Reconciliation – Territorial Wildlife Regimes and the Future of the Northern Wildlife Resource

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1 INTRODUCTION

This paper will explore the role of land claims and co-management systems in restoring Aboriginal wildlife rights and harvesting practices. It will describe the effect of this northern system of rights and institutions on territorial wildlife laws and argue that this framework offers important lessons about reconciliation in relation to wildlife and habitat management and protection. It will also argue that these lessons are critical to the future of northern wildlife populations and to Canada's obligations to northern Indigenous peoples. Finally we argue that this approach to wildlife management is consistent with the courts' decisions on reconciliation and could be helpful in the provinces.

2 CONSERVING WILDLIFE: THE STATE AND COMMUNITY WILDLIFE MANAGEMENT PARADIGMS

From time immemorial the Indigenous peoples of Canada's northern territories[1] managed their use of wildlife on the basis of their spiritual, cultural and community-based values.

First Nations and Metis, the Inuvialuit and Inuit had their own systems of rules, customs and wildlife management based on their traditions, cultures and belief systems. This wildlife management paradigm was integral to the organization of these Indigenous societies. It was based on intimate knowledge of the land and animals and on traditional ecological knowledge.[2] It never entirely disappeared.

Euro-Canadian wildlife management rules emerged from a different tradition and belief system and these Euro-Canadian values shaped the rules that were enshrined in statute and enforced by the courts.

Beginning during the period of Canada's western and northern expansion and until 1982, these Euro-Canadian rules were applied and expanded in the territories to the detriment of the Indigenous, community-based wildlife management systems. The clash of these wildlife management paradigms resulted in the erosion of Aboriginal[3] and treaty rights to wildlife and wildlife harvesting, including the right to make local decisions about these activities.[4]

Over time, the community paradigm continually gave way to the state paradigm as law enforcement presence and wildlife management efforts intensified in the territories.[5] The tension

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1 This paper is focused on the general history and management of wildlife in Yukon, Northwest Territories and Nunavut, collectively the "territories".

2 See for example: Dr. Peter J. Usher, The Devolution of Wildlife Management and Prospects for Wildlife Conservation in the Northwest Territories, Policy Paper 3 (Ottawa: Canadian Arctic Resources Committee, 1986); Fikret Berkes, Sacred Ecology: Traditional Ecological Knowledge and Resource Management (Philadelphia: Taylor & Francis, 1999); and Fikret Berkes, ed., Common Property Resources: Ecology and Community-Based Sustainable Development (London: Belhaven Press, 1975).

3 The term "Aboriginal rights" is used inclusively. It is intended to include treaty rights, inherent Indigenous rights recognized or asserted through the common law system and rights derived from modern land claim agreements, unless the context suggests a narrower usage.

4 Collectively referred to as "wildlife rights" below.

5 This dynamic tension was played out as a subplot in the litigation surrounding *Baker Lake (Hamlet)* v. *Canada (Minister of Indian Affairs and Northern Development)* (1979), 107 D.L.R. (3d) 513, 3 C.N.L.R. 17 (F.C.T.D.).

between these paradigms continued to exist until land claim negotiations were completed[6] and section 35[7] jurisprudence[8] began to push back against the dominant state paradigm.

2.1 The State Paradigm

At the end of the 19th century, a similar ethical and conceptual framework for wildlife conservation and management emerged in Canada and the United States. This framework incorporated a rejection of the excesses of commercial or market hunting and of the English or European "privileged approach" to the allocation of wildlife resources. This framework incorporated the emerging body of wildlife science, management skills and law capable of husbanding the resource in pursuit of the goal of "wise use".

In Canada, wildlife professionals share this broadly accepted framework of principles which underlies our wildlife law and facilitates the management of wildlife.[9] This wildlife law paradigm has evolved over the last 150 years[10] and is a reflection of the values, principles and legal traditions of the dominant, that is, Euro-Canadian culture.[11]

Under the state paradigm, the managers are separated from the users. Management and control of publicly-owned wildlife requires formal, centralized authority, established by Parliament or the Legislature, assigned to a Minister of the Crown and enforced by game management officials, the police and the courts. Such a system is bureaucratic and hierarchically organized. The Euro-Canadian approach to wildlife management is also science-based and purportedly value-free.

The elimination or strict management of commercial hunting requires tight control on the transportation, storage, sale, barter or trading of the products of the hunt. This is achieved by way of licensing systems, the creation of statutory offences prohibiting the sale of game, and the enforcement of these rules. Such a system permits the killing of wildlife only in situations where it used for food, fur or for the defence of persons or property. Although trophy hunting is allowed, the wasting of the game meat generated by trophy hunts is prohibited.

Inuit in the Kivalliq region of Nunavut were of the view that uranium exploration was driving the Beverly and Kaminuriaq caribou herds away. Government biologists testified that the problem was Inuit over harvesting of these herds. Later, caribou surveys indicated that government census techniques were significantly under counting the caribou. The views of the biologists supporting the dominant paradigm held sway and the community of Baker Lake's request for an injunction to prevent further mineral exploration was unsuccessful.

6 The first comprehensive land claim settled north of 60 was the *Inuvialuit Final Agreement* ("IFA") brought into force by the *Western Arctic (Inuvialuit) Claims Settlement Act, S.C. 1984, c.24*.

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

8 The first of the important section 35 wildlife cases was *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

9 The term "wildlife" requires definition for purposes of this paper. I have focused on laws related to birds and terrestrial mammals under the jurisdiction of the territorial Legislatures unless the context requires otherwise.

10 For a description of this evolution see John Donihee, *The Evolution of Wildlife Law in Canada*, Occasional Paper #9 (Calgary: Canadian Institute of Resources Law, 2000).

11 For an analysis set in the northern context, see R.G. McCandless, *Yukon Wildlife: A Social History* (Edmonton: University of Alberta Press, 1981).

2.2 The Community-Based Paradigm

Systems of local or community-based control of wildlife harvesting activities developed in many Indigenous societies as a means of resource conservation and management. These systems often went hand in hand with a system of territorial use or land tenure, so that families, clans or even individuals held and managed defined hunting or fishing territories. Indigenous community-based management systems[12] share a number of characteristics which can be used to describe the community-based wildlife paradigm.

Indigenous fishing, hunting and gathering territories used for resource conservation were described in Labrador as early as 1915 by the American ethnologist Speck.[13] Most native peoples in North America had systems of land tenure that involved rules for resource allocation within the group and for control of access to those resources. In Inuit societies, wildlife harvesting required an organizational structuring for the integration of the personnel, equipment, and economic resources necessary for the hunt. This system required a social network with rules to direct interpersonal and intergenerational relations so as to form an efficient means of directing harvesting activities in a high risk natural environment. [14]

In the community system the users are also the managers.[15] In such societies, all members accumulate and share knowledge about the resource which is managed through harvesting activities. This "Indigenous system of management" is a core feature of all northern native cultures. "Community-based (but not family-based) territories were probably the primary practice for resource management at one time in North America".[16] The authorities indicate that these community-based self-management practices are highly resilient systems of wildlife use and management. They are local and consensual, communal in the use of territory and the sharing of the products of the hunt, and enforced through social and cultural controls. This paradigm does not need external or formal mechanisms to achieve management goals or the enforcement of rules. It is informal, flexible and adaptable.

3 EFFECTS OF THE APPLICATION OF THE STATE PARADIGM TO ABORIGINAL HARVESTING

Even a very brief consideration of some of the restrictions imposed on Aboriginal harvesters shows how significantly the regulatory framework established as a result of the state wildlife paradigm affected the exercise of Aboriginal harvesting rights over the years. Despite the liberalization of the rules applied to the interpretation of treaties over this period, the

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[12] I do not suggest that all Indigenous systems are the same. In fact the opposite is probably true, but common elements emerge from even a brief review of the literature in this area. Likewise, I do not suggest that only Indigenous populations developed locally-based systems. See for some examples, Evelyn Pinkerton, ed., *Cooperative Management of Local Fisheries* (Vancouver: University of British Columbia Press, 1989).

[13] F.G. Speck, 1915, "The family hunting band as the basis of Algonkian social organization", (1915) 17:*American Anthropologist*, pp 289-305.

[14] Arlene Stairs & George Wenzel, "'I Am I and the Environment': Inuit Hunting, Community and Identity" 3:1 *Journal of Indigenous Studies* 1-12, at 4.

[15] Dr. Peter J. Usher, The Devolution of Wildlife Management and Prospects for Wildlife Conservation in the Northwest Territories, Policy Paper 3 (Ottawa: Canadian Arctic Resources Committee, 1986).

[16] Berkes, *supra*, note 13 at 48.

jurisprudence indicates that ultimately, the courts would see to the enforcement of the dominant wildlife paradigm in the territories.

Prior to 1982, Aboriginal rights to wildlife could be regulated, and if the intention was clear enough, extinguished by the enactment of federal or territorial legislation, without the need for justification.[17]

From 1917 until its amendment in 1994, the *Migratory Birds Convention Act*[18] ("MBCA") and regulations prohibited spring hunting, hunting in Bird Sanctuaries, set bag and possession limits and prohibited the sale and buying of birds and eggs. Exemptions for native persons from the requirement for a permit were, however, granted.

Territorial wildlife law after 1960[19], specifically Game Ordinances, applied to Indians and Inuit automatically, unless a contrary intention appeared. Indigenous hunting for food on unoccupied Crown land was protected as long as the game was not declared to be in danger of becoming extinct. However, several key species including barren ground caribou, muskox, polar bear and wood bison were declared to be in such danger in the NWT in the 1960s. The harvesting of musk ox was prohibited for over 50 years and then, when subsequently permitted, was managed under strict quota. Polar bear and wood bison have also been managed since the 1960s on the basis of a strict quota system. Only barren ground caribou populations which rebounded in the 1980s escaped a quota system under the *Game Ordinance*.[20]

Over time, the Crown imposed progressively tighter restrictions on the barter, sale or other exchange of wildlife and established Wildlife Sanctuaries where some or all species of wildlife could not be harvested. The Crown regulated hunting techniques and equipment. Territorial laws regulated trapping as a commercial activity and restricted and then eventually virtually eliminated other commercial harvesting of wildlife. Dangerous hunting provisions and prohibitions against the abandonment or wasting of meat fit for human consumption have also had some effect on Indigenous hunting methods and activities.

An approach to the allocation of harvestable surpluses based on equal opportunities for all users may be appropriate for a government-owned common property resource but it can also result in resistance to special entitlements, such as those held by Indigenous persons. Tension, if not conflict, between sportsmen hunters and Indigenous hunters over access to game and to hunting areas has been one unfortunate result.[21]

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17 Supra, note 9, Sparrow.

18 Migratory Birds Convention Act, 1994, S.C. 1994, c.22.

19 See for example s.18 of the *Northwest Territories Act*, R.S.C 1985, c.N-27 (repealed).

20 The populations are once again seriously reduced. Total allowable harvests established by co-management tribunals under land claims are now in place for most NWT and Nunavut populations.

21 Brian Louis Calliou, *Losing the Game: Wildlife Conservation and the Regulation of First Nations Hunting in Alberta, 1880-1930* (LL.M. Thesis, University of Alberta, Spring 2000) [unpublished] at 149. Another good overview of the effect of the application of federal and provincial game laws on Indian hunting activities is: Bennett McArdle, *The Rules of the Game: The Development of Government Controls over Indian Hunting and Trapping in Treaty Eight (Alberta) to 1930*, Treaty and Aboriginal Rights Research, Indian Association of Alberta (May 1976) [unpublished].

4 WILDLIFE CONSERVATION AND MANAGEMENT REGIMES IN THE TERRITORIES

In the territories Indigenous peoples are a significant proportion of the total population. Approximately 86% of the total population of Nunavut,[22] 52% of the total population of the Northwest Territories,[23] and 23% of the total population of the Yukon Territory,[24] is Indigenous. These populations are widely distributed in small communities and they continue to depend on wildlife harvesting for food, cultural and spiritual uses. In many of these remote communities access to wildlife is also a food security issue of significant importance.

Since 1984, a series of comprehensive land claim agreements have been negotiated between Indigenous peoples and Canada and the territorial governments. The relevant agreements include:

- The *Inuvialuit Final Agreement* (1984)
- The *Gwich'in Comprehensive Land Claim Agreement* (1992)
- The *Nunavut Agreement* (1993)
- The *Umbrella Final Agreement* (Yukon 1993)
- The *Sahtu Dene and Metis Comprehensive Land Claim Agreement* (1994), and
- The *Tlicho Agreement* (2005).[25]

While these agreements vary considerably in specific content, they share important common elements in their approach to, and effect on the state's wildlife management.

Wildlife rights were of central importance in the negotiations for these land claims. Wildlife negotiations were initiated early and detailed provisions addressing beneficiaries' rights to wildlife are included in all these land claims. One of the fundamental principles of the IFA for example is "to protect and preserve the Arctic wildlife, environment and biological diversity."[26] A review of the wildlife rights chapters of these land claims indicates that they systematically roll back the effects of the state paradigm. Aboriginal harvesters' rights to harvest without a licence, without restrictions as to age, sex or size of wildlife and using any means available are confirmed. No seasons or times of day are applicable to Aboriginal harvesting. The only harvesting limits are the requirements of conservation, public safety and humane trapping and killing. The right to barter trade and sell wildlife amongst beneficiaries, and sometimes to

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22 Statistics Canada, 2016. Inuit: Fact Sheet for Nunavut, online at: http://www.statcan.gc.ca/pub/89-656-x/89-656-x2016017-eng.htm.

23 Statistics Canada, 2016. Aboriginal Peoples: Fact Sheet for Northwest Territories, online at: http://www.statcan.gc.ca/pub/89-656-x/89-656-x2016013-eng.htm.

24 Statistics Canada, 2016. Aboriginal Peoples: Fact Sheet for Yukon, online at: http://www.statcan.gc.ca/pub/89-656-x/89-656-x2016012-eng.htm.

25 Public Works and Government Services Canada, 2015. Comprehensive Land Claims Agreements in Effect: Yukon, Northwest Territories, and Nunavut, online at: https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/9/35#section-9.35.5.5.

26 IFA section 1(c).

others, is protected. Exclusive or preferential rights to harvest some species of wildlife are included within the claims settlement areas and on Aboriginal private lands.

The land claims establish Aboriginal institutions– community hunters and trappers organizations or renewable resource committees as well as regional organizations. These bodies make decisions about the exercise of Aboriginal rights, quota allocations and harvesting activities are a common feature of many land claims thus bringing important harvesting decision making home to the community level.

In addition, the land claims establish wildlife co-management bodies which are institutions of public government. In all cases these co-managers are indicated to be the primary authority for wildlife management within the land claim settlement area.[27] All significant government wildlife management decisions in the territories take place in the context of these co-management processes. The membership of these tribunals is at least half nominees or appointees of the land claims organizations. No major decision on wildlife management takes place in an area with a settled land claim without the advice – or in some cases decision of the co-management body. In many areas[28] the co-management tribunal works in concert with community based institutions representing beneficiaries. Wildlife management in the territories has become decidedly more local since the advent of land claims.

The rights granted through land claims are protected by section 35 of the *Constitution Act, 1982*. Co-management regimes in the land claims must be honoured by the Crown. In *First Nation of Nacho Nyak Dun v. Yukon*[29]the Supreme Court of Canada held "[a]lthough not exhaustively so, reconciliation is found in the respectful fulfillment of a modern treaty's terms."[30]

The Supreme Court made clear the application of the *Nacho Nyak Dun* decision to the overall resource management framework established in Yukon by the Umbrella Final Agreement ("UFA").

In this decision, the Court identified and emphasized the fundamental importance of the co-management regimes which characterize comprehensive land claim agreements across northern Canada. The *Nacho Nyak Dun* decision underscores the constitutional underpinning of these arrangements and their importance in the quest for reconciliation on northern landscapes. The Court signalled that governments are required to consult First Nations with land claim agreements and may only make changes under these co-management regimes in a manner consistent with the land claims and with the honour of the Crown. In *Nacho Nyak Dun*, the Court also strongly emphasized the importance of good faith participation in the co-management process set out in the UFA for land-use planning.

This reasoning is equally applicable to the Crown role and participation in wildlife co-management regimes established under land claims. Constitutionally protected comprehensive land claims have fundamentally altered the relationship between the state and community-based

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[27] For example, s.12.8.1 of the Gwich'in Comprehensive Claim establishes a Renewable Resources Board which is the "main instrument for wildlife management in the settlement area" and is required to act "in the public interest".

[28] The Sahtu Settlement Area and Nunavut are two examples.

[29] 2017 S.C.R. 58 ("Nacho Nyak Dun").

[30] *Supra* note 36 at para 38.

wildlife paradigms in a way that, absent agreement, cannot be reversed. Moreover, as will be set out below, land claims and co-management have had a forcing effect on wildlife statutes in the territories in a way which also advances the interests of reconciliation. The approach taken recently by the territorial governments to developing new wildlife legislation reflects the requirements of accommodation and reconciliation as set out in Supreme Court jurisprudence and could serve as a model for similar initiatives in other jurisdictions.

4.1 Yukon

In 2002, the Yukon Government amended the *Wildlife Act*[31] to include Part 13 which addresses the Inuvialuit Final Agreement and its application on the Yukon North Slope. Overall the Part 13 development process and its contents give clear indication that collaborative development of wildlife legislation is the optimal approach in an area to which land claims rights and harvesting privileges apply. Part 13 was developed with direct involvement by representatives from the Inuvialuit Game Council ("IGC")[32] and the Wildlife Management Advisory Council (North Slope).[33] The development of the legislation was collaborative and Inuvialuit representatives and co-managers had direct access to legislative drafters and the opportunity to comment directly on drafts of Part 13 as the legislation was developed. Section 198 of the Act makes it clear that Part 13 prevails over any other provision of the Act in a case of conflict or inconsistency and that the IFA prevails over the Act in any similar situation. Part 13 only applies to the North Slope.

This part of the Act reflects Inuvialuit rights to harvest, methods of harvesting, rights to exchange or barter wildlife products and move harvested wildlife anywhere in the Inuvialuit Settlement Region without a permit, including export from Yukon. The exemption from licensing requirements and special harvesting entitlements of Inuvialuit are reflected in Part 13. The process for establishing subsistence quotas and total allowable harvests in a case where conservation needs require it is set out in a manner consistent with the IFA. Harvest allocation processes are also set out consistent with the land claim, including arrangements for respecting Hunters and Trappers Committees' harvesting bylaws.

4.2 Nunavut

The Nunavut Government ("GN") rewrote its wildlife legislation as a priority after the territory was established in 1999. In Nunavut there is a single land claim covering the whole territory. GN invited Nunavut Tunngavik Incorporated (the Nunavut Inuit rights-bearing organization) and the Nunavut Wildlife Management Board ("NWMB")[34] to join a working group which systematically analyzed the impact of the Nunavut Agreement on the *Wildlife Act*.[35] All parties had counsel and the legislative drafting process was centered on the working group process with

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31 RSY 2002, c. 229 [Yukon *Wildlife Act*].

32 The IGC is the rights bearing organization established by ss.14(73) of the IFA to represent Inuvialuit in wildlife management in the Inuvialuit Settlement Region, which includes the North Slope.

33 WMAC(NS) is a co-management tribunal established by ss.12(46) of the IFA to oversee wildlife management in the North Slope area of Yukon.

34 An institution of public government established by s.5.2.1 of the Nunavut Agreement.

35 R.S.N.W.T. 1988, c.W-4. This was NWT legislation enacted before division and remained in place until replaced by Nunavut's new *Wildlife Act*.

all parties receiving and commenting directly on draft provisions. This process was novel and took several years to complete. A new *Wildlife Act*[36] was enacted in 2003.

The *Wildlife Act* includes species at risk provisions and was written to specifically accommodate Inuit wildlife rights and the roles of both Inuit wildlife organizations (community and regional) and the NWMB. Section 1 of the statute asserts:

> Purpose of this Act
>
> 1. (1) The purpose of this Act is to establish a comprehensive regime for the management of wildlife and habitat in Nunavut, including the conservation, protection and recovery of species at risk, in a manner that implements provision of the *Nunavut Land Claims Agreement* respecting wildlife, habitat and the rights of Inuit in relation to wildlife and habitat.

This part of the Act explicitly incorporates Inuit traditional knowledge into the interpretation of the legislation using Inuit concepts set out in Inuktitut. Part 2 explicitly acknowledges the rights to harvest confirmed for Inuit by the Nunavut Agreement.

Overall, the statute respects and reflects the wildlife rights set out in the Nunavut Agreement and provides an excellent example of the integration of these rights into a modern wildlife statute.

4.3 Northwest Territories

The Government of the Northwest Territories ("GNWT") faced an even more complex task. At the time wildlife legislation reform was initiated there were four settled land claims and at least three others in the negotiation process, including Metis Claim negotiations. There are differences in both the specific rights granted to land claim beneficiaries and in the roles and authorities of the co-management tribunals established by the claims. In addition, Treaties 8 and 11 apply in the NWT.

The GNWT invited all interested Aboriginal Governments to join a Wildlife Act Working Group (WAWG) and began an exploration of the changes required to wildlife legislation to accommodate and reflect Aboriginal rights.

GNWT chose to use the WAWG to develop both a *Species at Risk Act*[37] and a *Wildlife Act.*[38] The legislation is framed around collaborative wildlife management. Land claim, Treaty and Aboriginal rights are reflected in the text as are the institutions established by land claims. GNWT's approach was to treat all Aboriginal organizations as "governments" and to build direct engagement and consultation with these governments into these statutes.

Land claim and common law harvesting rights based on s.35 of the *Constitution Act, 1982* are reflected in the text of the Acts. Decisions made by co-management bodies are a required precursor to Ministerial decision-making. GNWT has continued its use of the WAWG for the

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[36] SNu 2003, c.26 in force 2005.
[37] S.N.W.T. 2009, c.16. In force February 2010.
[38] S.N.W.T. 2013, c.30. In force November 2014.

development of wildlife regulations and ongoing Aboriginal consultation. Despite the complexity of the Aboriginal rights framework in the NWT it is important to note that all the leadership of members represented on the WAWG agreed to the final Bill that went into the Legislature.

GNWT's success in this initiative should put to rest any argument that incorporating Aboriginal rights into legislation is too complicated and that the best approach is a non-derogation clause and to let the courts sort out disputes. The non-derogation clause approach falls short of the effort required to achieve reconciliation.

5 RECONCILIATION AND THE FUTURE OF THE NORTHERN WILDLIFE

In early cases such as *R v Sparrow* and *R v Horseman*, where Canadian courts first considered the infringement of section 35 rights, judicial discussion of reconciliation was limited.[39] In more recent jurisprudence, however, the Supreme Court has clearly articulated that the purposes of section 35 include the reconciliation of Indigenous interests with those of Non-Indigenous peoples [40] and the protection of Indigenous rights.[41]

According to the Federal Court of Appeal, reconciliation is a process that requires Indigenous and Non-Indigenous peoples to make "good faith efforts to understand each other's concerns and move to address them."[42] In *R v Van der Peet,* the Supreme Court explained that "true reconciliation" accounts for both the Indigenous and Euro-Canadian perspective.[43] The goal of reconciliation is to foster a "mutually respectful long-term relationship" between and to bridge the cultures of Indigenous and Non-Indigenous peoples. [44]

The Supreme Court's characterization of reconciliation demands more than the limited recognition of Indigenous hunting rights found in most provincial hunting and wildlife laws. Reconciliation demands that those drafting wildlife and hunting legislation reconcile Indigenous rights to wildlife with other interests, including the competing interests of recreational hunters and conservationists. An appropriate reconciliation of these interests must account for Indigenous community perspectives on wildlife management and involve good faith efforts to understand and address Indigenous people's rights and interests in wildlife.

Arguably, in the context of wildlife rights, reconciliation has been successfully effected through the negotiation of modern treaties in the North. Modern treaties, as "expressions of partnership between nations," are "critical in fostering reconciliation."[45] In *First Nation of Nacho Nyak Dun*

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[39] See for example *R v Sparrow*, 1990 CarswellBC 105, [1990] 1 SCR 1075 and *R v Horseman* 1990 CarswellAlta 47, [1990] 1 SCR 901.

[40] *Delgamuukw v British Columbia* 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1997] 3 SCR 1010, [1997] SCJ No 108 at para 186 [*Delgamuukw*]; *Beckman* at para 10.

[41] *Tsilhqot'in Nation v British Columbia* 2014 CarswellBC 1814, 2014 CarswellBC 1815, 2014 SCC 44, 2014 CSC 44 at para 118 [*Tsilhqot'in*].

[42] *Prophet River First Nation v Canada (Attorney General)* 2017 CAF 15, 2017 FCA 15 at para 49 [*Prophet River*].

[43] *R v Van der Peet* 1996 CarswellBC 2309, 1996 CarswellBC 2310, [1996] 2 SCR 507, [1996] 4 CNLR 177 at para 50 [*Vanderpeet*].

[44] *Beckman v. Little Salmon Carmacks First Nation,* 2010 SCC 53 at para 10; *Delgamuukw* para 81.

[45] *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at para 1 [*First Nation of Nacho Nyak Dun*].

v Yukon, the Supreme Court held up the Yukon Umbrella Final Agreement ("UFA") as a "model for reconciliation" because "[a]greements falling under the UFA are intended to foster a positive and mutually respectful long-term relationship between the signatories."[46] The UFA in particular "establishes institutions for self-government and management of lands and resources"[47] and "set[s] out in precise terms a co-operative governance relationship."[48]

Negotiated approaches to wildlife management, such as those found in the North, are consistent with the theme of reconciliation adopted by the Supreme Court of Canada in recent section 35 cases. In the context of the management of resources such as wildlife, "land claim negotiations provide the best opportunity to overcome long-standing rules or policies that fail to reflect the interconnectedness of all resources, and fail to link a diverse range of strategies and techniques in managing resources."[49]

Territorial governments have taken the lead in responding to this guidance from the courts. Their wildlife statutes have been adapted to incorporate Aboriginal rights and the new institutions established by land claims. The collaborative approach taken to the drafting of this legislation has resulted in an inclusive statutory framework and processes for ensuring that wildlife and habitats are protected in the interests of all Northern residents. Collaborative wildlife management has led to instances like the call by the Tlicho Government for a total allowable harvest of zero for Bathurst herd barren ground caribou in a 2016 proceeding before the Wek'eezhii Renewable Resources Board.[50]

Co-management gives a voice to Aboriginal harvesters and a direct role in decision-making. Wildlife management challenges and the need to protect habitats are more likely to be addressed successfully in a collaborative wildlife management framework.

6 CONCLUSION

Land claims and the Supreme Court's reconciliation jurisprudence have converged in the legislation and approach to wildlife management in the territories. The result is a collaborative decision-making regime which promises better wildlife management outcomes for all. The northern approach to the development of these wildlife laws could be useful in other jurisdictions where legislation does not fully reflect Indigenous rights and interests. If we hope to ensure the continued presence of wildlife and habitats on our landscapes, we must do better. Ensuring that our wildlife laws better accommodate Aboriginal rights and interests would be a good place to start.

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46 *First Nation of Nacho Nyak Dun* at para 10.
47 *First Nation of Nacho Nyak Dun* at para 10.
48 *First Nation of Nacho Nyak Dun* at para 33.
49 Barry Stuart, "The Potential of Land Claims Negotiations for Resolving Resource Use Conflicts" in Monique Ross & J. Owen Saunders, eds., Growing Demands on a Shrinking Heritage: Managing Resource Use Conflicts (Calgary: Canadian Institute of Resources Law, 1992) at 131.
50 Wek'eezhii Renewable Resources Board: Reasons for Decision Joint Proposal for the Management of the Bathurst (Barren-ground caribou) Herd, May 2016 www.wrrb.ca