitions are useful to understand the status of Inuit Owned Lands. In the Agreement, "lands" are defined to not include water, but to include all lands covered by water, whether in the onshore or offshore. "Water" means waters in any river stream, lake or body of inland waters on the surface or underground in the Nunavut Settlement Area, and includes ice and all inland ground waters, but does not include water or ice in marine areas.

Other definitions are useful to understand land ownership on the coast. "Marine areas" are Canada's internal waters or territorial sea, whether open or ice covered in the Nunavut Settlement Area, but do not include inland waters. Internal waters

³² Nunavut Final Agreement, article 19.2.5-6.

or territorial sea include the seabed and subsoil beneath these waters.³³

Inuit Owned Lands are private lands, where the Inuit either own surface lands, or surface lands and subsurface rights. Where they only own surface lands, other parties may explore and develop mineral resources, subject to requirements in the Agreement. There are no Inuit Owned Lands in marine areas.³⁴

The Kivalliq Land Administration manages Inuit Owned Lands in the Kivalliq region in accordance with the most recent land use plans in effect for the region, and its rules and procedures.³⁵ Inuit Owned Lands are subject to the land and resource management boards discussed subsequently, and rights of public access.

All Inuit Owned lands adjacent to a sea coast, navigable waters or navigable lakes are subject to a public right of access for the purpose of travel by water. This access is for a 100 foot strip measured from the ordinary high water mark of the coast and these rivers and lakes. No fee is payable, but persons exercising this right can not cause damage, mischief, or interfere with the Inuit enjoyment of these lands. Access for other purposes requires Inuit consent and perhaps the payment of compensation.³⁶

³³ Nunavut Final Agreement, definitions in article 1.1.1.

³⁴ Nunavut Final Agreement, article 15.2.3.

³⁵ *Keewatin Regional Land Use Plan* (Nunavut Planning Commission, 1998). This plan is being replaced revised by subsequent land use plan for the Kivilliq region. However, this revised plan is not yet available.

³⁶ Nunavut Final Agreement, article 21.

The Inuit have water rights for Inuit Owned Lands. The Inuit have the exclusive right to use waters on their lands, subject to any requirements for an approval by the Nunavut Water Board. Further, the Inuit have the right to have water flow by Inuit Owned Lands substantially unaffected in quality, quantity and rate of flow.³⁷

The Nunavut Water Board approves uses of fresh water in the Nunavut Settlement Area. Water uses in the area that would affect the water on or by Inuit Owned Lands may only be approved by the Board if the applicant for the water use has entered into a compensation agreement with the Inuit, or the Board determines the level of compensation.³⁸

Similarly, water uses external to the Nunavut Settlement Area affecting Inuit Owned Lands may only be approved by the authority there if a compensation agreement has been achieved, or that authority has made a determination.³⁹ It is interesting to consider how the latter requirement may be enforced, particularly if the water use is occurring in a province where a provincial government has jurisdiction over water uses.

Subject to the requirement of compensation, Inuit water rights do not affect the Nunavut Water Board's ability to approve water uses in the Nunavut Settlement Area. Inuit water rights also do not affect public rights of navigation on those waters, or the use of water for emergency or domestic purposes.⁴⁰

Considering Inuit Owned Lands and water rights for the western Hudson Bay region, these rights will require the participation of the Inuit and Inuit organizations in integrated management for the region. Inuit Owned Lands are private lands where the Inuit or other parties will engage in, regulate or affect development activity. As such, knowledge of these activities and their regulation will be important for integrated coastal management for the region.

³⁷ Nunavut Final Agreement, article 20.2.2-4.

³⁸ Nunavut Final Agreement, article 20.3.1-4.

³⁹ Nunavut Final Agreement, article 20.4.1-3.

⁴⁰ Nunavut Final Agreement, article 20.5.1-2.

Inuit wildlife rights

Article 5 of the Nunavut Final Agreement discusses Inuit wildlife rights, while article 6 describes wildlife compensation when these rights are affected. Some general definitions for wildlife are found in article 1 of the Agreement.

In article 1, "wildlife" is defined as all terrestrial aquatic, avian and amphibian flora and fauna. "Marine species" are defined as fish, shellfish, crustaceans, marine mammals, and the eggs, spawn and immature stages of these species.⁴¹

Article 5 begins with a summary of the principles for wildlife. These principles are as follows:

- 5.1.2 ... (a) Inuit are traditional and current users of wildlife;
- (b) the legal rights of Inuit to harvest wildlife flow from their traditional and current use;
- (c) the Inuit population is steadily increasing;
- (d) a long-term, healthy, renewable resource economy is viable and desirable;
- (e) there is a need for an effective system of wildlife management that complements Inuit harvesting rights and priorities, and recognizes Inuit systems of wildlife management that contribute to the conservation of wildlife and protection of wildlife habitat;

(f) there is a need for systems of wildlife management and land management that provide optimum to the renewable resource economy;

(g) the wildlife management system and the exercise of Inuit harvesting rights are governed by and subject to the principles of conservation;

there is a need for an effective role for Inuit in all aspects of wildlife management, including research; and

(i) Government retains the ultimate responsibility for wildlife management.

Article 5.1.3 and 5.1.4 describe the objectives for a system of Inuit harvesting rights, priorities and privileges for wildlife, and a wildlife management system. These systems are subject to principles of conservation, including the protection of wildlife habitat, and the maintenance and restoration of healthy wildlife populations.

Inuit wildlife rights and wildlife compensation are discussed here. While government retains ultimate jurisdiction for wildlife, the Nunavut Wildlife Management Board is the primary instrument of wildlife management in the Nunavut Settlement Area. The board is discussed under the land and resource management boards.

Article 5.6 describes Inuit harvesting rights. If no limitations have been set upon a stock or wildlife population, Inuit may harvest wildlife to their full level of their economic, social and cultural needs. If a total allowable harvest has been set by the Nunavut Wildlife Management Board, Inuit harvest wildlife in accordance with that restriction and the terms of article 5.6. This system of limitations and allocations of the wildlife harvest is not discussed here.

⁴¹ Nunavut Final Agreement, article 1.1.1.

Article 5.7 discusses Hunter and Trappers Organizations and Regional Wildlife Organizations which supervise Inuit harvesting. Each community, and every outpost organization which requests one, has a Hunter and Trapper Organization. The Keewatin Wildlife Federation is the Regional Wildlife Organization for the Kivalliq region.

After Inuit social, cultural and economic needs are satisfied, the Nunavut Wildlife Board allocates surplus in the following order of priority: other residents, existing sport and commercial operations, economic ventures sponsored by Hunter and Trapper Committees and Regional Wildlife Organization, and residual uses such as commercial, commercial sport and recreational uses.

As indicated, Inuit commercial uses follow in priority immediately after existing sport and commercial operations. If a person other than Inuk harvest big game, they are obliged to use an Inuit guide. Designated Inuit organizations also have the right of first refusal to establish new sports and naturalist lodges in the Nunavut Territory.⁴²

The commercial utilization of wildlife is an important issue for the Inuit, and for any integrated coastal regime for the western Hudson Bay region. The Nunavut Wildlife Management Board is working directly with territorial Department of Sustainable Development on the promotion of commercial harvests. Fisheries and Oceans Canada have also entered a memorandum of understanding with the Department of Sustainable Development for emerging fisheries development. The Inuit

⁴² Nunavut Final Agreement, articles 5.6.31-5.6.42 and 5.8.1.

and the Nunavut Wildlife management Board, along with numerous other parties, are participants in the Northern Shrimp Advisory Committee, and involved in the implementation of the Northern Shrimp Management Plan.⁴³

Inuit commercial harvesting rights have already been the subject of litigation. *Nunavut Tunngavik Inc v Canada (Minister of Fisheries and Oceans)* (Doc. no. A-583-97) (FCA) examines the allocation of the total allowable catch for turbot in Zone I under article 15.3 of the Agreement. In 1997, the Minister of the Fisheries and Oceans had reallocated an increase in the catch for turbot so that the Inuit's overall share of the catch was reduced from 27.3% to 24%. The corporate arm of the Inuit, Nunavut Tunngavik Inc, challenged this reallocation on a number of grounds.

The Federal Court Trial Division issued a decision on the matter, that was appealed to the Federal Court of Appeal. The Federal Court of Appeal set aside the Minister's decision as being contrary to law, and referred the matter back to the current Minister. The court did so as there were no explanations or reasons that the Minister's decision was lawful, leading to the reasonable inference that the Minister did not give special consideration to the adjacency and economic dependence principles, as required by the Agreement. The Minister could also have misconstrued

⁴³ News release "Government of Nunavut and Nunavut Wildlife Management Board pledge closer working relationship" (July 15, 1999); and *Canada-Nunavut Memorandum of Understanding on Emerging Fisheries Development*, between Fisheries and Oceans Canada and Department of Sustainable Development (2000).

these principles when allocating commercial fishing licences within the zone.

Last, Part 9 of article 5 focuses on international and domestic interjurisdictional agreements. Legislation implementing these agreements treat the Inuit on at least as favourable a basis as any other aboriginal people in Canada. Further, Canada agrees to include Inuit in discussions for international agreements relating to Inuit wildlife harvesting rights in the Nunavut Settlement Area.

Article 6 describes the wildlife compensation process that applies to developments and marine transportation. This process is very extensive as it applies to the Nunavut Settlement Area, and Zones I and II. Zone I are those waters north of 60 degrees of latitude in Canadian jurisdiction that are not within the Nunavut Settlement Area. Zone II are those waters of James and Hudson Bay, and Hudson Strait that are not within the Nunavut Settlement Area or another land claim agreement.

Wildlife compensation interrelates with other forms of compensation in the Agreement. Compensation for negative impacts on Inuit water use, and for entry and access to Inuit lands applies to damage that can be determined in advance. Other claims are made through article 6. If parties enter into Inuit Impact and Benefit Agreements they do not need to enter into compensation arrangements for negative impact on water use or access.

There are separate regimes for marine transportation, and development, which is defined to exclude marine transportation. A complex regime in place delineating compensation for marine transportation. If marine transportation is directly associated with commercial,

industrial, municipal, territorial or federal undertaking on land or water in the Nunavut Settlement Area, a specific regime governs. The federal government will specify a person, fund or both capable of assuming liability for marine transportation. That person or fund will be considered a developer and that marine transportation shall be considered a development activity for the purpose of article 6.

Wildlife compensation differs for commercial shipping not directly associated with these undertakings. In this situation, the Inuit are entitled to compensation under the laws of general application, and under terms at least as favourable as those applying to wildlife harvesters in other areas of Canada. At this time, this liability is likely to be addressed by statutes such as the *Canada Shipping Act* and the *Arctic Waters Pollution Prevention Act*, with liability flowing to the shipper or Canadian or international funds.

Article 6.3 states the general principal that a developer is absolutely liable, without proof of fault or negligence for loss or damages suffered by the Inuit in respect of loss or damage to property or equipment used in wildlife harvesting, present and future loss of income and wildlife for personal use. Developer's liability is eliminated for limited *force majeure* events, which is legal term of art referring to acts of war or natural phenomena or events of an exceptional, inevitable or irresistible character. Claimants are required to make reasonable efforts to mitigate. The article describes a process for claims before the Nunavut Surface Rights Tribunal, which is not discussed here.⁴⁴

⁴⁴ Nunavut Final Agreement, article 6.3 and 4.

Article 6.3.4 is an extensive provision, which describes the role of legislation in allocating liability. It states:

6.3.4 Legislation may provide for appropriate limits of liability of develops or methods of setting such limits and shall also require proof of fiscal responsibility and may also provide for security deposits and any other matters not inconsistent with this Article. Recognizing Inuit concerns regarding collection of compensation, Government will give consideration to including enforcement mechanism. Limits of liability will be set at level sufficient to cover reasonably foreseeable damages.

Proposed legislation, which has since died, highlights the difficulties of legislatively implementing wildlife compensation. Bill C-62: *Nunavut Waters Act and Nunavut Surface Rights Tribunal Act* addressed wildlife compensation and statutory limits of liability. Under section 152 of the Bill, developers were absolutely liable, subject to exceptions, for losses or damages to wildlife that were experienced by the Inuit as a result of development activity. The Bill created a ceiling on the developer's liability at 20 million dollars per incident. Section 153 provided for additional rules of liability, and access to the Ship-source Oil Pollution Fund under the *Canada Shipping Act*.

Nunavut Tunngavik Inc. commented extensively on this Bill. For wildlife compensation, it noted that the provisions of this Bill were not adequate to implement article 6.3.4. Specifically, the 20 million dollar ceiling for loss or damage from one incident was too low, and there is no

requirement for proof of financial responsibility, security deposits, or enforcement mechanisms.⁴⁵

There are parallels between ambiguous limits on wildlife compensation under the Inuvialuit Final Agreement and the Nunavut Final Agreement, statutory limits under the proposed Bill C-62, and statutory limits for offshore oil and gas activities under the *Arctic Waters Pollution Prevention Act*. There has been longstanding dispute over the interpretation of wildlife compensation under the Inuvialuit Final Agreement and the role of legislation in defining and limiting that compensation. There has also been the issue of whether the twenty to forty million dollar limitation under the *Arctic Waters Pollution Prevention Act* is sufficient, given the likely cost of damages and cleanup for incidents in marine waters involving oil and gas exploration and production.

⁴⁵ Hurley, M.C. et al, *Bill C-62: Nunavut Waters and Nunavut Surface Rights Act: Legislative History of Bill C-62 (9 June 1999)* at 10 of 14, and Vertes N L et al., *Five Year Review 1993 to 1998: Implementation of the Nunavut Land Claims Agreement An Independent Review* (October 1999) at 2-20.

Parks and conservation areas

Articles 8 and 9 of the Agreement discuss parks and conservation areas, and the Inuit Impact and Benefit Agreements (IIBA) that apply within these parks and areas. Each article will be discussed in turn.

Article 8 discusses national and territorial parks, as well as general provisions that apply to all parks such as IIBA, other Inuit economic benefits, management, Inuit access and new parks.

Article 8.2 addresses national parks in the Nunavut Settlement Area. It recognizes the desirability of establishing national parks in representative region, and indicates Parks Canada will work with designated Inuit organizations, affected communities and the territorial government. Several proposed parks are then summarized, including the Ukkusiksalik (Wager Bay) National Park near Wager Bay in the Kivalliq region.

If federal government attempts to redraw boundaries of a national park or remove lands, article 8.2.6 requires public consultation and that the lands be offered to the Inuit in exchange for comparable Inuit Owned Lands. However, this provision does not apply to marine areas within a national park.

Several provision address parks management. Subject to IIBA, each national park is required to be predominantly special preservation and wilderness zones. Subject to limited exceptions, land use planning and environmental assessment provisions of the Agreement apply to the establishment of new national parks, including Ukkusiksalik

National Park. Land use planning does not apply to national parks once they are established. Environmental assessment only applies to project proposals within the parks.

Water uses in the parks are regulated by park management plans and laws of general application. Legislation implementing the Nunavut Water Board will determine whether the Board has jurisdiction within the park. However, Inuit continue to be entitled to compensation if water use in national parks affects Inuit water rights on Inuit Owned Lands. The compensation can be determined under article 20, or within an IIBA.

Article 8.3 contains requirements for territorial parks, which are very similar to requirements for national parks. There is an acknowledgement that it is desirable to establish territorial parks. If the territorial government intends to redraw boundaries or remove lands from a territorial park, there are similar requirements that they conduct public consultation and offer the lands to the Inuit, and a similar restriction that this does not apply to marine areas. The territorial government and the Inuit recognize the desirability of involving Inuit and local residents in the planning and management of these parks, and there is the requirement that these parties be involved.

Similarly to national parks, land use planning and environmental assessment apply to the establishment of new parks. Land use planning does not apply once the parks are in place. Environmental assessment applies to project proposals in the parks. Unlike national parks, the Nunavut Water Board and Inuit water rights and compensation apply to and within territorial parks. Finally, the territorial government and Inuit organizations may

negotiate Inuit participation in the planning and management of the parks.⁴⁶

Article 8.4 describes IIBA and other Inuit economic benefits for national and territorial parks. These provisions also apply, with some restrictions, to conservation areas and the government agencies with responsibilities for these areas. No parks may be established until the requirements in articles 8.4.4 and 8.4.5 have been complied with.

Prior to the establishment of a park, Parks Canada, in conjunction with other federal departments, and a designated Inuit organization are required to negotiate an IIBA. The agreement includes any matter with the park that could confer a detriment or benefit to the Inuit. Schedule 8-3 lists some but not all factors that appropriate for IIBA. The schedule includes preferential Inuit employment, training, business opportunities, Inuit access to the park, important environmental concerns, including measures for the protection and conservation of wildlife, and land uses and restrictions in the park.⁴⁷ Inuit harvesting rights and compensation continue in the park, though it is not necessary to negotiate compensation if there is an IIBAs.⁴⁸

If Parks Canada and the designated Inuit organization can not agree on an IIBA in a reasonable period of time, the parties are required to article 8.4.5 appoint a conciliator who shall submit a report to the responsible Minister. There is also a requirement that parties finalize negotiations for IIBA prior to the fifth anniversary of the

⁴⁶ Nunavut Final Agreement, article 8.3.1 to 8.3.9.

⁴⁷ Nunavut Final Agreement, article 8.4.1 to 8.4.4.

⁴⁸ Nunavut Final Agreement, articles 8.4.19 and 6.5.1 to 6.5.2.

Agreement, or by 1998, and that agreements be renegotiated every seven years.

Interestingly, there is an ambiguous statement in article 8.4.5: "The obligation to conclude an IIBA with respect to any proposed Park shall endure only so long as the other party is acting in good faith." The meaning of this statement does not seem to have been explored, despite a relatively drawn out process for negotiating IIBA for all the parks and conservation areas.⁴⁹

The Agreement provides further economic benefits, such as preferential treatment to qualified Inuit contractors in the tendering of contracts, ensuring that contractors give preferential treatment to Inuit, and that Inuit organization shall have a right of first refusal on business opportunities contracted out for the parks.

Finally, articles 8.4.11 to 8.4.14 provide for joint Inuit and government parks planning and management committees shall be established through the IIBA, upon the request of either the Inuit or government. The committee shall consist of equal numbers of members of Inuit and government members. Separate committees are to be established for territorial and federal parks.

The committee may advise the Minister, the Nunavut Water Board and other agencies on parks management, and recommend a management plan for the park. The management plan must be developed within five years of the establishment of the park, and is based on the recommendation of the committee after they have considered the recommendations of interested persons and bodies. After review by the committee, the plan are send to the Minister for

⁴⁹ Nunavut Final Agreement, article 8.4.5 o 8.4.7.

consideration and approval. These plans may then be reviewed and revised, as provided in the plan. These shared management obligations continue even in the absence of an IIBA.

The proposed Ukkusiksalik National Park is the only national park being finalized in the Kivalliq region of the Nunavut Territory. This proposed park is located in and around Wager Bay, and will include the marine waters. Land for the park has been withdrawn from disposal under the *Withdrawal from Disposal Order (Wager Bay National Park, N.W.T.)*, SI/96-87, but the park has not been officially established.

Wager Bay supports bearded seals and ring seals, and beluga whales in the summer time. Polar bears are numerous, two caribou herds are found here as well as wolves and smaller arctic mammals. Forty species of birds nest here including Canada's densest population of peregrine falcons.

Negotiations on the IIBA for the park, involving Parks Canada, the government of Nunavut and Inuit are almost complete. IIBA negotiations are underway for territorial parks as well, but are not yet completed.⁵⁰

Given the Ukkusiksalik National Park is not finalized, it is not indicated on the map of the western Hudson Bay region. No further national parks are being planned for Kivalliq at this time. Existing territorial parks and conservation areas in the Kivalliq region are indicated on Figure 1, which is the map of western Hudson Bay region.

⁵⁰ Vertes N L et al., *Five Year Review 1993 to 1998: Implementation of the Nunavut Land Claims Agreement An Independent Review* (October 1999), at 2-23 to 2-37; and personal communications with Parks Canada in November 2000.

Article 9 defines conservation areas, and discusses their conservation and management, the application of IIBA, and specific provisions for the Thelon Game Sanctuary. Conservation areas are defined to include national wildlife areas, migratory bird sanctuaries, wildlife sanctuaries, critical wildlife areas, Ramsar wetland sites, and Canadian Heritage Rivers, and areas of particular significance for ecology, culture, archeology or research.⁵¹

Article 9.3 discusses conservation and management. Government, in consultation with the Inuit, are required to conduct a survey to determine the need for new legislation, or the amendment of existing legislation to designate and manage terrestrial and marine conservation areas in the Nunavut Territory. This survey was to have been completed and published within two years of the Agreement, or 1995.⁵²

The Nunavut Wildlife Management Board must approve the establishment, removal and changes to the boundaries of conservation areas for the management and protection of wildlife and habitat. Specific provision address the treatment of Inuit Owned Lands, and the applicability of federal and territorial legislation. Land use planning, environmental assessment, water licensing and Inuit water rights apply to conservation areas. The same provisions for shared management apply to parks and conservation areas.⁵³

Article 9.4 discusses IIBAs and conservation areas. This is identical to requirements for parks, subject to the

⁵¹ Nunavut Final Agreement, article 9.1.1.

⁵² Nunavut Final Agreement, article 9.3.1.

⁵³ Nunavut Final Agreement, articles 9.3.2 to 9.3.8.

following restrictions. In the case of emergencies, an IIBA may be concluded after the establishment of the area. Further, IIBA do not apply if the area would not have a detrimental impact on the Inuit or reasonably confer a benefit. IIBAs also apply to both conservation areas and government agencies having responsibilities for the areas.

Article 9 concludes with provisions for the Thelon Game Sanctuary, which is not discussed here, and general provisions. These general provisions confirm the existence of Inuit wildlife rights in the conservation areas. They also confirm Article 9 applies to marine areas.

There seem to be close parallels between Inuit harvesting, economic and management rights for national and territorial parks and conservation areas in the Kivalliq region and similar Manitoba First Nation rights for the Wapusk National Park, wildlife management areas and resource management areas of northern Manitoba.

Despite the different designations, all these parks and areas are characterized by aboriginal harvesting rights, some degree of preferential economic treatment and shared management approaches. One difference may be the clear application of these rights and management approaches to marine areas in Kivalliq. Given the common issues and interjurisdictional species, it might be interesting to undertake some comparison as to what initiatives are particularly satisfactory for the purposes of participation and conservation.

Nunavut land and resource management boards

The Nunavut Final Agreement establishes institutions of public government for land and resource management within and beyond the Nunavut Settlement Area. These institutions are joint management boards with nominees from the federal and territorial governments and the Inuit. These boards are referred to as "institutions of public government" in the Agreement, and have a duty to implement the terms of the Agreement in a fair and impartial way. These institutions include the Nunavut Wildlife Management Board, Nunavut Planning Commission, the Nunavut Impact Review Board, the Nunavut Water Board, and the Nunavut Surface Rights Tribunal.

The Nunavut Final Agreement provides the final word on the boards and their processes. Given the delays in enacting legislation to implement boards other than the Nunavut Wildlife Management Board, the Agreement and the internal policies and guidelines of the boards provide the most meaningful description of the legal regime governing the boards and applications within their jurisdiction.

Both the Tunngavik Nunavut Inc and independent five year review of the implementation of the Agreement noted the absence of an active management approach to implementing the Agreement by all parties, and the need to separate implementation of the Agreement from attempts to renegotiate the agreement to eliminate or add benefits.

The independent review directly comments on the implementation

environment. These comments are included as they provide a perspective on the difficulties in understanding resource management under the Agreement.

"The NCLA [Nunavut Final Agreement] is a very large and complex undertaking. The Agreement, the [Implementation] Contract and the development since July, 1993 add to the complexity. The decentralized nature of the implementation environment and its component parts adds a further layer of complexity. The evolution of the IPG [institutions of public government] and the introduction of the Government of Nunavut add still more.

The Agreements are complex in both content and detail. No one has the whole picture.

At the same time there are considerable misconceptions about the Agreements. Representatives of the parties are not well informed about rights and obligations under the NCLA, nor is the administrative machinery that provides substance to many of the rights and obligations. High turnover in many key position exacerbates the problem. ...

The public is not generally aware of the content of the Agreements, although there are high expectations in some areas. At the moment, this is made worse by the lack of anticipated legislation and revisions to the laws of general application. It would be useful to have the public better informed about the basic facts,

as laid out in the Agreement and the Implementation Contract."⁵⁴

The Nunavut Wildlife Management Board, Nunavut Planning Commission, the Nunavut Impact Review Board, the Nunavut Water Board, and the Nunavut Surface Rights Tribunal are in their early implementation stage. The Nunavut Wildlife Management Board was implemented very briefly under the *Nunavut Land Claims Agreement Act*. Under this Act, there is no description of the powers and responsibilities of the Board.⁵⁵

With this exception, these resource and management boards have not been legislatively implemented. Further, federal and territorial legislation touching upon the responsibilities of these boards has not been consistently revised to reflect the reallocation of jurisdiction considered below.

This portion of the report reviews the Nunavut Marine Council, the Nunavut Wildlife Management Board, the Nunavut Planning Commission, the Nunavut Impact Review Board, the Nunavut Water Board, and the Nunavut Surface Rights Tribunal. Other than the Nunavut Wildlife management Board, these agencies are discussed very briefly. Parties are referred to other materials for a more detailed analysis

of their role for resource management within the Nunavut Settlement Area.⁵⁶

Nunavut Marine Council

Marine issues are central to the Nunavut Final Agreement, and addressed in several ways. One aspect is the creation of coordinated decision making for land and marine areas through the creation of the Nunavut Marine Council.⁵⁷ Different land and resource management boards have indicated their interest in marine issues and conservation.⁵⁸

Article 15.4 of the Agreement provides that the Nunavut Planning Commission, the Nunavut Impact Review Board, the Nunavut Water Board may jointly, as a Nunavut Marine Council, or independently advise and make recommendations to other government agencies regarding marine areas, and that government will consider this advice and recommendations in making decisions which affect marine areas.

On 25 June 1998, the Nunavut Planning Commission, the Nunavut Impact Review Board and the Nunavut Water Board entered into an agreement to create the Nunavut Marine Policy Advisory Council.

⁵⁶ One such report was completed by the author: M. Muir, *Comprehensive land claims agreements for the Northwest Territories: implications for land and water management*, book co-published by the Arctic Institute of North America and the Canadian Institute of Resources Law, November 1994.

⁵⁷ Gillis, B, "The Nunavut Final Agreement and Marine Management in the North", in CARC-Northern Perspectives (Volume 23, Number 1, Spring 1995).

⁵⁸ News releases, "Nunavut co-management boards issue joint declaration on marine conservation" (10 December 1997).

⁵⁴ Vertes N L et al., *Five Year Review 1993 to 1998: Implementation of the Nunavut Land Claims Agreement An Independent Review* (October 1999), at 5-1 to 5-5, and 5-34. The quote is from 5-34.

⁵⁵ Nunavut Land Claims Agreement Act, sections 10 to 12.

The three land and resource management boards become full members of the Council. They also introduced a paper, the Nunavut Marine Issues Action Plan, which sets out the Council's mandate.

The Nunavut Wildlife Management Board and the Nunavut Tunngavik Inc also signed the agreement and are associate members of the Council. The Nunavut Marine Policy Advisory Council is an intermediate organization until the Nunavut Wildlife Management Board joins, at which point it will become the Nunavut Marine Council referred to in the Agreement.⁵⁹

It is difficult to discuss the Nunavut Marine Policy Advisory Council, or the Nunavut Marine Council. There are very limited provisions for the Nunavut Marine Council in the Agreement. There is also no readily available information about the activities of the Nunavut Marine Policy Advisory Council .

Nunavut Wildlife Management Board

Wildlife in the Nunavut Territory is managed in accordance with Inuit harvesting rights and wildlife compensation regimes under the Agreement. The Agreement provides that federal or territorial government retains ultimate responsibility for wildlife management, permitting a flexible allocation of authority between government and the board, depending on the board's responsibility and the matter being considered.

As the result of the transfer of authority from the federal government, the territorial government has legislative

⁵⁹ "New Nunavut marine council sets sail", article in Nunavut Edition Headline News (2 July 1998).

authority for terrestrial wildlife, subject to any requirements for wildlife in the Nunavut Final Agreement. For example, the Nunavut Wildlife Management Board works directly with territorial Department of Sustainable Development on the promotion of commercial harvests.

Other federal departments are also involved. Fisheries and Oceans Canada is involved with fresh water and marine species and their habitat. Environment Canada is active with migratory birds and terrestrial species, including polar bears. Parks Canada Agency is active with species and habitat within their parks and designated areas. All these parties cooperate with the Nunavut Wildlife Management Board, though their legislation may not have been modified to reflect the Nunavut Final Agreement.

The territorial government is a one exception as representatives of the territorial government, the Nunavut Tunngavik Inc. and the Nunavut Wildlife Management Board signed terms of reference on 29 September 2000 to create a task force to devise a new law governing the management of wildlife in the territory. However, this process is expected to take a least two years, and will only include terrestrial matters within the government's jurisdiction.⁶⁰

"Taking Stock: A Review of the First Five Years of Implementing the Nunavut Land Claim Agreement" discusses problems in relation to implementation of the wildlife provisions of the Agreement, including the delayed amendment of laws of general application to conform with the Agreement.

⁶⁰ News release, "Nunavut Asserts its Autonomy with New Wildlife Law" (Environmental News Service, 2 October 2000).

Potential interpretive difficulties arising from delay in implementing wildlife legislation are eloquently summarized in the following passage:

"Unfortunately, unless considerable greater bureaucratic energy is invested in the updating of federal and territorial laws to accommodate the Nunavut Agreement, the ability of even professional wildlife managers- let alone members of the public- to understand the wildlife management regime in post-division Nunavut will be almost impossible. To do so, it will be necessary to go through a series of interpretative challenges that many lawyers would find difficult: first look at the Nunavut Act, then import the wildlife laws of the pre-division Northwest Territories as "grandfathered through", then read Article 5 of the Nunavut Agreement and, as stipulated by the federal *Nunavut Land Claims Agreement Act*, read down (or out) all those Northwest Territories wildlife laws that conflict or are inconsistent, and then, if any doubt remains, speculate as to the interpretive applications of the protections provided land claims rights under section 35 of the *Constitution Act, 1982*."⁶¹

The Nunavut Wildlife Management Board is the main instrument of wildlife management in the Nunavut Settlement Area, the main regulator of access to wildlife, and has primary responsibility for wildlife as described in the Agreement.

⁶¹ Taking Stock: A Review of the First Five Years of *Implementing the Nunavut Land Claim Agreement*, (NTI, 1999) at 65-67.

The Nunavut Wildlife Management Board is composed of nominees of Fisheries and Oceans Canada, Environment Canada, the Department of Indian Affairs and Northern Development, the territorial Department of Sustainable Development, and four Inuit nominees.

The Board's jurisdiction extends to land and marine regions of the Nunavut Settlement Area. The Board is assisted in the performance of its duties by different government departments, which nominate a board member and who may provide scientific expertise and conduct research on their behalf, and by local Inuit Organizations and Hunter and Trappers Committees.

The interaction between the Nunavut Wildlife Management Board, and parks and conservation areas is explicitly addressed when the Agreement provides the both the Board and the Minister are required to take into account the special purposes and policies for those areas.

The Nunavut Wildlife Management Board's role for wildlife management extends beyond the Nunavut Settlement Area for species like caribou, seals and beluga whales and polar bears which migrate beyond the territory and are hunted by different groups. The Agreement addresses wildlife populations that migrate outside the Nunavut Settlement Area and are harvested in those jurisdictions. In those situations, the Nunavut Wildlife Management Board and Minister are required to consider terms of domestic interjurisdictional agreements and international agreements when setting harvest levels in the Nunavut Settlement Agreement.

The Nunavut Wildlife Management Board also has a role with inter-

jurisdictional management, as article 5.9.5 states that the Board shall "have a role in the negotiation or amendment of domestic interjurisdictional agreements commensurate with its status and responsibility in the management of wildlife in the Nunavut Settlement Area." This provision suggests the Board will have a very extensive role, particularly with interjurisdictional arrangements for the western Hudson Bay region. Agreements for Zones I and II are considered domestic interjurisdictional agreements.⁶²

Article 5: Wildlife applies to marine areas of the Nunavut Settlement Area. Article 15.3 of the Agreement discusses the role of the Nunavut Wildlife Management Board beyond marine areas in the Nunavut Settlement Area. Government is required to maintain structures to promote coordinated migratory marine species in Zones I and II (which includes Hudson Bay) and adjacent areas. The Nunavut Wildlife Management Board appoints representation to these structures. The Board also provides advice for wildlife management decision in Zones I and II if they affect Inuit harvesting rights in the marine areas of the Nunavut Settlement Area. Lastly, the Board may identify wildlife research requirements and deficiencies, review research proposals and applications, and recommend acceptance of these proposals and applications.

Nunavut Surface Rights Tribunal

The Nunavut Surface Rights Tribunal is responsible for determining access to Inuit Owned Lands under article

⁶² Nunavut Final Agreement, articles 5.3.4, 5.3.6, 5.9, and 15.3.5.

21, and wildlife compensation under article 6. Article 20.8 establishes the Nunavut Surface Rights Tribunal, which applies to the Nunavut Settlement Area.

Nunavut Planning Commission

The Nunavut Planning Commission is responsible for land use planning for the Nunavut Settlement Area. Article 11 describes the land use planning process, which applies to land, water and marine areas in the Nunavut Settlement Area, and the Outer Land Fast Ice Zone off the East Baffin Coast.

A land use plan is currently in place for the Kivalliq region. This is the *Keewatin Regional Land Use Plan* of 1998. This plan has been revised after extensive community-based consultation. A new land use plan for the Kivalliq region will be released by the Nunavut Planning Commission in early 2001.

Nunavut Impact Review Board

The Nunavut Impact Review Board is responsible for environmental impact assessment in the Nunavut Settlement Area. Article 12 describes the environmental assessment process that applies to land, waters and marine areas within the Nunavut Settlement Area, and the Outer Land Fast Ice Zone.

Article 12.11 specifies that environmental assessment process applies to project proposals that take place within the Nunavut Settlement Area and adjacent areas. The process may also apply to projects located outside the Nunavut Settlement Area that affect the area.

The federal and territorial government, as assisted by the Nunavut Impact Review Board, will negotiate

agreements with other jurisdictions to provide for collaboration in the review of project proposals which may have significant transboundary ecosystemic or socio-economic impacts.

Nunavut Water Board

The Nunavut Water Board is responsible for water applications in the Nunavut Settlement Area and, if necessary, determining compensation for impacts of water uses on Inuit Owned Lands. Article 13 describes the process that applies to fresh waters in the Nunavut Settlement Area.

Article 12.10 provides for interjurisdictional water management between the Nunavut Settlement Area and another jurisdiction. The federal and territorial government, as assisted by the Nunavut Water Board, will negotiate agreements with other jurisdictions for the use and management of drainage basins. The Nunavut Water Board will also collaborate with competent water authorities outside the Nunavut Settlement Area if a water use in its area affects an external area.

Impact of Nunavut Final Agreement in Manitoba

The Inuit have recognized interests under the Nunavut Final Agreement for the Manitoba coast and offshore waters of Hudson Bay. These interests are discussed extensively in an earlier report, and are only briefly summarized here.⁶³

The Nunavut Final Agreement specifies the cessation of aboriginal title under the Agreement does not apply to lands and fresh waters within Manitoba. There are some limits on Inuit rights within Manitoba. The Inuit are not entitled to seek any rights other than a definition of Inuit wildlife harvesting rights in exchange for Inuit claims to the lands and waters in Manitoba. However, the Agreement does not limit remedies for infringements of Inuit claims and rights in Manitoba. Therefore, the Inuit could have a full range of civil remedies to prevent the breach of their aboriginal title.

A number of rights and processes under the Nunavut Final Agreement apply to wildlife harvesting and management in Manitoba and marine waters offshore of that province. These rights and processes include the Nunavut Wildlife Management Board, the Nunavut Marine Council, environmental assessment, wildlife harvesting, and wildlife compensation.

The Agreement addresses wildlife populations that migrate outside the Nunavut Settlement Area and are harvested in those jurisdictions. In those situations, the Nunavut Wildlife Management Board and

the Minister are required to consider terms of domestic interjurisdictional agreements and international agreements when setting harvest levels in the Nunavut Settlement Agreements.

Part 9 of Article 5 focuses on international and domestic interjurisdictional agreements. Legislation implementing these agreements treat the Inuit on at least as favourable a basis as any other aboriginal people in Canada.

Article 6 describes the wildlife compensation process under the Agreement, and includes developments in Zone II of the Hudson Bay.

Article 40 of the Nunavut Final Agreement addresses the relationships between the Inuit and adjacent First Nations who may have overlapping aboriginal claims, or traditional harvesting rights in the other's claims area.

Part 1 of article 40 addresses the relationship between the Inuit Final Agreement and other aboriginal and treaty rights, and indicates the agreement is not intended to affect these other rights. Parts 2 and 3 of article 40 address the Inuit of Northern Quebec and other aboriginal peoples in the Northwest Territories. Part 5 of the article 40 addresses the Denesuline Bands of Northern Saskatchewan.

Part 4 of article 40 considers the Denesuline Indian Bands in northern Manitoba. It discusses reciprocal wildlife harvesting rights between the Inuit and the Fort Churchill and the Northlands Indian Bands. Manitoba First Nations may hunt in the Nunavut Settlement Area and on Inuit Owned Lands on the same terms and with the same access as the Inuit. The harvesting rights of the Inuit and Manitoba First Nations are based on reciprocity. Both

⁶³ M. Muir, *Jurisdictional Issues for Fish and Marine Management in Northern Manitoba*, 1999.

parties have similar harvesting rights and the ability to participate in each other's management process.

Article 42: Part 1 deals with Inuit harvesting rights in Manitoba, while Part 2 which deals with Inuit harvesting rights to the marine area east of Manitoba. The marine area east of Manitoba is the area south of the Nunavut Settlement Area, and between the Manitoba shoreline and 15 miles offshore.

Restrictions on the Inuit harvesting rights may be imposed by a domestic interjurisdictional agreement, and management agencies are required to consider the special purposes and policies relating to parks and conservation areas for these areas. Other provisions focus on the Nunavut Wildlife Management Board and the Keewatin Regional Wildlife Organization and their role with management agencies.

BIBLIOGRAPHY

International Conventions

Agenda 21, United Nations Conference on Environment and Development.

Agreement Between Denmark, Finland, Iceland, Norway And Sweden On Information And Cooperation In Response To Pollution Of The Sea By Oil Or Other Harmful Substances (Copenhagen Agreement).

Agreement Between Denmark, Finland, Iceland And Sweden (Nordic Agreement).

Agreement on the Conservation of Polar Bears and Their Habitat, 1973.

Arctic Environmental Protection Strategy.

Convention On The Protection Of The Marine Environment Of The Baltic Sea Area (Helsinki Convention).

Convention on Wetlands of International Importance especially as Waterfowl Habitat. Referred to as the *Ramsar Convention on Wetlands*.

Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, 1995.

Iqualuit Declaration.

International Convention for the Regulation of Whaling.

Straddling Stocks Agreement. This agreement resulted from the United Nations Conference on Straddling Stocks and Highly Migratory Stocks.

United Nations Conference on Straddling Stocks and Highly Migratory Stocks.

United Nations Convention on the Law of the Sea (1994).

United Nations Framework Convention on Climate Change.

Constitutional documents

A Contract Relating to the Implementation of the Nunavut Final Agreement (DIAND, 1993).

Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada. Referred to as the Nunavut Final Agreement. Tunngavik and Indian Affairs and Northern Development, Ottawa, 1993.

Constitution Act, 1867.

Constitution Act, 1982

Gwich'in Final Agreement.

Manitoba Natural Resources Transfer Agreement, 1930. This agreement is one of the documents that forms part of Canada's constitution.

Manitoba Treaty Land Entitlement Framework Agreement (May 29, 1997).

Memorandum of Understanding between Canada and the

Manitoba Denesuline dated 12 July 1999 to negotiate wildlife harvesting north and south of the 60th parallel, to consider land selection in Manitoba, and to address Manitoba Denesuline concerns with the Nunavut Final Agreement.

Northern Flood Agreement (1977).

Northern Quebec Inuit Offshore Land Claims Agreement. The agreement is currently being negotiated.

Sahtu Dene and Metis Final Agreement.

Western Arctic Claim: the Inuvialuit Final Agreement (1984), subsequently referred to as the Inuvialuit Final Agreement.

York Factory Final Agreement (1996).

Canada-US Joint Marine Pollution Contingency Plan (1998).

Federal-Provincial Memorandum of Agreement for the Wapusk National Park, Parks Canada (April 24, 1996).

The Manitoba Framework Agreement Initiative between the Assembly of Manitoba Chiefs and Canada (7 December 1994).

Memorandum of Understanding for the Assembly of Manitoba Chiefs - MKO - Manitoba Department of Natural Resources Working Group on Manitoba's Network of Protected Areas between MKO, the Assembly of Manitoba Chiefs and the Manitoba Department of Natural Resources (now Manitoba Conservation) (5 March 1998).

Inter-jurisdictional agreements

Beverly-Qamanirjuaq Barren Ground Caribou Agreement dated 4 June 1992 between the governments of Canada, Manitoba, Saskatchewan and the Northwest Territories

Canada-Manitoba Agreement of Environmental Assessment Cooperation (May 2000).

Canada-Nunavut Memorandum of Understanding on Emerging Fisheries Development between Fisheries and Oceans Canada and Department of Sustainable Development (2000).

Legislation

Arctic Waters Pollution Prevention Act, RSC 1985, c A-12.

Canada Oil and Gas Operations Act, RSC 1985, c O-7.

Canada Petroleum Resources Act, RSC 1985, c C-8.5.

Canadian Environmental Assessment Act, SC 1992, c 37.

Canadian Environmental Protection Act, SC 1999, c 33.

Canada Marine Act, SC 1998, c 10.

Canada Shipping Act, RSC 1985, c S-9.

Canada Wildlife Act, RSC 1985, c W-9.

- Crown Lands Act*, RSM 1987, c C-340.
- Department of Indian Affairs and Northern Development Act*, RSC 198, c I-6.
- Ecological Reserves Act*, RSM 1987, c E-5.
- Endangered Species Act*, RSM 1987, c E-111.
- Environment Act*, RSM 1987, c E-125.
- Federal Real Property Act*, SC 1991, c 50.
- Fisheries Act*, RSC 1985, c F-14.
- First Nations Land Management Act*, SC 1999, c 24.
- Game and Fish Act*, R.S. O. 1990, c. F-33.
- Indian Act*, RSC 1985, c I-5.
- Indian Lands Agreement (1986) Act*, SC 1988, c 39.
- Indian Oil and Gas Act*, RSC 1985, c I-17.
- Manitoba Claims Settlement Implementation Act*, formerly Bill C-14, SC 2000.
- Manitoba Natural Resources Act*, RSC 1930, c 29.
- National Parks Act*, RSC 1985, c N-14.
- Navigable Waters Protection Act*, RSC 1985, c N-22.
- Nelson House First Nation Flooded Land Act*, SC 1997, c 29.
- Northwest Territories Waters Act*, SC 1992, c 39.
- Nunavut Act*, SC 1993, c 28.
- Nunavut Land Claims Agreement Act*, SC 1993, c 29.
- An Act to Amend the Nunavut Act and the Constitution Act, 1867*, SC 1998, c 15.
- Oceans Act*, SC 1996, c 31.
- Split Lake Cree First Nation Flooded Land Act*, SC 1994, c 42.
- Territorial Lands Act*, RSC 1985 c T-7.
- Transportation of Dangerous Goods Act, 1992*, SC 1992, c 34.
- Water Power Act*, RSM 1987, c W-60.
- Water Rights Act*, RSM 1988, c W-80.
- Western Arctic (Inuvialuit) Claims Settlement Act*, SC 1984, c 24.
- Wildlife Act*, RSM 1987, c W-130.
- Withdrawal from Disposal Order (Wager Bay National Park, N.W.T.)*, SI/96-87
- York Factory First Nation Flooded Land Act*, c. Y-O.6 (1997, c. 28).

Judicial decisions

- Delgamuuk v. A.G. (B.C.)* [1997] 3 S.C.R. 1010
- Gulf Trawler Association v Canada* [1987] 2 FC 93 (CA)
- Guerin v. The Queen* (1984) 13 D.L.R. (4th) 321 (SCC)
- Ordon Estate v Grail* [1998] SCJ No 84
- Northwest Falling Contractors v The Queen* [1980] 2 SCR 292

Nunavut Tunngavik Inc v Canada (Minister of Fisheries and Oceans) (1998) (Doc no. A-583-97) (FCA) (July 2 and 13, 1998).

R. v Blais [1998] M. J. No. 395 (Man Q B)

R v Keyn (1876) 2 Ex D 63

Re Newfoundland Continental Shelf [1984] 1 SCR 79

Re Offshore Mineral Rights of BC [1967] SCR 792

Re Ownership of the Bed of the Strait of Georgia [1980] 1 SCR 388

R. v Powley [1998 O. J. No. 5310] (Ont Prov Div), [2000 O.J. No 99] (Ont. S.C)

Sparrow v. The Queen, (1992) 70 D.L.R. (4th) 385 (SCC)

Samuel v. The Queen, (Filed March 1993)

Government policies

Canada, *Gathering Strength -- Canada's Aboriginal Action Plan* (1998).

Canadian Coast Guard, Central and Arctic Region. *Arctic Response Strategy*. 23 November 1999.

Canadian Coast Guard, Fisheries and Oceans Canada. *Proposed Adjustments to the Governance of Canada's Marine Oil Spill Preparedness and Response Regime*. December 1998.

Building Relationships and Creating Opportunities: Guiding Principles for Success between the First Nations, Metis Nation,

Northern Community Councils, the Minerals Industry and the Province of Manitoba (March 2000).

Fisheries and Oceans Canada, Habitat Management Branch. *Decision Framework for the Determination and Authorization, Disruption and Destruction of Fish Habitat* (1998).

Fisheries and Oceans Canada, Habitat Management Branch. *Fish Habitat Conservation And Protection: Guidelines For Attaining No Net Loss*.

National Marine Policy. December 1995.

Proposed adjustment to the governance of Canada's marine oil spill preparedness and response regime, Minister of Public Works Canada, Ottawa, December 1998.

North Slope Subarea Contingency Plan.

Oceans Canada. *An Approach to the Establishment and Management of Marine Protected Areas*. January 1997.

Oceans Canada. *Role of Federal Government in the Oceans Sector*. 1997.

Oceans Canada. *Towards Canada's Oceans Strategy*. 1997.

Transport Canada. *The Arctic Ice Regime Shipping System*. May 1998.

Transport Canada. *The Shipping Safety Control Zone System*.

Wapusk National Park Interim Management Guidelines Parks Canada (6 February 1998).

Publications

Beverly and Qamanirjuaq Caribou Management Plan 1996 to 2002, report dated 1996.

Protecting Beverly and Qamanirjuaq Caribou and Caribou Range, report dated 1999.

Gillis, B, "The Nunavut Final Agreement and Marine Management in the North", in *CARC- Northern Perspectives (Volume 23, Number 1, Spring 1995).*

Keewatin Regional Land Use Plan (Nunavut Planning Commission, 1998).

Hogg, P, *Constitutional law of Canada*, 2nd ed (Toronto: Carswell, 1985).

Hurley, M.C. et al, *Bill C-62: Nunavut Waters and Nunavut Surface Rights Act: Legislative History of Bill C-62 (9 June 1999)*

Muir, M A K, *Regulation of Marine Transportation and Implications for Oceans Management in Hudson Bay*, 2000.

Muir, M A K *Jurisdictional Issues for Fish and Marine Management in Northern Manitoba*, 1999.

Muir, M A K "Contrasting approaches to aboriginal water management: joint management

and multi-stakeholder processes," paper for National Symposium on Water Law, Toronto, 9 and 10 April 1999.

Muir, M A K "First Nations/government resource management regimes: emerging models of joint management and public government for the Northwest Territories," CBA "Environmental law in the North American context" conference in Montréal, 24 May 1996.

Muir, M A K *Comprehensive land claims agreements for the Northwest Territories: implications for land and water management*, (Arctic Institute of North America and the Canadian Institute of Resources Law, November 1994.

Muir, M A K "Impact of existing and proposed aboriginal claims agreements on environmental review in the Northwest Territories," *Journal of Environmental Law and Practice*, July 1991.

Nunavut Tunngavik Inc., *Taking Stock: A Review of the First Five Years of Implementing the Nunavut Land Claim Agreement (1999)*

Vertes, N L et al., *Five Year Review 1993 to 1998: Implementation of the Nunavut Land Claims Agreement An Independent Review (October 1999).*

Williams, Harvey, "The Wapusk National Park Board Management Board", located at www.mbnet.mb.ca/mms/parks.

