

“HOME AND NATIVE LAND”:
HOW THE EEYOUCH IN QUÉBEC AND THE SÁMI IN NORWAY USED HYDROPOWER
DEVELOPMENTS TO DEMOCRATIZE LEGISLATION

ANN ÅSFRID HOLDEN
Bachelor of History and Education, 1998
Volda University College and Bergen University

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ANN ÅSFRID HOLDEN

Date of Defense: August 25, 2014

Dr. Christopher Burton Co-supervisor	Associate Professor	Ph.D.
Dr. Heidi MacDonald Co-supervisor	Associate Professor	Ph.D.
Dr. Jo-Anne Fiske Thesis Examination Committee Member	Professor	Ph.D.
Dr. Carol Williams Thesis Examination Committee Member	Associate Professor	Ph.D.
Dr. Thora Martina Herrmann Thesis Examination External Supervisor, Université de Montréal	Associate Professor	Ph.D.
Dr. Christopher Epplett Chair, Thesis Examination Committee	Associate Professor	Ph.D.

Dedication

To Matthew, Katarina and Erika for the
love and support during the thesis writing.

Abstract

This comparative study examines how Indigenous people, the Eeyouch in Québec and the Sámi in Norway, have secured their right to be consulted prior to new developments on their land through the *James Bay and Northern Québec Agreement* and the *Finnmarksloven*. The longstanding tension between notions of private property and collective land-use rights are also found in these laws: the *Agreement* broke loose from the *Indian Act's* patrilineal base of collective land ownership, and the *Finnmarksloven* emphasized land as important to Sámi culture while recognizing the local reality of ethnic diversity. Consultation based on dialogue with an aim to reach consensus was an important aspect of traditional Indigenous law-making. Ostrom's theories on local land governance, combined with Habermas' theories on colonization of the lifeworld, are used to illuminate the Sámi and Eeyouch agency to incorporate their own cultural and normative aspects into national laws.

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Abbreviations:

CEAA: Canadian Environmental Assessment Agency

CPR: Common Pool Resource

CRA: Cree Regional Authority

CTA: Cree Trapping Association

EEC: European Economic Community

EFTA: European Free Trade Association

EU: European Union

FTA: Free Trade Agreement

GATT: General Agreement on Tariffs and Trade

ILO: International Labour Organization

IQA: Indians of Québec Association

JBNQA: James Bay and Northern Québec Agreement

JBRDA: James Bay Region Development Act (*Bill 50*)

NAFTA: The North American Free Trade Agreement

NIB: National Indian Brotherhood

NRL: Norske Reindrifsamers Landsforbund [Reindeer Herders' Organization]

NS: Norsk Sameråd

NSR: Norske Samers Riksforbund [National Association of Norwegian Sámi]

SLF: Samenes Landsforbund [Sámi Association]

UN: United Nations

UNDRIP: UN Declaration on the Rights of Indigenous Peoples

WCIP: World Council of Indigenous Peoples

WGIP: UN's Working Group on Indigenous Populations

ZEC: zone d'exploitation contrôlée (ZECs) or "controlled exploitation zones"

Introduction:

Finmark, the northernmost county of Norway, is located well above the Arctic Circle, and because of its latitude one might expect a very cold climate. The continental climate, with large differences between winter and summer temperatures, is primarily found on the interior plateau, on Finnmarksvidda, a tundra that stretches from Finland in the east to Alta in the west.¹ The open landscape on the tundra is rich in lichen, shrubs and cloudberry. The mountain plateau “falls steeply into the fjord,” creating a dramatic landscape, where farms have utilized the green grass for a few sheep or cows.² The rivers are like arteries in this landscape, rich in fish, with the most fertile soil along the river banks. The Gulf Stream keeps the coast line ice-free; the larger stream goes back to the Atlantic at Troms county, while a smaller current goes to the Barents Sea.³ In 1970, 71 982 people lived in Finnmark, a territory slightly bigger than Denmark (46 537.2 km).⁴

Eeyou Istchee, in Northern Québec, is located south of the Arctic Circle; however, without the Gulf Stream much of the coastline on the James Bay is frozen between December and May. The land is part of the Canadian Shield, and the landscape was formed by ice and water.⁵ Water still defines the landscape, as millions of lakes are woven between rolling hills and marshes. The interior plateau reaches a height of 700 meters, and it is on this plateau that the headwaters of eight large rivers and their many estuaries are found. Four of the nine communities of Eeyou Istchee are located by the coast, and the wildlife the coastal zone has to offer is important to the Eeyou or “coasters”’ livelihood.⁶ Boreal forest covers much of the land in the southern part while the northern parts, the tundra, make an excellent habitat

¹ Gro B. Ween and Marianne Lien, “Decolonialization in the Arctic? Nature Practices and Land Rights in the Norwegian High North,” *Journal of Rural and Community Development* 7, (2012), 96.

² Ween and Lien, “Decolonialization in the Arctic,” 96.

³ Ween and Lien, “Decolonialization in the Arctic,” 96. “Gulf Stream: Charting the chaotic current that warms Norway,” The Research Council of Norway. Last accessed 29/5/2014.

<http://www.sciencedaily.com/releases/2011/12/11202091148.htm>. The North Atlantic Current – popularly known as the Gulf Stream – warms Norway and Northern Europe, but if its waters flowed smoothly north along the Norwegian coastline, the current would deliver far less warmth to Norway. Researchers have discovered that it is the chaos of the seas that warms the country.

⁴ Norges Offisielle Statistikk XII 263, Statistical Yearbook of Norway 1970, 89th Issue, Central Bureau of Statistics of Norway, Oslo: 1970, 6. (STATISTISK ÅRBOK 1970, 89. ÅRGANG).

⁵ “Wonders of Eeyou Istchee,” Discover Eeyou Istchee Land of the People. Last accessed 11/7/2014. <http://www.discovereeyouistchee.ca/wonders-of-eeyou-istchee/the-land.shtml>.

⁶ The four coastal communities have 59% of the population. Eeyou is the name for coastal people and Eenuu for the people in the interior.

for lichen, moss and hardy bushes.⁷ In 1970, 5451 people lived in the territory, which is slightly larger than France in size.⁸

Electrification socialists and electrification of the North

Electrification of the Western world had been ongoing since around 1880. According to Thomas P. Hughes, from the 1890s to World War One, electric power utilities were built to supply electricity to a single urban centre or industrial complex.⁹ Since the electricity that was produced stayed locally, there was no need to have standardized electrical currents. This changed when one area was supplied by more than one utility company, and the need for standardization emerged. After World War One the invention of high voltage transmission lines made it possible to transfer electricity to towns further away.¹⁰ To achieve a transformation from local power production to power networks or national grids coordination between political powers, economic powers and the legal frameworks in the nations where the networks were built was necessary.¹¹

Geir Martin Pilskog saw local political resistance as one of the reasons why Norway did not get a national power network until 1971.¹² Expansion of power-intensive industries such as the aluminum industry was cited as the government's motivation to establish a national grid. Arbeider Partiet (The Norwegian Labour Party), argued for new hydropower developments and some of the most passionate

⁷ Hugo Jacqmain, Louis Bélanger, Réhaume Courtois, Christian Dussault, Thomas M. Beckley, Martin Pelletier, and Sam W. Gull, "Aboriginal Forestry: Development of a Socioecologically Relevant Moose Habitat Management Process Using Local Cree and Scientific Knowledge in Eeyou Istchee," *Canadian Journal of Forest Research* 42, no. 4 (2012): 633, doi:10.1139/X2012-020. It comprises nine communities, five of which are impacted by forestry. The four others are north of the commercial limit for forestry.

⁸ Adrian Tanner, *Bringing Home the Animals: Religious Ideology and Mode of Production of the Mistassini Cree Hunters* (Memorial University of Newfoundland: Institute of Social and Economic Research, 1979), 20.

⁹ Thomas P. Hughes, *Networks of Power: Electrification in Western Society, 1880-1930* (Baltimore: Johns Hopkins University Press, 1983), 15. Power plants were situated close to where the electricity was used, because the technology to transmit energy was just emerging.

¹⁰ Hughes, *Networks of Power*, 324. The invention of high voltage transmissions could be used to transmit power between places that had different peak hours. When a system grows, technology sometimes out-invents its capacity; however, by going back and improving parts of the system that is blocking further expansions, the whole system can go forward. Hughes calls this "reverse salience."

¹¹ Hughes, *Networks of Power*, 107.

¹² Geir Martin Pilskog, "I Spenninga Mellom Teknologi og Politikk: Ein Studie av Samkøyringa av Norsk Elforsyning 1950-1970" (Master's Thesis, University of Bergen, 1996), Chapter One, paragraph 8, <http://www.ub.uib.no/elpub/1996/h/506004/pilskog/geir.html>. A few areas were still outside the national network: East Finnmark was integrated in the network in 1974 and Nord-Salten, the last one, in 1980. (Pilskog, "I Spenninga," Chapter Two, last paragraph).

advocates were labelled “electrification socialist” (kraftsosialistar). Arguments for hydropower as a base for new industry and employment were heard in Finnmark as high voltage transmission lines that could bring power from the south were regarded as too expensive. Changes in technology enabled transmission of power from Alta to the south after the dam was built.¹³ Québec was at the forefront of advancements in transmission technology. The Manic-Outardes complex opened new terrain in power transmission in 1968: its lines carried the highest power voltages in the world.¹⁴ It was improved technology in transmission lines that made the developments on the La Grande possible.

Electrification in Québec and Norway is similar in that it could be labelled “electrification socialism.” Internationally, electric power was used to communicate enthusiasm for political ideas and possibilities for economic growth, famously captured by Lenin’s quotation: “Communism is Soviet power and the electrification of the whole country.”¹⁵ These large hydropower developments were to be built by the government in the socialist inspiration that it would benefit the entire population, and bring progress and employment. One of the driving forces behind the Quiet Revolution in Québec was the “nationalization” and expansion of electric power.¹⁶ Because of the conflation in Québec of nationalism and electrification, the socialist dimension of redistribution of power has been narrated in nationalistic terms.¹⁷ Nevertheless, the political party behind using electrification of Québec as the answer to end economic and employment challenges, the Liberal Party, shared in some of the ideologies of the power socialists in Norway.¹⁸ Whether the hydropower developments in James Bay and Finnmark were narrated in nationalistic or socialistic terms, they imply that the controversy caused by dam-building went beyond the changes in the land. As Richard White writes, it was not the technology that was the issue, but that the

¹³ Lars Martin Hjorthol, *Alta: Kraftkampen som Utfordret Statens Makt* (Oslo: Gyldendal Akademisk, 2006), 28.

¹⁴ “History of Electricity in Québec, Hydro- Québec Highlights,” Hydro-Québec website. Last accessed 11/7/2014. http://www.hydroquebec.com/learning/histoire/faits_saillants.html.

¹⁵ Anne D. Rassweiler, *The Generation of Power: The History of Dneprostoi* (New York: Oxford University Press, 1988), 3 and 48.

¹⁶ Alain-G Gagnon and Guy Rocher, ed. *Reflections of the James Bay Northern Québec Agreement* (Montréal: Québec Amérique, 2002), 241. “1963 was the second phase of nationalization of electricity in Québec. Hydro Québec was authorized to acquire, by mutual agreement, private distributors and electricity cooperatives.”

¹⁷ See for instance Caroline Desbiens, *Power from the North: Territory, Identity, and the Culture of Hydroelectricity in Québec* (Vancouver: UBC Press, 2013), 31-32. Norwegian politicians had used nationalistic rhetoric in an earlier period.

¹⁸ Arbeiderpartiet (Labour Party) has strong connections to labour organizations which welcome employment opportunities.

people on the land were not consulted.¹⁹ While the hydropower projects on the La Grande/Chisasibi and Alta River were seen as necessary to avoid a power shortage and create or retain employment in Québec and Norway, the loss of livelihoods and land would be the burden of the Indigenous peoples. This was troublesome because it implies that the Sámi and Eeyouch were conceived as outsiders, distinct from the general population.

In 1971 the Québec government decided to launch a grand hydropower project in James Bay. The project seemed like a great idea: necessary to avoid a power shortage and with promises of 100,000 jobs.²⁰ The project was planned in two phases, with road construction to the sites starting in 1972. Hydro Québec, a hydropower company owned entirely by the Québec government, was responsible for the construction of the four dams that together are called the La Grande complex.²¹ However, the inhabitants in James Bay, different nations of Cree, had not been consulted about the hydro power project. The majority of the Cree population used the land for hunting, and artificial dams would pose a threat to this lifestyle.²² The legal status of the land was peculiar, as Crown land covered by the Royal Proclamation, but under Québec jurisdiction.²³

The Norwegian government used a similar approach to hydropower developments as the Québec government had done. Prognoses done by the Norwegian Water Resource and Energy Directorate (NVE), a directorate under the Ministry of Petroleum and Energy, warned about a power deficiency in the northern part of Norway.²⁴ Building a dam on the Alta River, the NVE argued, would stimulate the local economy,

¹⁹ Richard White, "Are You an Environmentalist or Do You Work for a Living?": Work and Nature" in *Uncommon Ground: Rethinking the Human Place in Nature*, ed. William Cronon (New York: W.W. Norton & Co., 1996),182.

²⁰ Robert Bourassa, *James Bay*, (Montreal: Harvest House Ltd., 1973), Chapter 1. "Energy Crisis: Québec solutions."

²¹ "History of Electricity in Québec, Hydro- Québec Highlights," Hydro-Québec website. Last accessed 11/7/2014. http://www.hydroquebec.com/learning/histoire/faits_saillants.html.

²² Richard F. Salisbury, *A Homeland for the Cree: Regional Development in James Bay, 1971-1981* (Kingston, Ontario: McGill-Queen's University Press, 1986); Boyce Richardson, *Strangers Devour the Land: The Cree Hunters of the James Bay Area versus Premier Bourassa and the James Bay Development Corporation* (Toronto: Macmillan of Canada, 1975).

²³ Salisbury, *A Homeland for the Cree*, 158 n2; Toby Morantz, *The White Man's Gonna Getcha: The Colonial Challenge to the Crees in Québec*, (Montreal and Kingston: McGill-Queens University Press, 2002), 133-134.

²⁴ "Norwegian Water Resources and Energy Directorate website," accessed May, 15, 2013. <http://www.nve.no/en/About-NVE/>; Hjorthol, *Alta: Kraftkampen*, 20.

and bring employment.²⁵ The Alta River was dammed by the Norwegian Water Resource and Energy Directorate (NVE), although the powerhouse is now operated by Statkraft, a government owned Hydropower Company.²⁶ Plans of damming the Alta River were made public in 1970, and met with opposition from several groups of people, among them the local reindeer herders and inhabitants of Masi, a Sámi village that was to be flooded. The inhabitants of Masi created a committee against the dam project and as Sámi society has rarely opposed the government in an organized way, this was one of the first protests since the Kautokeino uprising in 1852.²⁷ A dam would alter the landscape and change the Sámi's resource base; thus the Sámi Committee in Masi raised the question of land rights.²⁸ Despite protests, the project was not stopped, and after the damming of the Alta River had been up for discussion in the Parliament twice, it was decided that NVE could go ahead with the project in 1978.

In both Norway and Québec, the fate of the rivers was taken to court. There were aspects of dam building that could be questioned based on the laws existing at the time. In Canada the hydropower project could be questioned in the light of the *Indian Act*. In Norway, the fishery question weighed the heaviest, because the Alta River is an important spawning river for salmon. The court cases that ensued illustrate how hydropower was affected by the legislation, including how, once the hydropower developments were begun, legislative amendments were made in regards to the Indigenous population. Therefore, the major research question is as follows: how did the legal situation of the Sámi and Cree change as a result of the hydropower projects, particularly regarding rights to be consulted about territorial and water encroachments?

Legal methods

The main sources for the thesis are legal. Naturally, one of the methods used is analysis of the legislation. Changes to the Sámi and Cree legal situation included the right to be consulted as a way to preserve communal land governance. A concept that is of interest when exploring legislation on communal landownership is group rights to land as opposed to private property rights. Group rights is not a new

²⁵ Hjorthol, *Alta: Kraftkampen*, 27.

²⁶ NVE stands for Norges Vassdrag og Enegidirektorat

²⁷ Hjorthol, *Alta: Kraftkampen*, 17. This uprising was spurred by a religious movement, which was preached illegally outside the state church. See Chapter Two.

²⁸ Hjorthol, *Alta: Kraftkampen*, 18. Examples of questions: Was the land that was going to be dammed Crown land? Or could the customary usage rights be used to argue for Sámi land rights?

concept; it is found in Crown land and usufruct legislation, and legislation such as the *Indian Act* and *reindrifstloven* [reindeer herding law].²⁹ However, legislation that emerged after the hydropower controversies (*James Bay and Northern Québec Agreement* and *Finnmarksloven*) gave the Indigenous peoples more control over how the resources are utilized as they had to be consulted: this gave them bargaining power when faced with new developments. The challenge, however, is to critically look at the nuances of the land legislation, since law has to be interpreted by a context. The hydropower legal cases will be examined, especially regarding what arguments were made.

The legal framework that the Sámi and Cree have been subjected to was part of an uneven power structure. When concepts of land ownership and rights to water usage differ between two cultures, the dominant culture's views are most likely to be codified. Moreover, laws have to be interpreted, and the context the laws are applied to defined. Whose definition of context that is used in a legal case can also reveal a power structure. Using precedents from past legal cases can therefore reinforce and conserve previous legislative goals. This is why court cases such as *Altevattn* (Rt-1968-429) and *Calder et al. v. Attorney General of British Columbia*, [1973] have been celebrated as setting a new course in the legislative framework for Indigenous resource rights. In the deliberation in these cases and in the *Kanatewat et al. v. James Bay Development Corp. et al.*, [1975] and NOU 1984:18, questions were raised about who has the power to produce knowledge, and whose point of view the legal framework is based on.

Scholars have not agreed on a definition of law. One tension in law is what constitutes legal validity (what makes a law a law) and explanations of normativity (why is a law a law) and this is played out in legal philosophy of natural law and positive law. Natural law proponents are concerned with rights, and they focus on the justice aspect of law, and that law promotes a common good, while positive law proponents concentrate on the system of law rather than the individual rule, how law is done rather than its merits.³⁰ In reality, theories overlap and the focus of the problem discussed often determine if it is framed under natural or positive law philosophy. Law is also part of culturally different ways of organizing a

²⁹ Terms such as usufruct rights and commons are used in the thesis because they are understood internationally.

³⁰ *Stanford Encyclopedia of Philosophy*, s.v. "The Nature of Law," last accessed 11/7/2014. <http://plato.stanford.edu/entries/lawphil-nature/>; *Stanford Encyclopedia of Philosophy*, s.v. "Legal Positivism," last accessed 11/7/2014. <http://plato.stanford.edu/entries/legal-positivism/>

society; therefore views on nature, resources and relationships have permeated it. The concept of law therefore has some fluidity and room to change. The theorist who challenged the way I look at law specifically is constitutional scholar John Borrows. He argues that a legal system does not have to be based on a central authority as some legal positivists claims.³¹ Moreover, he questions why customs are at the bottom of the legal hierarchy, and often not called laws at all.³² With this in mind, I will call some of the “customs” laws.

The first Norse laws were a result of public discussions; the meeting place was called a *thing*.³³ There were several regional *things* or councils where politics and laws were discussed. Borrows cites a similar source of laws for Indigenous peoples in Canada: deliberate law discussions, he argues, are important to keep legal practices from fundamentalist or dictatorial influences.³⁴ Borrows touches on two important aspects of law: first, that laws should be proposed in a logical, deliberate way; and second, that laws have to be fair. This may be seen as a contradiction, a paradox also found in the words *law* and *justice*. The words *law* and *justice* were incorporated into the English language through contacts with Scandinavian and French. The word *law* has its source in the Old Norse word *lagu*. Many of the loan words from Scandinavian languages are technical in character, for instance words that dealt with legal customs.³⁵ The word *lagu* is the most important of these. The word was used for “decree, enactment, for a code of laws or legal system, and for an area under a specific legal system.”³⁶ It is interesting to note that the word *wrong* (Old Norse ‘*vrang*’) was used in old legal documents (before 1016) concerning unjust judges turning wrong to right and right to wrong.³⁷

The meaning of the word *justice* was understood as a concept before it entered into the English vocabulary from French.³⁸ The word *justice*, which means the quality of being fair and just, that like cases

³¹ John Borrows, *Canada’s Indigenous Constitution*, 12. (Bentham and Austin, this is an example of how the positivist focus of a system necessitates central authority).

³² Borrows, *Canada’s Indigenous Constitution*, 13.

³³ The name of Norway’s parliament the *Storting* owes its name to the *thing*.

³⁴ Borrows, *Canada’s Indigenous Constitution*, 36.

³⁵ Mary S. Serjeantson, *A History of Foreign Words in English*, 3rd ed. (London: Routledge and Keagan Paul, 1962), 63.

³⁶ Serjeantson, *A History of Foreign Words*, 67.

³⁷ Serjeantson, *A History of Foreign Words*, 68.

³⁸ Serjeantson, *A History of Foreign Words*, 5. Some words came to French from other origins, Greek and Latin.

were treated alike, and that the administration of law were according to accepted principles, was incorporated into English legal practice in 1140, as a way to refine the legal language in England.³⁹ Linguistic scholar Henry Hitchings argues that the legal terminology was used in Norman French by the governing elite to disempower English-speakers. It may seem a little paradoxical that the word *justice* replaced commonly understood English terms, as the legal system was technocratized through the development of a professional, administrative language, but for this thesis it is actually quite fitting, as law can be used to free and to suppress.⁴⁰ Although the idea of justice does not permeate every law or aspect of a legal system, it is an irreplaceable part of it.

Political theorist Jürgen Habermas and legal philosopher H.L.A. Hart take care to explain the relation between law and morality. Habermas assumes a post-metaphysical level of justification of laws, and he denies the idea that moral laws are above juridical laws, but rather that they assume a complementary relationship.⁴¹ Hart also makes a clear distinction between morality and law, while at the same time acknowledges the commonality between the two.⁴² The language use overlaps, and the ideas of morality from certain social groups permeated into laws. In a colonial context, the values of colonizers and colonized differ.⁴³ Marx and Engels saw law as an expression of power; and legislation surrounding private property as part of the superstructure that controlled the means of production.⁴⁴ Their concept took universal justice out of the legal system; however, the exposure of the legal system as a controlling tool for certain classes has revitalized the justice aspect of laws to such an extent that laws can be used to achieve social justice.⁴⁵

³⁹ Serjeantson, *A History of Foreign Words*, 108; Henry Hitchings, *How English Became English* (London: John Murray, 2008), 45.

⁴⁰ Hitchings, *How English Became English*, 45.

⁴¹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Massachusetts: The MIT Press, 1996), 106. The separation is also a colonization of the lifeworlds by the media of power, but as Marx pointed out a necessity to avoid the domination of the morals belonging to one specific lifeworld.

⁴² H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 185-186.

⁴³ I am thinking of outlawing potlatches and marriage laws; these laws were illegal and immoral in one culture, but not in the other.

⁴⁴ Carl Joachim Friedrich, *The Philosophy of Law in Historical Perspective*, 2nd ed. (Chicago: The University of Chicago Press, 1963), 143.

⁴⁵ Friedrich, *The Philosophy of Law*, 143, 144, 147 and 152.

The Eeyouch had legal traditions that were robust enough to survive colonialism.⁴⁶ The Cree had organized their societies into hunting units, and the leader (umicaw) had to ensure that he or she knew the limits of the hunting territory.⁴⁷ Moreover, disputes were to be solved by consensus and involved the elders' knowledge of history, the natural environment, and traditions. To an extent, the resource usage was governed by elders; merit in resource management and fairness between people was part of that governance.⁴⁸ Yet the physical reality of the land governed many of the norms people lived by; for instance how many animals could be trapped each season, when land could be used to hunt and when the land needed to rest. Because of the size of the areas each hunting group needed, private property was not a practical way in which to organize land. Property rights by these standards would indeed hinder the particular way the Eeyouch used the land rather than make it more "productive." The transfer of legal knowledge happened orally and continued to be passed down despite interferences.⁴⁹ Thus, some of the Eeyouch legal foundations made it into the *James Bay and Northern Québec Agreement* (JBNQA).

In Cree legal jurisprudence *wahkohtowin* flows from the Creator, and is the overarching law that governs relations.⁵⁰ According to *wahkohtowin* legal guidance can be found by observing nature: in how the wind blows, how swallows teach their young to fly or the beaver shares food with his family. While *wahkohtowin* is the main source of law in close relationships, unrelated people have to use law from other sources as well.⁵¹ *Miyo-wicehtowin* originated from the creator and is used to maintain peace when people of different territories or perspectives meet.⁵² Examples of *miyo-wicehtowin* includes the circle; the circle is "sacred and represents the bringing together of people."⁵³ If someone breaks the law the consequence is

⁴⁶ One example is the *Eeyou Indoh-Hoh Weeshou-Wehwun* [Traditional Eeyou Hunting Law], a written law grounded in traditional Eeyouch jurisprudence and values.

⁴⁷ *Kaanoowapmaakin* or *Kaanoowapmaakin Esquow* (female): the hunting law has words for both female and male "tallymen." In this law all references to the male include the female and all references to the female include the male.4.18.

⁴⁸ Salisbury, *A Homeland for the Cree*,

⁴⁹ For instance time spent away from the community in residential schools.

⁵⁰ Borrows, *Canada's Indigenous Constitution*, 84.

⁵¹ Borrows, *Canada's Indigenous Constitution*, 84.

⁵² This origin of law illustrate why first nation people regard their land and treaties as sacred. Awareness was gained through personal communication with Leon Crane Bear and Rodney Big Bull, in addition to observation on how Indigenous people talk about land.

⁵³ Borrows, *Canada's Indigenous Constitution*, 85.

called *ohcinewin*, which means “to suffer in retribution for an action against creation,” and includes such aspects as compensation, reprisal, vindication and obligation.⁵⁴

The legal traditions of the mountain Sámi were organized around the *siida*. A *siida* is a small community of people who used land collectively, and it was the institution that organized and managed land rights.⁵⁵ The *siida* was also a semi-nomadic lifestyle: the work was collective and the members had obligations through kinship.⁵⁶ Up until 1863, the *siida* was part of the land management system of both the coastal and mountain Sámi, and while the property rights belonged to the *siida*, the individual member of the *siida* had particular usage rights.⁵⁷ The exclusive and collective rights were part of the seasonal nomadic way of life.⁵⁸ According to Sámi jurisprudence belonging to a *siida* gave rights to land and resources, and others had to get a permission to use land and water or join the *siida* to gain the same rights.⁵⁹ In the late 1600s and early 1700s, the coastal Sámi voiced their grievances about encroachment on their land by the mountain Sámi.⁶⁰ These conflicts were rooted in new modes of production, as this is the time period most commonly cited when the mountain Sámi started to keep semi-tame reindeer as livestock, and the reindeer herders’ *siida* boundaries faded.⁶¹ Inhabitants around rivers such as Neiden and Alta, also confirm that it was the local *siida* population who had rights to fish.⁶² Rights to local resources in the fjords

⁵⁴ Borrows. *Canada’s Indigenous Constitution*, 85.

⁵⁵ Mikkel Nils Sara, “Siida and Traditional Sámi Reindeer Herding Knowledge,” *Northern Review* (2009).
<http://www.highbeam.com/Search?searchTerm=author%3a%22Sara%2c+Mikkel+Nils%22&orderBy=Date+DESC>, accessed 22/5/2014. The main elements of the *siida* are the individuals (in Sámi *siidda olbmot*); the husbandry units (*baikedoalut*); the collective and the herding unit (*siidaoallu*); the *siida* territory, resources, and infrastructure (*orohagat/siidavuoddu*); and the semi-nomadic or nomadic lifestyle in accordance with the flow of the seasons (*johtaladdan*.)

⁵⁶ Jan Åge Riseth, “Sámi Reindeer Management in Norway: Modernization Challenges and Conflicting Strategies” in *Indigenous Peoples: Resource Management and Global Rights*, ed. Svein Jentoft, Henry Minde and Ragnar Nilsen (Delft: Eburon, 2003), 232.

⁵⁷ NOU 2001:34 *Sámiske Sedvaner og Rettsoppfatninger*, [Sámi Customs and Jurisprudence], 5.4.2.

⁵⁸ NOU 2001:34 *Sámiske Sedvaner og Rettsoppfatninger*, 6.

⁵⁹ NOU 2001:34 *Sámiske Sedvaner og Rettsoppfatninger*, 3.1.

⁶⁰ NOU 2001:34 *Sámiske Sedvaner og Rettsoppfatninger*, 3.1.

⁶¹ Cronon, *Changes in the Land*, 161, NOU 2001: 34 *Sámiske Sedvaner og Rettsoppfatninger*, 5.4.2. The coastal Sámi’s movements continued within the boundaries of the *siida*.

⁶² The *siidas* still exist as a unit for the reindeer herding Sámi, but not in the fjords. Bygdelag have some similarities to the *siida*, it is a collective group that decide how local resources were used.

did not include fishing rights in the fjords, which was considered an open access commons.⁶³ This has been confirmed by both the local inhabitants and visiting fishermen; Paine commented on the open access to fishing grounds in Revsbotn fjord, where everyone fished together in one spot, and did not mind outsiders coming to the fjord.⁶⁴

Methods

As the title of the thesis indicate, this study is comparative. Marc Bloch is regarded as a leading figure in comparative history. One distinct feature of Bloch's use of comparison is as a tool for explanation.⁶⁵ He emphasizes that by comparing societies that are geographically close, during the same time period and "constantly influenced by one another," the historian may draw more precise conclusions.⁶⁶ Although Northern Norway and Northern Québec are physically far away, the Sámi and the Cree were close contextually, because they had some of the same influences. The perceived power shortage were part of the narrative in both places; the dams affected livelihoods drawn from natural resources, and the Indigenous groups were both a minority in a democracy. Moreover, as technology is an important part of this study, both welcomed some technology, for instance skidoos, which were easily incorporated into both the trapping culture and reindeer herding culture. Most importantly in the cases of the Sámi and the Cree, both influenced and were influenced by international legislation on Indigenous rights, legislation that gained momentum in the 1980s. The Eeyouch and Sámi actively participated in international forums where they could voice their concerns, for instance, the United Nations and conferences, and thus, what happened in one place influenced the other.⁶⁷ By comparing two phenomena, in this case the building of dams on

⁶³ NOU 2001:34 *Sámiske Sedvaner og Rettsoppfatninger*, 4.2.

⁶⁴ Robert Paine, *Coast Lapp Society I: A Study of Neighbourhood in Revsbotn Fjord* (Tromsø: Tromsø Museums Skrifter Vol. IV, 1957), 101.

⁶⁵ Marc Bloch, "Toward a Comparative History of European Societies," trans. J.C. Riemersma in *Enterprise and Secular Change: Readings in Economic History*, ed. Fedric C. Lane and Jelle C. Riemersma (Illinois: Irwin Homewood, 1953), 498.

⁶⁶ Bloch, "Toward a Comparative History of European Societies," 498.

⁶⁷ Douglas Sander, "The UN Working Group on Indigenous Populations," *Human Rights Quarterly* 11, no. 3 (1989), stable URL: <http://www.jstor.org/stable/762100>. Sanders article mentions many of these groups.

Indigenous land and how laws were challenged and changed to protect a way of life. the use of a comparative method can bring to light relationships between phenomena.⁶⁸

The underlying problem in the two cases was that the large scale hydropower developments threatened to change both the physical and the legal situation on Indigenous land. Looking to the British phenomenon of enclosures, a process of converting the commons in England into private property, people who had secured a livelihood in the commons were pushed off the land by more powerful economic interests.⁶⁹ What happened in Finnmark and Eeyou Istchee is similar to the enclosure process in that the Sámi and Eeyouch's livelihoods had to yield to the economic interests of others. Borrowing from E. P. Thompson, their reactions were also like England's working class: they resisted through a process of developing relationships with groups beyond their local factions, and working towards a common goal of securing rights to the land and water. Through resistance commonalities appeared and a consciousness of belonging to an Eeyouch nation or being Indigenous developed.⁷⁰ The development of governing bodies such the Sameting and the Cree Regional Authority were physical expressions of the emerging consciousness.⁷¹

The comparison aims at bringing out not only the similarities, but also the contextual differences and nuances between the two cases.⁷² Land ownership traditions add important nuances in this project. While Canada had legislation that secured Indigenous ownership of land, the *Indian Act*, Norwegian legislation did not. Some ownership traditions in Canada originated in England or France, and the contrast with the new milieu in North America was tangible. The *Indian Act* is a good example of how English and several First Nations' legal concepts were merged. Landownership traditions in Norway were also influenced from the European continent; however, the Sámi and non-Sámi jurisprudence originated in

⁶⁸ Benjamin J. Richardson, Shin Imai and Kent McNeil, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland, Oregon: Hart Publishing, 2009), 8.

⁶⁹ E.P. Thompson, *The Making of the English Working Class*, 4th ed. (London: Penguin Books, 1991), 237- 238.

⁷⁰ Before 1970, the Eeyouch did not have a regional consciousness, but identified with one of the nations in the area. The Sámi did not have an indigenous consciousness.

⁷¹ Sámi women who were interviewed by Rauna Kuokkenen do question if the regional land governance (as opposed to municipal governance) was grounded in Sámi governance principles.

⁷² Bloch also discussed the comparative method as "the observation of differences" Bloch, "Toward a Comparative History of European Societies," 507.

closer context of each other. The legislative process is tightly connected to the political organization, and to show the direction of influences the *long durée* approach was necessary.

The *long durée* is also beneficial in environmental history. The obvious environmental changes in this project were the damming of the rivers, which created lakes. The dams fenced in or enclosed the water and these dams were a physical reminder in the landscape of how the Sámi and the Eeyouch had been excluded from the land, but as historian William Cronon put it, the dams marked off “its economic activities and relationships as well.”⁷³ The European notion of private property, and that “fenced in land” was more productive, challenged the existing way of seeing land and the fruits that could be harvested from the land. With the dams the traditional livelihoods did become less “profitable” and thus the ecological changes enforced the economic views of the Québécois and the Norwegian government.⁷⁴ The resistance, however, did challenge these perceptions of the natural environment. The Eeyouch challenged Hydro Québec’s scientific knowledge on the environment in *Kanatewat*; and they continued to argue for protection polices to save the environment.⁷⁵ The Sámi claimed that the land held more than just economic benefits: that a culture depended on it. Thus, the Sámi and Eeyouch were able to communicate that economic value of land and water was intertwined with relationships: kin relationships to take part in a trapline, fishing spaces, or as members of the same reindeer-herding group. The intersection of relationships and economic benefits has been described by Elinor Ostrom, as a way to strengthen protection of “common pool resources” (CPR).⁷⁶

Habermas divides society into system and lifeworld. In his model of society, he defines the systems as the administrative state and the official economy and he emphasizes that the systems are non-communicative.⁷⁷ The lifeworld he defines as common understanding, including values that develop

⁷³ William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill & Wang, 1983), 137-138.

⁷⁴ William Cronon, *Changes in the Land*, 162.

⁷⁵ Jacqmain et.al., “Aboriginal Forestry,” 637. The Eeyouch hunters suggested, among other things, a 60-120 meter patch of forest to be saved along wetland and rivers.

⁷⁶ Elinor Ostrom. *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990), 90, 206. She found the institutions to become stronger over time, and if the users lived near the land, and shared social celebrations with each other.

⁷⁷ Jürgen Habermas, *The Theory of Communicative Action Volume Two: Lifeworld and System: A Critique of Functionalist Reason*. Trans. Thomas McCarthy. (Boston: Beacon Press, 1984), 121-137.

through face to face contacts over time in various social groups, for instance families or communities, and communication communication is the key in the lifeworld.⁷⁸ The media of the state system is power, the media for the economic system is money, and the media of the lifeworld are influence and value commitment. In traditional societies, the system was tightly integrated with the lifeworld.⁷⁹ For instance, social control was culturally anchored and maintained without the state's power of sanction; breaking the norms was sacrilege.⁸⁰ This resonates with Borrows as he writes that many of the Indigenous laws stem from creation stories and as such have a sacred source.⁸¹ The laws that in particular were viewed as sacred were those that guided how humans should relate to the land, and each other to avoid conflict over territories.⁸² Treaties signed with the Europeans were therefore regarded by the elders as originating in a sacred source.⁸³ Borrows compare the different "sacred" views on law with a comment told by Professor Noel Lyon, "I think there is a tendency to regard the Crown almost in the way the First Nations people regard the Creator, as being the source of all things."⁸⁴

In modern societies, the systems have been de-coupled from the lifeworld. According to Habermas, this happened when tribal societies became hierarchical, and new social roles developed into classes who had their own milieus or lifeworlds.⁸⁵ The integration between lifeworld and systems comes to an end, the first are "colonized" by the media from the latter; power and money encroaches on the lifeworld.⁸⁶ Instead of consensus making, the media of the lifeworld, majority vote, the media of power, becomes a way to make decisions. Habermas sees the colonization process throughout society, but especially in regards to norms and laws. As law becomes more abstract, more detailed, and influenced by

⁷⁸ Habermas, *The Theory of Communicative Action: Volume Two*, 121-137.

⁷⁹ Habermas, *The Theory of Communicative Action: Volume Two*, 155 and figure 37, 274.

⁸⁰ Habermas, *The Theory of Communicative Action: Volume Two*, 159.

⁸¹ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 47. Borrows' concern of positive law, stems from his historical and cultural context, where man-made laws such as the *Indian Act* or a leader who in a small community could instate policies that only served "their own narrow material interests." Positive laws, even if deliberated upon by the majority society do not adequately pay attention to the needs of the minority society.

⁸² Borrows, *Canada's Indigenous Constitution*, 25. Creation stories are examples of sacred sources for indigenous law.

⁸³ Borrows, *Canada's Indigenous Constitution*, 25-26.

⁸⁴ Borrows, *Canada's Indigenous Constitution*, 26.

⁸⁵ Habermas, *The Theory of Communicative Action: Volume Two*, 169.

⁸⁶ Habermas, *The Theory of Communicative Action: Volume Two*, 356.

the media of power and money, it also becomes de-coupled from the lifeworld.⁸⁷ Those who participate in the discourse of law formation gain power, and the rise of the number of formal laws, policies and regulations indeed shows the colonization the lifeworld.⁸⁸

When governing structures become more complicated, the lifeworld becomes more provincial.⁸⁹ This is where Habermas's and Ostrom's theories come together, as Ostrom's description of successfully governed commons describe Habermas's lifeworld: the members who are part of the governing/CPR community uses communicative action when modifying rules, graduated sanctions are carried out by the community, and the local governing institution is not challenged or colonized by government authorities.⁹⁰ The successfully governed commons may align formal laws with the rules developed locally, or simply fill in gaps of law.⁹¹ When the formal laws and local norms work together, the system of formal laws gets legitimation from the lifeworld.⁹² This is the key to Habermas's theory: only the lifeworld can legitimize the system and justify the laws.

Legitimation must be supported by a public and practical discourse, such as engagement in the public square where individuals gather for dialogue. In Habermas's abstract analysis of how the lifeworld influences the system, he stresses that political problems cannot be solved in the public sphere; yet this sphere can be used to seek a solution from within the political system.⁹³ There are also many complex procedures public opinion has to go through before it reaches the regulating stage, and Habermas identifies

⁸⁷ The laws that are not based on common understanding, values or influences from the lifeworld and have not developed through face to face contacts over time.

⁸⁸ Mathieu Deflem, "Law in Habermas's Theory of Communicative Action," *Universitas*, no. 116 (2008): 275, http://content.ebscohost.com/pdf23_24/pdf/2008/2QA6/02Jan08/39362722.pdf?T=P&P=AN&K=39362722&S=R&D=a9h&EbscoContent=dGJyMNLr40SeprY4yOvqOLCmr0yep7VSr624TbeWxWXS&ContentCustomer=dGJyMPGut0%2B0qLZluePfgex44Dt6fIA.

⁸⁹ Habermas, *The Theory of Communicative Action: Volume Two*, 173.

⁹⁰ Ostrom, *Governing the Commons*, 89. Cities also have CPR governed commons, but they are not the focus in this project.

⁹¹ Ostrom, *Governing the Commons*, 51.

⁹² Habermas, *The Theory of Communicative Action: Volume Two*, 177. Note that the legitimation of the systems that comes from the lifeworld is an ongoing process.

⁹³ Habermas, Jürgen, "Civil Society, Public Opinion, and Communicative Power," in *Sociological Theory in the Contemporary Era*, ed. S. Appelrouth and L. D. Edles (Thousand Oaks, CA: Pine Forge, 2007): 498. Holub defines the public square as the realm in which individuals gather to participate in open discussions. Robert C. Holub, *Jürgen Habermas: Critic in the Public Square* (New York: Routledge, 1991), 3.

these procedures to be part of a robust civil society, because they limit populist and fundamentalist movements' power to change society drastically and suddenly.⁹⁴ The public sphere's influence goes beyond election times. For instance mass communication can influence codification by keeping certain problems in the spotlight. This is especially important for minorities, whose concerns may not be heard through other democratic channels such as elections.⁹⁵ Minorities have found a way to utilize mass media when they have used "sensational actions, mass protests and incessant campaigning."⁹⁶ In attempts to convince governments to change legislation, both the Eeyouch and the Sámi used communicative actions. In Chapter Two, the Sámi staged a protest in Oslo to convince the Norwegian government to change a *Royal Resolution*, and in chapter Three I show how the James Bay Cree successfully changed legal decisions with the use of symbolic actions that drew media attention. The public discourse the Sámi and Cree took part in communicated to the government that laws could not be passed without input from the Indigenous peoples. It is important to note that although the "fourth branch of government" is not immune to controlling influences; opinions shared in mass media must resonate with the public to be taken seriously.⁹⁷

There are a few things that the reader should keep in mind when reading this thesis. First, I should mention that I have not been to Finnmark or Eeyou Istchee, and thus, I have relied on other people's observations and interpretations of what happened. Second, I do not speak Sámi or Cree, and was not able to use those linguistic and cultural tools to interpret the material. Yet, my interpretations of the material have been coloured by my own position coming from a small town in Western Norway. The rural experiences included a community's belief that by standing together one had a political voice. From these experiences, the theories of Habermas resonated with me, as the colonization of the lifeworld might be more tangible in a rural setting. There is the danger of assuming that these theories are immediate transferrable to the contexts of this thesis. That is not my intention, however; it is rather to show that a context influences thoughts of law, but also that different perspectives can observe similar phenomena.

⁹⁴ Habermas, "Civil Society, Public Opinion, and Communicative Power," 504. The stages include media coverage of opinions, votes to a party, the members of that party's belief in the necessity of change and willingness to apply changes to the legal system.

⁹⁵ Else Grete Broderstad and Hans Kristian Hernes, "Gjennombrudd ved Konsultasjoner? Finnmarksloven og Konsultasjonsordningen i Stortinget" in *Finnmarksloven*, ed. Hans-Kristian Hernes and Nils Oskal (Oslo: Cappelen Akademisk Forlag, 2008), 126.

⁹⁶ Habermas, "Civil Society, Public Opinion, and Communicative Power," 509.

⁹⁷ Habermas, "Civil Society, Public Opinion, and Communicative Power," 505-506.

Chapter 1: Contested Territory: Eeyouch and Sámi jurisprudence meet Canadian and Norwegian jurisprudence

In law a vacuum cannot exist, so when groups with different social organizations occupy the same territory the challenge is to formulate laws that govern coherently the way land and water is utilized. The Indigenous peoples had a local and democratic social organization, while the non-Indigenous peoples came from a governing structure with a hierarchical organization; thus, formulating laws that reflected a shared territory was extremely challenging. Newcomers who settled in North America and Sápmi sought a livelihood; however, they brought culturally specific expectations that were grounded in experiences on different land. As part of their cultural baggage, they also brought their sovereigns. This chapter looks at how the settlers' laws and social organizations challenged the pre-existing laws in an Indigenous territory.

The Lapp Codicil of 1751 and the Royal Proclamation of 1763

King George III and King Frederick V did not send armies to conquer the James Bay or Finnmark: instead they assumed sovereignty by applying the legal doctrines that were acceptable to the ruling elite in England and Denmark. King George III came from a governing tradition where the principle had, since before the Glorious Revolution, been to limit royal power.⁹⁸ George III's reign has been called "a legislative revolution" due to a rise in the number of bills passed during his reign.⁹⁹ The professionalization of legal practice also made it pertinent to justify sovereignty by the use of law; however, that meant that the law was used in "tactical manoeuvrings on the part of a man who still knows in general what he is out to achieve."¹⁰⁰ In comparison, in Denmark-Norway the king had become an absolute ruler in 1665 with *Kongeloven*, and all land that was not private property became the king's.¹⁰¹ Nevertheless, up until around 1740 both individual Sámi and siidas were seen as owners of the land by the authorities and the courts, because the Danish-Norwegian monarchy had "neither the means nor the intention of implementing a

⁹⁸ Herbert Butterfield, "Some Reflections on the Early Years of George III's Reign," *Journal of British Studies* 4, no. 2 (1965): 99, <http://www.jstor.org/stable/175147>.

⁹⁹ Michael W. McCahill, "Chapter 12. Lords and Commons (1): Partners in Legislation," *The House of Lords in the Age of George III (1760-1811)* published in *Parliamentary History* (Wiley-Blackwell) 28, (2009): 277, doi: 10.1111/j.1750-0206.2009.00088.x.

¹⁰⁰ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge: Cambridge University press, 2004), 29; Butterfield, "Some Reflections," 96.

¹⁰¹ Sverre Tønnesen, *Retten til Jorden i Finnmark*, Bergen: Universitetsforlaget, 1979, 71. In Finnmark this meant almost all the land.

genuinely authoritarian regime.”¹⁰² The king’s power was limited by the ethical principle that his most important duty was to protect the inhabitants against attacks on life and property. What considerations the administrations took towards the inhabitants can be seen in the quality of these rights.¹⁰³ The judicial system was described as “equitable, accessible, and inexpensive” by contemporary Robert Molesworth; the law codes were accessible to the layperson, and there was not much professionalization of legal practice.¹⁰⁴ One of the reasons for stability in Denmark-Norway was that the social elite were part of a “formalized service structure,” and the amount of power granted the elite depended on their loyalty to the king.¹⁰⁵ To sum up, the English king could better assert his power in North America by using the principles of English law, and the Danish king could better keep the peace in the furthest corners of the kingdom by showing considerations towards the local inhabitants’ legal doctrines.

The *Lapp Codicil* of 1751 and the *Royal Proclamation* of 1763 recognized Indigenous people’s land usage rights, and these rights were incorporated and acknowledged by the national legislatures during the same time period. That the *Lapp Codicil* and the *Royal Proclamation* were signed during the same time period is important, because it implies that they were created under similar philosophical influences. One such influence was that of Francisco de Vittoria, who “provided a strong philosophical foundation for Indigenous property rights.”¹⁰⁶ According to his philosophy the natives were equal parties in land negotiations and his views have been recognized as a foundation for the formation of the *Lapp Codicil* and the *Royal Proclamation*.¹⁰⁷ The *Lapp Codicil* shows considerations for local customs and land use in Finnmark. However, as Rojas-Páez pointed out, Vittoria based his assumptions on European notions of

¹⁰² Nils Oskal, “Political Inclusion of Saami as Indigenous Peoples of Norway,” *International Journal on Minority & Group Rights* 8, no. 2/3 (2001) 257, doi: 10.1163/15718110120908411; Thomas Munck, “Absolute Monarchy in Later Eighteenth-Century Denmark: Centralized Reform, Public Expectations, and the Copenhagen Press,” *The Historical Journal* 41, no. 1. (1998): 203. Stable URL: <http://www.jstor.org/stable/2640150>.

¹⁰³ Tønnesen, *Retten til Jorden i Finnmark*, 107-108.

¹⁰⁴ Munck, “Absolute Monarchy,” 203, 205.

¹⁰⁵ Munck, “Absolute Monarchy,” 204. These men were mostly part of the aristocracy, however, commoners could also be granted positions.

¹⁰⁶ Jan Åge Riseth, “‘So the last shall be first and the first last?’ Sámi Reindeer Management vs. Other Land Users in Mid-Scandinavia,” in *Discourses and Silences: Indigenous Peoples, Risks, and Resistance*, ed. G. Cant, A. Goodall and J. Inns (Christchurch, New Zealand: University of Canterbury Press, 2005), 41.

¹⁰⁷ Riseth, “‘So the last shall be the first?’” 41, for the Sámi; Alain Beaulieu, “‘An equitable right to be compensated:’ The Dispossession of the Aboriginal Peoples of Québec and the Emergence of a New Legal Rationale (1760–1860),” *The Canadian Historical Review* 94, no.1, (2013): 5, doi: 10.3138/chr.1060.

property and ways of relating to the land.¹⁰⁸ The *Royal Proclamation* acknowledged First Nation peoples' sovereignty by the fact that they were to be governed by their own laws and that land negotiations were to be done directly by the sovereign in London and not as a land transaction between individuals.¹⁰⁹ Despite the "equal partner" considerations in the laws, the recognition of land rights was not the motives of King Frederick V and King George III in signing these documents. The reasoning behind these documents was to assert state control of the territory they described: in the first case, defining borders to achieve peace with Sweden while safeguarding an economic base for taxation, and in the latter, securing prosperity through peace with First Nation's tribes, settlement, and legal control of the land.¹¹⁰

That the *Lapp Codicil* had taxation of the Sámi as a main concern becomes apparent after reading through the first few paragraphs.¹¹¹ Of the thirty paragraphs of the *Codicil*, eleven are about taxation directly (§ 1 – 9, 12, 20), and ten are about taxation indirectly, either in the form of moving from one tax region (country) to another (§ 10-14) or about the taxation agents (lensmenn, § 15 -21). It is therefore safe to assume that one of the reasons the Swedish and the Norwegian-Danish governments acknowledged the Sámi's customary land use was to secure the economic tax base. The Sámi had the right to choose their allegiance; those who had paid taxes to both Sweden and Denmark-Norway before 1742 had to choose loyalty to one monarch.¹¹² The Sámi who used land in the neighbouring country had to pay land rent, so in effect none of the governments offered "its" resources to the Sámi without any monetary compensation. This was in accord with Hobbesian state theory, "[t]he "wise" ruler uses the resources thus obtained to increase the general level of economic well-being of the subjects to a degree sufficient that the ruler can increase tax revenues while being able to reduce the more oppressive uses of coercion."¹¹³ State sovereignty was thus asserted through appropriation of Sámi customary law.

¹⁰⁸ Gustavo Rojas-Páes, "Whose Nature? Whose Rights? Criminalization of Social Protest in a Globalizing World," *Oñati Socio-Legal Series* 4,(2014):6, <http://ssrn.com/abstract=2386597>.

¹⁰⁹ John Milloy, "The Origins and Significance of the Proclamation of 1763," 3. www.trentu.ca/academic/nativestudies/Proclamation/Proclamatio_1763... · PDF file.

¹¹⁰ Milloy, "The Origins and Significance of the Proclamation of 1763," 1.

¹¹¹ The document refers to the Sámi as Lapps.

¹¹² Første Codicill og tillæg til Grendse-Traktaten imellem Kongerigerne Norge og Sverrig Lapperne betreffende 2. oktober 1751 (Lappekodisillen) [The Lapp Codicil], (§ 4).

¹¹³ Ostrom, *Governing the Commons*, 41.

The *Royal Proclamation of 1763* imported English law in British North America, while the existing laws were not extinguished by conquest or other means.¹¹⁴ They were “granted” to the Indigenous peoples in the *Proclamation* as protected land rights which were therefore a deliberate way to secure control in the colonies.¹¹⁵ First of all, the *Proclamation* was constructed to attract settlement. For instance, “(...) all Persons inhabiting in or resorting to our Said Colonies may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England.”¹¹⁶ In addition to insuring that the subjects could enjoy English Law in the colonies, it also granted land to the men who fought with England in the Seven-Years War, to acquire land settled by loyal royalists. It is the second half of the *Proclamation* that contains legislation regarding Indigenous land rights. Land is set aside for *Indians* as their “Hunting Grounds” and it is the “Royal Will and Pleasure, that no governor or Commander in Chief in any of our colonies” survey or patent the land, for it can only be bought by or ceded to the Crown.¹¹⁷ As the king asserted ownership of the land, his peacekeeping role in the document is clear: the *Proclamation* promises land to those who fought for the English crown and a fatherly protection for the rest.

The *Lapp Codicil of 1751*, was an addendum to the treaty of Strömstad, which defined the borders in Fennoscandia, and simultaneously secured Sámi usage rights to land across the borders.¹¹⁸ The treaty was signed between Denmark-Norway and Sweden, and the Sámi were not signatories; however, despite the obvious economic benefits for the government, the Sámi customary land use was recognized.¹¹⁹ Two things are worth emphasizing here: first, the firm legal recognition of Sámi usage rights, and second, the implied autonomy of the Sámi culture. The legal recognition was in the form of a treaty, and as such one

¹¹⁴ Borrows, *Canada's Indigenous Constitution*, 21.

¹¹⁵ Milloy, “The Origins and Significance of the Proclamation of 1763,” 2. Milloy writes that “a military solution was not an option” against “dispersed, skilled forest guerilla fighters.”

¹¹⁶ King George III, No. I, *The Royal Proclamation*. Assented to October 7, 1763. <http://originaldocuments.ca/api/pdf/RoyalProc1763Oct7.pdf>. The *Proclamation* also has a description of land so that the subjects know where the English laws apply.

¹¹⁷ King George III, No. I, *The Royal Proclamation*. The “hunting grounds” became Crown land in this clause.

¹¹⁸ Carsten Smith, *Rettstenkning i Samtiden, Rett – Økonomi – Politikk*. (Oslo: Universitetsforlaget, 1992), 141, 143.

¹¹⁹ It has been questioned if the *Codicil* had every Sámi in mind or only the transhumant Sámi who crossed the borders. Use of words such as “Lappish Nation” in preparatory work for the *Codicil* assumes that the *Codicil* means all Sámi, although the reindeer herders’ interests are clearly the focus of the treaty.

nation could not change it without consent from the other nation that signed the treaty.¹²⁰ The immemorial customary rights were therefore under stronger legislation than merely national law, and implied autonomy where the state accepted that the Sámi could utilize land in two countries. However, Patrik Lantto argues that state borders were firmly established in 1751 and the Sámi had to choose allegiance, a form of national identity was therefore required, and thus the national Swedish and Norwegian identity gained superiority over the Sámi identity.¹²¹

To regulate the land use on the other side of the border, a “Sámi Sheriff” was appointed.¹²² This sheriff, who was always a member of his *siida*, was the intermediary between his group and the authorities; he collected the land fees based on the number of reindeer that were brought over the border, and had judicial powers in disputes.¹²³ Although the *Lapp Codicil* acknowledged the Sámi identity with the land they used, as a treaty between Denmark-Norway and Sweden, the national laws became superior to the laws practiced by the *siidas*.¹²⁴ The Sámi laws that structured their society and gave guidelines to resource and land use were similar to Norwegian usufruct norms. These laws were rooted in a northern landscape with its particular mode of production, where usage rights would better accommodate a transhumance lifestyle than property rights.¹²⁵ By basing the taxes on the number of reindeer grazed, and using a local tax collector, the local customs merged with national legislation.

The *Royal Proclamation* was rooted in a different landscape, where according to Hobbes’ state theories, private property rights were at the base of state control.¹²⁶ By assuming that well-being depended

¹²⁰ Carsten Smith, *Rettstenkning i Samtiden*, 153. Since the king was absolute, the international legislation did not have to be “transformed” into national legislation.

¹²¹ Patrik Lantto, “Borders, Citizenship and Change: The Case of the Sámi People, 1751-2008,” *Citizenship Studies* 14, no. 5 (2010): 546, doi: 10.1080/13621025.2010.506709. The land rights did not change, but the Sámi land areas were incorporated into a larger national identity.

¹²² *Første Codicill og Tillæg til Grendse-Tractaten imellem Kongerigerne Norge og Sverrig Lapperne betreffende* (Lappekodisillen) §15. <http://lovdata.no/dokument/NL/lov/1751-10-02>.

¹²³ NOU 1984:18 *Om Samenes Rettsstilling*. (About the Situation of the Sámi Rights) Oslo: Universitetsforlaget, 171. “Lapp sheriff” The more equal relationship is here practically displayed.

¹²⁴ Note that the treaty did not have to go through a “transformation” into national laws at this time, because it was up to the absolute monarch to sign treaties and adjust laws for the citizens. (NOU 1984: 18, *Om Samenes Rettsstilling* 175).

¹²⁵ Property rights are also *usage* rights. It is the use of land that gives it value. J. H. Dales, “Land, Water, and Ownership,” *The Canadian Journal of Economics* 1, no. 4 (1968). <http://www.jstor.org/discover/10.2307/133706?uid=3739392&uid=2&uid=3737720&uid=4&sid=21104312803897>.

¹²⁶ Borrows, *Canada’s Indigenous Constitution*, 6; *Stanford Encyclopedia of Philosophy*, s.v. “Hobbes Moral and Political Philosophy,” last accessed 11/7/2014. URL =

on royal protection, the *Proclamation* amalgamated Indigenous peoples' need for protection of communal rights with private property owners' need for state protection of the property.¹²⁷ The document mentions "frauds and abuses" the natives had suffered because Europeans had purchased or settled their land, and that in the future the state will protect and thereby "remove all reasonable Cause of Discontent." The king or state asserted control of the land against other interests: "And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and License for that Purpose first obtained."¹²⁸ The Proclamation emphasizes that it is the *use* of the land that is important to the First Nations, juxtaposed by the settlers who gained property rights to the land.

To write that the land was set aside for Indigenous peoples was in essence a form of expropriation as it turned the Indigenous peoples' land into Crown land, a commons.¹²⁹ First, the land could not be sold to anyone but the Crown. Second, the sale could not be decided by an individual, not even a chief, but had to be concluded at a public meeting with an "Assembly of the said Indians."¹³⁰ The public meeting that included a large group of the members indicates that the collective rights held by First Nations people over the land "set aside" for them was similar to the way that Crown land was managed by the various communities in Norway and England.¹³¹ The assurance of Indigenous rights on Crown land also granted

<<http://plato.stanford.edu/archives/spr2014/entries/hobbes-moral/>>.Hobbes's Moral and Political Philosophy <http://plato.stanford.edu/archives/spr2013/entries/hobbes-moral/#LimPolObl>.

¹²⁷ "And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them. or any of them, as their Hunting Grounds"

¹²⁸ King George III, No. I, *The Royal Proclamation*.

¹²⁹ According to the *Crown Lands Act, Ch 114*, "Crown land means all or any part of land under the administration and control of the Minister." Ostrom defines the commons as shared resources in which each stakeholder has an equal interest. As the crown cannot utilize most of the land in its possession, it can also be governed by CPRs and the same land can be both crown land and a commons.

¹³⁰ King George III, No. I, *The Royal Proclamation*, the entire sentence says: "but if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians."

¹³¹ In Norway, *bygdela* means people who lived in the same town, and were connected not only by location, but also by a set of norms.

state control, as it effectively limited strong private economic interests' control of the land.¹³² This addressed the underlying problem alluded to in both the *Lapp Codicil of 1751* and the *Royal Proclamation of 1763*; the way societies were organized differed: locally organized societies where land was communally used and managed, depended less on a centralized power than private property holders who had surrendered to state control for the protection of their land.¹³³ There is also a question about what customary use meant: was it a “tolerated” use – a right that lasts as long as it did not collide with other right holders, or was it an actual right? Both points have been argued in the judicial literature.¹³⁴ The next parts of the chapter will look at how this tension has been played out in land ownership laws in England, Norway and the Dominion of Canada.

Land ownership traditions

Usage rights for the commons had strong legal traditions in the Norwegian-Danish kingdom, and could compete with property rights in legal strength. These rights were not always an “open for all” concept without any rules or regulations. Definitions vary, from Nørregaard's in 1798 “...uncultivated land, is perceived to belong to the entire Nation, but is not included in any private person's property...”¹³⁵ Others, for instance Ørsted (1812), added that the common could be exclusive to a group of people.¹³⁶ Different types of access to the commons existed, from open for all to grazing rights based on the size of farm. Generally, usage rights in the commons were based on location, and the inhabitants of a specific town had rights to areas that lay in close proximity to it.¹³⁷ Local, customary norms regulated when the commons could be used; for instance, the date when the cloudberry picking was allowed to start was decided in plenum after church, and announced the next Sunday.¹³⁸ For the *Lapp Codicil* to incorporate ideas about customary use across the borders was therefore not only practical from a tax perspective, but also consistent

¹³² Butterfield, “Some Reflections,” 95-99. Butterfield warns about seeing things with modern eyes, especially when the focus is on one thing such as territorial control. However, later legislation on limiting the size of parcels of land that could be purchased also adds to this assumption.

¹³³ Tamanaha, *On the Rule of Law*, 32. The surrender of was made legitimate through consent, which respected the autonomy of the individuals.

¹³⁴ NOU 1984:18, *Om Samenes Rettsstilling*, 176.

¹³⁵ Nørregaard in Tønnesen, *Retten til Jorden i Finnmark*, 310, my translation.

¹³⁶ Ørsted in Tønnesen, *Retten til Jorden i Finnmark*, 310.

¹³⁷ Rights in the commons could be tied to private property rights, Tønnesen divides the Norwegian Crown land into Private commons, Village commons, State commons and Finnmark commons, Tønnesen, *Retten til Jorden i Finnmark*, 312.

¹³⁸ Tønnesen, *Retten til Jorden i Finnmark*, 165, Land sale had to take into account “The Sámi's cloudberry fields and assure continuous use.

with the laws and norms of the kingdoms. Sale of land is not mentioned in the *Lapp Codicil*, because the land of Finnmark was legally in a peculiar situation.¹³⁹ The *Lapp Codicil* does not have a clause that enables one state to undo it, as the rules were supposed to be lasting, and it was therefore confirmed in the *Karlstad Convention* in 1905 when Norway and Sweden separated.¹⁴⁰

In England people also had legal rights to the commons, although these rights were impinged on by enclosure legislation. The legal rights in regard to land can be divided into two main categories: private property rights and usufruct rights. Henry de Bracton, a legal theorist on property from England in the thirteenth century, defined the *commons* as “together with others” or “others in one” and he goes on to describe that it “may be held in common with others, not by one without the others, and not admit to division, with or without the consent of the parties”¹⁴¹ This implies that he does not see the commons as open for all, but as a section of land that was used by a defined group of people. Had it been open to use by all, he would not have to include the “consent of the parties” to divide it.¹⁴² There is no doubt that the concept of communal ownership has been part of the English land ownership tradition, yet it did not translate into a well-developed part of its case law. Joshua Getzler, professor of law and legal history at Oxford, wonders why the common law did not develop this any further. One of his explanations is that the norms that governed the communal resources were indeed local, and disputes were discussed and solved locally.¹⁴³ With a centralization of power, the norms or customs that governed the commons diminished in importance. In addition, the legal paradigm changed when Liberalism emerged in the late seventeenth and eighteenth centuries. The rule of law had been traditionally aimed at the community, but individual rights and freedoms increasingly became the justification of laws.¹⁴⁴

In England, communal land rights began to change in the sixteenth century; the reforms of importance to this project are the *Enclosure Acts*. These *Acts* privatized common land and the majority

¹³⁹ Land was not for sale until 1775.

¹⁴⁰ *Rt. 1968-429*, 436; NOU 1984:18, *Om Samenes Rettsstilling*, 17, 3, 166. Norway was part of Denmark until 1814, then Sweden until 1905. The *Codicil* was amended in 1883 in a bilateral agreement between Norway and Sweden. Laws that come after do not annul the previous ones, but adds a layer. If the new law is abolished, the older laws come into effect again.

¹⁴¹ Bracton cited in Joshua Getzler, *A History of Water Rights at Common Law* (Oxford: Oxford University Press, Oxford, 2004), 68.

¹⁴² *An Act for the Better Cultivation, Improvement, and Regulation of the Common Arable Fields, Wastes, and Commons of Pasture in this Kingdom*. 1773 CHAPTER 81 13 Geo 3. §1.

¹⁴³ Getzler, *A History of Water Rights*, 110.

¹⁴⁴ Tamanaha, *On the Rule of Law*, 33.

were passed during the Industrial Revolution (1750-1860).¹⁴⁵ The legality of the land transformation was briefly discussed by E.P. Thompson in *The Making of the English Working Class*. He argues that the enclosure “was a plain enough case of class robbery, played according to fair rules of property and law laid down by a parliament of property-owners and lawyers.”¹⁴⁶ The same people who benefited from strengthening private property laws were the ones who passed them, while the commoners were the ones who lost their economic base. Jane Humphries illustrated this when she argued that the common rights supplied women and children with a more profitable source of “income” than wage labour. The common rights could be used to glean, pick berries, gather fuel, and fodder.¹⁴⁷ The weekly income from these activities was much higher than if the women were to take part in wage labour, if measured in the quality of diet.¹⁴⁸ Yet, the enclosures contained much more than economic or land reforms, they were also an ideological shift in how nature was viewed. When “open fields and common wastes were recast as wasted commons,” the relationships grounded in communal land use had to yield for nature pictured as a mere commodity.¹⁴⁹ The vigorous resistance against enclosures can therefore be seen as a wish to protect a community that was closer to nature from destruction as well.¹⁵⁰

Although the customs that governed the communal resources were not officially incorporated into state law, which was defined by the landowning classes, their continued use can be seen in what Elinor Ostrom has labelled common pool resource (CPR) management. Some of the principles of long enduring CPRs, as seen in usufruct norms that governed the commons, is that they have clearly defined boundaries, rules can be modified to fit changing local conditions, a monitor system is in place, the sanctions for breaking the rules are gradual, there are mechanisms for conflict resolutions, and the local institutions are

¹⁴⁵ For instance in 1773: *An Act for the better Cultivation, Improvement, and Regulation of the Common Arable Fields, Wastes, and Commons of Pasture in this Kingdom*. 1773 CHAPTER 81 13 Geo 3.

¹⁴⁶ Thompson, *The Making of the English Working Class*, 237 – 238. His focus is on the years between 1790 and 1830.

¹⁴⁷ Jane Humphries, “Enclosures, Common Rights, and Women: The Proletarianization of Families in the Late Eighteenth and Early Nineteenth Centuries,” *The Journal of Economic History* 50, no. 1 (1990): Stable URL: <http://www.jstor.org/stable/2123436>. Hay: 23-25, glean: 34, fuel: 32-34, berries: 32.

¹⁴⁸ Humphries, “Enclosures, Common Rights, and Women,” 24, 25. Children of poor families were impacted the most, not only did the enclosures deprive them of access to milk, but also of childcare.

¹⁴⁹ Jesse Goldstein, “Terra Economica: Waste and the Production of Enclosed Nature,” *Antipode* 45, no. 2, (2013) 363, doi: 10.1111/j.1467-8330.2012.01003.x.

¹⁵⁰ Thompson, *The Making of the English Working Class*, 239.

not challenged by external government authorities.¹⁵¹ Since disputes could be handled locally, the need to involve professional lawyers and official legislation was limited, and even unwanted. Resource extraction from the commons could continue without much involvement from the legal system. Land as private property is different in this regard. The legal system was a great tool for private land owners if someone disturbed the enjoyment of the property, and case law concerning private property grew in volume during the period of early industrialization. Private property owners depended indirectly on a relationship with the state to solve conflicts, and to justify the usage of the land; thus private property gave the state a great deal of control over how resources are used.¹⁵²

Communally governed property did not denote the same state control. The strong sense of community that was necessary to effectively govern the different forms of commons was also used to oppose the closing of it. A strong community spirit is evident from the many riots that took place during the time of enclosures; the loss of autonomy, identity and security was worth fighting against.¹⁵³ McDonagh and Daniels show the disturbance enclosures had on communities, with the riots, filling in ditches and breaking hedges by digging up the roots.¹⁵⁴ They argue that the appeals to the law in regards to enclosures became less frequent in the 18th and 19th centuries, because by then the enclosures were legal.

Sir William Blackstone (1723-80) has been regarded as the one of the first to formulate private ownership rights of the sole owner with “absolute” rights of his property.¹⁵⁵ The sole rights one owner has to his property may come from Blackstone’s writings of the hindrances for the enjoyment of property. Trespass and nuisance were the two main injustices property owners could suffer. Trespass was “any physical intrusion that interfered with the enjoyment of property”¹⁵⁶ and nuisance included less tangible interference, including the smell from a hog farm or blocking light to a window.¹⁵⁷ The concept that justified one person’s rights over another in regards to property is that of first occupancy. Blackstone used

¹⁵¹ Ostrom, *Governing the Commons*, 90.

¹⁵² *Stanford Encyclopedia of Philosophy*, s.v. “Property,” last accessed 11/7/2014. <http://plato.stanford.edu/entries/property/>.

¹⁵³ Humphries, Thompson.

¹⁵⁴ Briony McDonagh and Stephen Daniels, “Enclosure Stories: Narratives from Northamptonshire,” *Cultural Geographies* 19, no.1 (2012): 112-115, doi: 10.1177/1474474011427361.

¹⁵⁵ M.C. Mirow, “The Social Obligation of Property: Duguit, Hayem and Others,” *Florida Journal of International Law* 22, no.2 (2010): 193-194; Getzler, *A History of Water Rights*, 182. New scholarly research has shown a revised and more complex picture of Blackstone.

¹⁵⁶ Getzler, *A History of Water Rights*, 184.

¹⁵⁷ Getzler, *A History of Water Rights*, 184.

the Lockean tradition in his concept of first occupancy to defend private land ownership and private rights to use a part of a river for milling.¹⁵⁸ One of Blackstone's most famous statements, often quoted, describes property right as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."¹⁵⁹ These concepts of trespass and first occupancy are important to keep in mind because they have been used in land legislation both in North America and Norway, to define the strength of private property rights and usufruct rights.

In some ways, Blackstone's notion of exclusive property rights is incompatible with communal rights to use land and water. The first challenge is when the two are prescribed for the same geographical space. Locke's first occupancy right does not apply to non-cultivated land. The usufruct rights could therefore "trespass" on a private owner's exclusive rights to enjoy his property. Second, usufruct rights are communal, and "membership" in the community of users is less predictable than what it is on private property.¹⁶⁰ Cooperation is the most salient character of communal land rights, and codifying norms of communal land use by a central government power can disrupt the local norms that were created for a specific geographic location.¹⁶¹ Legislation concerning private property is also more easily applied to a variety of landscapes: farmland, forested land, the factory ground and so forth. Moreover, when the concepts developed for private property are used about usufruct land rights, they imply that the hierarchical order puts communal land usage rights beneath private property rights. To quote Blackstone again, "So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."¹⁶²

Edmund Burke (1729-1797) saw protection of private property at the heart of a moral society governed by rule of law.¹⁶³ In his *Reflections on the Revolution in France, 1790/1791* he did not

¹⁵⁸ Getzler, *A History of Water Rights*, 173. Blackstone was not the first to use the concept of first occupancy; Oskal, "Political Inclusion of Saami as Indigenous Peoples of Norway," 235.

¹⁵⁹ Blackstone quoted by Getzler, *A History of Water Rights*, 159.

¹⁶⁰ This might be one of the reasons the definitions of who has *Indian status* have been so important to define and redefine by the government of Canada.

¹⁶¹ Ostrom, *Governing the Commons*, 195, 201. (175-177 examples).

¹⁶² Blackstone quoted in *Kanatewat et al. v. James Bay Development Corp. et al.*, [1975] 1 S.C.R. 48 Volume 2, 368.

¹⁶³ Edmund Burke, *Reflections on the Revolution in France, 1790/1791*. First four paragraphs: http://www.constitution.org/eb/rev_fran.htm. Remainder: <http://www.fordham.edu/halsall/mod/1791burke.asp>.

congratulate France on “the new liberty of France until [he] was informed how it had been combined with government, with public force, with the discipline and obedience of armies, with the collection of an effective and well-distributed revenue, with morality and religion, *with the solidity of property*, with peace and order, with civil and social manners.”¹⁶⁴ Burke used property as part of his narrative to convey to readers the drawbacks of revolutions, but at the same time he revealed much about what property means as well. The heart of what Burke means by “solidity of property” is that it has continued through time. It has belonged to forefathers, and will be inherited by offspring. The continuation of ownership ensured conservation “without at all excluding a principle of improvement.”¹⁶⁵ Interestingly, treaty making also had an element of endurance built into it, as it was to last for “as long as the sun shines and the rivers run.”¹⁶⁶ This quote was significant to the solidity of treaty rights. Although Burke spoke allegorically of the improvement of the monarchy in this paragraph, one can assume that the farmers who improved the land from generation to generation by removing rocks, draining bogs and building new barns, understood his analogy. Concepts of time and improvement on land were also used to establish land ownership in Canada, for instance in the *Law of Public Lands of the Dominion of 1872* and *the Indian Act of 1876*.

The Law of Public Lands of the Dominion of 1872

The importance of the *Royal Proclamation* is evident in later land legislation for the Dominion of Canada. *The law on Public Lands of the Dominion* reiterates the components of the *Royal Proclamation*: settlement of the Dominion is the main goal, land is set aside to be exchanged for military bounty, and land with *Indian title* is for the exclusive use by *status Indians*.¹⁶⁷ However, whereas close to half of the *Royal Proclamation of 1763* was about securing *Indian title*, only one paragraph was used for this purpose in *the Public Lands of the Dominion Act*.

Reading the *Public Lands of the Dominion Act* can enhance the understanding of some of the clauses regarding land in the *Indian Act*. The main aim of the *Dominion Act respecting the public lands of 1872* was to get agricultural settlements in the dominion, particularly the Prairies. The land the authors of

¹⁶⁴ Ibid, Burke, emphasis is mine.

¹⁶⁵ Burke, *Reflections on The Revolution in France*, paragraph 8.

¹⁶⁶ Governor Alexander Morris, *Treaties of Canada with the Indians of the North-West* (1880): 234-235, quoted in Indian Chiefs of Alberta, *Citizens Plus*, Edmonton: Indian-Eskimo Association of Canada, 1970. 25.

¹⁶⁷ When the term *Indian* is used it is used as a legal term defined by the government.

the law had in mind was flat and easily divisible, and the law had detailed descriptions of how to manage the land: “The Dominion lands shall be laid off in quadrilateral Townships, containing thirty-six sections of one mile square each.”¹⁶⁸ The land could be paid for in “cash or military bounty”¹⁶⁹ and “unappropriated Dominion lands” were “open for purchase at the rate of one dollar per acre; but no such purchase of more than a section, or 640 acres, shall be made by the same person.”¹⁷⁰ From these excerpts of the *Act* two assumptions can be made. First, that the state wanted long term settlement on the land; it is made accessible for people to obtain land, but since it had to be paid for, it became private property. And second, small landowners were preferred, not powerful land barons or individuals enriching themselves on the monarch’s land through speculation. Thus the maximum land purchase by one individual of 640 acres was made to prevent land speculation.

The creation of communal lands or commons was not in the state’s interest. Grazing lands and hay lands are mentioned; “[l]eases of unoccupied Dominion lands may be granted for grazing purposes to any person whomsoever being *bona fide* settler in the vicinity of the land sought to be leased;” yet if the land is sold, there will be no “compensation, save by a proportionate deduction of rent, and six months’ notice.”¹⁷¹ The notions of a commons or an area of land that could be used by more than one person is alluded to in these sections. The area does not have open access to anyone, just the farmers in the *vicinity*. However, the new settlers could not claim usage rights from time immemorial, and the lands that were used by more than one family according to the *Act Respecting the Public Lands of the Dominion* were therefore not a true commons, only a vacant lot that could be used until someone purchased them. More importantly, communally used land could not become a hindrance to securing private property. However, there was one obstacle that challenged private property in the dominion: the land set aside for the Indigenous peoples in the Royal Proclamation.

¹⁶⁸ *An Act Respecting the Public Lands of the Dominion*, 1872, 35 VICT. C, 23, Assented to 14th April, 1872. S. 3.1.

¹⁶⁹ *An Act Respecting the Public Lands of the Dominion*, 1872, 35 VICT. C, 23, Assented to 14th April, 1872. S. 3.30.

¹⁷⁰ *An Act Respecting the Public Lands of the Dominion*, 1872, 35 VICT. C, 23, Assented to 14th April, 1872. S. 3.20

¹⁷¹ *An Act Respecting the Public Lands of the Dominion*, 1872, 35 VICT. C, 23, Assented to 14th April, 1872. S. 34.

The Indian Act

The British colonization of land tenures is evident in how the *Indian Act of 1876*, reiterates the *Public Lands of the Dominion Act of 1872* in how the land is to be managed. For instance, “[the] Superintendent-General may authorize surveys, plans and reports to be made of any reserves for Indians, (...) and may authorize that the whole or any portion of a reserve be subdivided into lots.”¹⁷² Similar rules of land ownership that applied to settlers outside the reserve were valid on the reserve: Blackstone and Locke’s idea of first occupancy is valid on the reserve, therefore “no Indian shall be disposed of any lot or part of a lot, on which he or she has [made] improvements, without receiving compensation thereof.”¹⁷³ The *Act* did not describe what improvements mean, but one can assume it means plowing or cultivating the land. Agriculture therefore seems to be the most effective way to gain rights to land also within a reserve.

The land set aside for natives was reserved for those who could claim *Indian* status. The *Indian Act* has several clauses on how someone can voluntarily give up *Indian* status, for instance a man could be enfranchised under the *Act* of 1876 in return for a patent of a portion of the reserve land, or in other words a piece of *private property*. Very few chose this option.¹⁷⁴ Maria C. Manzano-Munguía claimed that “Indigenous peoples’ resistance forced the colonial government to create other pieces of legislation to enforce their enfranchisement.”¹⁷⁵ The most significant of the involuntary enfranchisement sections regarded women’s choice of partner. A woman’s only tie to the land was through her husband’s land rights; his *Indian* status or lack thereof, determined her status, and his belonging to a reserve determined what land she was allowed to use. It was the tradition of the laws of the time that women followed their husbands. Thus if a woman living in the Dominion of Canada married a man from Scotland, she automatically ceased

¹⁷² The Indian Act, S.C., c.18, s. 5 (1876) (Can.); The Indian Act R.S.C., c. 43, s. 15 (1886) (Can.); The Indian Act R.S.C., c.98, s. 20 (1927) (Can).

¹⁷³ *The Indian Act*, S.C., c.18, s. 6 (1876) (Can.). The word *made* is missing from the copy of the Act I used.

¹⁷⁴ J.R. Miller, *Reflections on Native-Newcomer Relations: Selected Essays*, Toronto: University of Toronto Press, 2004, quoted in Maria C. Manzano-Munguía, “Indian Policy and Legislation: Aboriginal Identity Survival in Canada,” *Studies In Ethnicity & Nationalism* 11, no. 3 (2011): 410. doi: 10.1111/j.1754-9469.2011.01145.x.

¹⁷⁵ Manzano-Munguía, “Indian Policy and Legislation,” 410. A list of these acts: *Act Respecting Civilization and Enfranchisement of Certain Indians*, 1859, c. 9 (Canada 1859); *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st Victoria*, Chapter 42 S.C. 1869, c. 6. Vict. (Canada 1869).

to be Canadian and became Scottish instead.¹⁷⁶ The *Indian Act* of 1876 conformed to the “woman follows man” thesis, and stated that “any Indian woman marrying any other than an Indian or a non-treaty Indian shall cease to be an Indian in any respect within the meaning of this *Act*.”¹⁷⁷

The marriage clause disregarded women’s relationship to the land completely, the work on the land and the meaning land held for the individual woman and for her community. In addition, the “marrying out” clause also ignored the local practices. In Eastmain, for instance, it was not uncommon for a man to share hunting grounds with his father-in-law.¹⁷⁸ Although Toby Morantz found that ancestors of the James Bay Cree leaned towards patrilocal kinship traditions, she found land use patterns to be fluid enough to not exclude matrilineal traditions. The inflexibility of the *Indian Act* to allow sons-in-law to reside on the wife’s reserve broke the practice of using marriage to create relationships.¹⁷⁹ Moreover, the marriage clause assumed a conformance to the nuclear family unit, which was inconsistent with how many First Nation families lived, as their livelihood often demanded larger groups for successful hunting and fishing.¹⁸⁰ Morantz discovered that co-residential groups of four and five commensal units were found in winter camps, especially in the interior Eastern James Bay where hunting of caribou was important.¹⁸¹ This is also consistent with what was found about the Sámi reindeer herders and hunters: larger units were required during the winter months to successfully hunt the reindeer.¹⁸² Involuntary enfranchisement of women that forced them out of their land created both personal hardships and disrupted land management and usage.¹⁸³

The sections of the *Indian Act* about trespass illustrate that the purpose of the *Act* was to narrow native peoples’ access to land. The detailed sections on trespassing of the reserves by “any person or Indian

¹⁷⁶ Philip Girard, “‘If two ride a horse, one must ride in front’: Married Women’s Nationality and the Law in Canada 1880–1950,” *The Canadian Historical Review* 94, (2013), 33, doi: 10.3138/chr.1349.

¹⁷⁷ *The Indian Act*, S.C., c.18, s. 3.3. c) (1876) (Can.). Every Act up until 1985 repeats this in some form. The 1985 Act involuntarily enfranchises children instead of women.

¹⁷⁸ Toby Morantz, *An Ethnohistoric Study of Eastern James Bay Cree Social Organization, 1700-1850*, Ottawa: National Museum of Man, Mercury Series, 1983, 87.

¹⁷⁹ Morantz, *An Ethnohistoric Study*, 89-90. The variety was great. Although one wife was the norm, Morantz found a few powerful men had two wives. The nuclear family was not the norm, but the HBC insisted that the hunters listed only the nuclear family unit.

¹⁸⁰ Morantz, *An Ethnohistoric Study*, 89-91.

¹⁸¹ Morantz, *An Ethnohistoric Study*, 91. Based on archival material from 1823-1839.

¹⁸² NOU 1984:18, *Om Samenes Rettsstilling* 121, 122.

¹⁸³ *The Indian Act* R.S.C., c.81, s. 26 a) and b) (1906) (Can.). Widows also had to have a “good moral character” to inherit any “property of all kinds, (...) including any recognized interest she may have in land in a reserve.”

other than an Indian of the band” are evidence of this.¹⁸⁴ The trespassing clauses were aimed at those who settled, occupied or hunted on the land.¹⁸⁵ This makes one wonder who the trespassers were. The answer may be buried in the *Act* itself. The sections on trespass were expanded eight times in the *Indian Act* between 1876 and 1951, and became more specific with every amendment, to include “fishing in any marsh, river, stream or creek.”¹⁸⁶ Fishing was often done in groups, and included celebrations and social gatherings; this amendment did not therefore protect the resources of the reserve from “outsiders” as much as it eliminated communal land usage and governance.¹⁸⁷ Oral accounts confirm that the social element of hunting and fishing in groups was valued.¹⁸⁸ In fact, in 1918 new amendments stating that “whenever any land in a reserve whether held in common or by an individual Indian is uncultivated and the band or the individual is unable or neglects to cultivate the same, the Superintendent general, (...) may, without surrender grant a lease of such lands for agricultural or grazing purposes.”¹⁸⁹ With this in mind, the trespass legislation in the *Indian Act* seemed to be aimed less at white settlers taking the odd trip into the reserve to collect firewood and more towards Indigenous people who did not belong to the band.¹⁹⁰ An expanded part of the trespass section is about people who had already been told to leave, and who continued to return to the land. While the *Indian Act* is silent on why these people kept coming back, policies may shed light on the reasons people kept coming back to the land. In Québec, the goose hunting season was “eagerly anticipated” in Cree villages, and when a license had to be issued before one could hunt, which only those who were not employed could obtain, many government officials knew that many Cree would rather quit their jobs than miss out on the community goose hunt.¹⁹¹ Both policies and the *Indian Act* encourage the abandonment of traditional land use, and limitations of those who the government saw as justified to use

¹⁸⁴ *The Indian Act*, S.C., c.18, s. 12 (1876) (Can); *The Indian Act* R.S.C., c.98, s. 115 (1927) (Can).

¹⁸⁵ *The Indian Act*, S.C., c.18, s. 12, 13 (1876) (Can.). Repeated almost word for word in sec. 13 regarding people who have been removed from the reserve previously.

¹⁸⁶ *The Indian Act* R.S.C., c.81, s. 34 b) (1906) (Can.).

¹⁸⁷ For the relationship between fishing and community see: Richard White, *The Organic Machine* (New York: Hill and Wang, 1995), 18, 21. Jo-Anne Fiske (and Betty Patrick), *Cis dideen kat (When the Plumes Rise): The Way of the Lake Babine Nation* (Vancouver: UBC Press, 2000), 42.

¹⁸⁸ Morantz, *The White Man’s Gonna Getcha*, 122. Morantz writes about how elders did not think it was practical, or advisable to hunt and fish alone.

¹⁸⁹ *The Indian Act*, S.C., c.26, s. 90 (3) (1918) (Can.).

¹⁹⁰ The trespassing rule included non-Indian children living as a foster child (or adopted child) with a family with Indian status. H.B. Hawthorn, ed. *A Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Politics*, Volume 1, Ottawa: Indian Affairs Branch, 1966, 278. Known as the Hawthorn Report in Canada.

¹⁹¹ Toby Morantz, *The White Man’s Gonna Getcha*, 207-208. A permanent job was three and a half months during the year. (1957).

the land on a reserve was a way to achieve such goals. This is one of the more peculiar aspects of the *Indian Act* that brings back thoughts of the enclosure process in Britain: with or without fences and ditches, someone was kept off the land.

Governing reserve land was consistently stifled by the *Indian Act*. Ostrom wrote that groups who combined work days with festivities added a positive element to the communal management, and celebrations re-enforced the norms of “proper” behavior.¹⁹² Important celebrations for First Nation’s people in this regard were feasts, such as potlatches and dances.¹⁹³ People met at festivals, and they could be used to settle disputes, discuss land use, redistribute food, and strengthen ties in the community.¹⁹⁴ These celebrations were a public space where politics was discussed, concerns were raised, and alliances were formed. The *Indian Act* on April 19th 1884 made these festivals illegal, and breaking the law could give the offender two to six months “in any gaol or other place of confinement.”¹⁹⁵ Consequently, this interrupted far more than a cultural celebration. By making these gatherings punishable by a minimum of two months in jail, one of the most salient features of local governance of land was effectively interrupted. Habermas discusses cultural traditions as vulnerable when it comes to retaining a legitimizing force.¹⁹⁶ Although Habermas analyzes a European context, one observation is particularly relevant: “Apparently, traditions can retain legitimizing force only as long as they are not torn out of interpretive systems that guarantee continuity and identity.”¹⁹⁷ Clearly, the festivals were part of an interpretation system that gave the local norms salience.¹⁹⁸

How did the *Indian Act* affect the legal status of land in Eastern James Bay? In 1912, when the Eastern James Bay had been transferred to the Province of Québec, the Governor in Council did keep the

¹⁹² Ostrom, *Governing the Commons*, 65, 88.

¹⁹³ A potlatch is a gift-giving or redistribution event.

¹⁹⁴ Fiske, *Cis dideen kat*, 208, 219.

¹⁹⁵ *The Indian Act*, S.C., c. 27, s. 3 (1884) (Can.). Reiterated in *The Indian Act* R.S.C., c. 43, s. 111 (1886) (Can.); *The Indian Act* R.S.C., c.81, s. 149 (1906) (Can.); *The Indian Act* R.S.C., c.98, s. 140 (1927) (Can).

¹⁹⁶ Jürgen Habermas, *Legitimation Crisis*, trans. Thomas McCarthy (Boston: Beacon Press, 1975), 70-71. He warns about traditions being strategically employed for administrative and market purposes.

¹⁹⁷ Habermas, *Legitimation Crisis*, 71.

¹⁹⁸ Tanner, *Bringing Home Animals*, 163. Tanner found that in the Mistassini area feasts were held as passage rites, after particularly successful hunts and certain yearly events.

powers to control and manage Indian land.¹⁹⁹ The entire territory of James Bay was federal Crown land that was held in trust for the people with *Indian* status who lived on the land, until the government of Québec had obtained surrenders of the land that was approved by the Governor in Council.²⁰⁰ However, in true New France style, the Québec government did not sign any treaties.²⁰¹ This put Eeyou Istchee in the unique situation of being unceded Crown land under Québec jurisdiction, a provincial government that did not recognize it as federal land.²⁰² Nevertheless, the land the ancestors of the Eeyouch inhabited was not coveted by the white settlers because it was not suitable for farming, and the remoteness of the land of the Eastern James Bay region gave the native inhabitants the benefit of benign neglect.²⁰³ Despite tensions over jurisdiction between Québec and Ottawa, the *Indian* title did not change when the land in the Eastern James Bay was transferred to the Province of Québec, because one condition of the border extension agreement was that the rights of the “Indian inhabitants in the territory” would continue to be the same as they were before the *Québec Boundaries Extension Act, 1912* was signed.²⁰⁴

The inhabitants in James Bay had their own notions of land rights. Morantz found a distinction between how access to resources from the land and the water was viewed. When people gathered for fishing, they were on neutral ground, while hunting and trapping was divided into hunting territories.²⁰⁵ One of Carlson’s sources saw trap-lines in Eeyou Istchee as private land.²⁰⁶ This is perhaps reiterated from information gathered when Eeyouch communicate their concepts of land rights to an English audience. For instance, Bill Namagoose, whose first language is Cree, wrote that his uncle Bertie “strongly believed that

¹⁹⁹ An Act Respecting the Extension of the Province of Québec by the annexation of Ungava, 2 GEO.V., c.7 s. 2 (e) (1912) (Can.). “The management of any lands now and hereafter reserved for their use, shall remain in the government of Canada subject to the control of Parliament.”

²⁰⁰ An Act Respecting the Extension of the Province of Québec by the annexation of Ungava, 2 GEO.V., c.7 s. 2 (e) (1912) (Can.). 2 c), d).

²⁰¹ Toby Morantz, *The white Man’s Gonna Getcha*, 133.

²⁰² Salisbury, *A Homeland for the Cree*, 158 n2. The Dorian Commission reported in 1971 on the land’s anomalous status.

²⁰³ Salisbury, *A Homeland for the Cree*, 32. Morantz, *The White Man’s Gonna Getcha*, 221, wrote that the Indian Agent may visit once a year, and up until 1947 the Indian Agent was also the medical doctor.

²⁰⁴ *An Act Respecting the Extension of the Province of Québec by the annexation of Ungava*, 2 GEO.V., c.7 s. 2 (c) (1912) (Can.).

²⁰⁵ Morantz, *An Ethnohistoric Study*, 117-118. Evidence was from 1814.

²⁰⁶ Watt Papers (1929) in Hans M. Carlson, *Home Is the Hunter: The James Bay Cree and Their Land* (Vancouver: UBC Press, 2008), 173.

he and his family owned the land and his responsibility as caretaker came by virtue of ownership.”²⁰⁷ With this comment, Namagoose appeals to English-speakers’ understanding of ownership as he strongly rejects that his uncle cares for *any* land: the care came from a legal relationship with the land. The best legal relationship to land as understood by English-speakers is that of ownership, and Namagoose communicated the intersections of feelings and responsibility with a legal right. What emerges from the literature is that land rights and resource management were strongly linked in Eeyou Istchee, and that the land managers were spatially connected to the land.

Land tenure is quite complicated in Eeyou Istchee. In Mistassini rights to land was not for an “enclosed” location.²⁰⁸ During summer gatherings, group leaders (*ucimaaw*) discussed plans for the winter hunt, and where to put up winter camps.²⁰⁹ The size of the group changed every few years, but the leader who had used an area for a few years remained the same.²¹⁰ He knew the neighbouring *ucimaaw*’s area and had demonstrated ability of “ideological and jural interpretation of resource use.”²¹¹ The leader had, on the juridical level, “a property relationship with the land used by his group”, however, this was a flexible system where the skills in managing the resources were a prerequisite to become a leader.²¹² The government system of registered trap-lines and beaver quotas contradicted the customary land use; however, since the information given to the government to obtain hunting quota was given by the trappers on a volunteer basis, the Mistassini hunters retained some flexibility of the system.²¹³ Morantz mentioned that trespass did happen, and that the occurrences increased in the mid-1800s.²¹⁴ The problems related to

²⁰⁷ Carlson, *Home Is the Hunter*, 149, 172-173. An inference of Carlson’s arguments is that the natives of James Bay had private lands, but he admits that he does not really know, and that the experts disagree. Bill Namagoose, “A message from the Newsletter editor” *Eeyou Eenou Nation*, December 2001. 4, 1-36.

²⁰⁸ Tanner, *Bringing Home Animals*, 182, 184. The location was often of secondary importance for the Eeyouch. Location was a European notion, and with strict boundaries between users demographic changes would contribute to a collapse in the resources. Flexibility and a culture of sharing the land contributed to the long term endurance of the resources.

²⁰⁹ Tanner, *Bringing Home Animals*, 186.

²¹⁰ Tanner, *Bringing Home Animals*, 185. The leader cannot openly show authority.

²¹¹ Tanner, *Bringing Home Animals*, 186.

²¹² Tanner, *Bringing Home Animals*, 187-189. Often it was transferred within families who had acquired the skills from the parent or relative.

²¹³ Tanner, *Bringing Home Animals*, 182, 191-192. The government officials assumed all traps would be visited each year, while in reality some areas were shared by two groups and other areas not visited at all until the following year.

²¹⁴ Morantz, *An Ethnohistoric Study*, 125.

trespass seemed to be with people who were outside the Cree moral code, because if a beaver was taken from a trap line by someone in the community it would often be replaced later.²¹⁵

Land rights in Finnmark

The historical context in Finnmark was quite different from Eeyou Istchee. There were various population groups in Finnmark before 1700: Norwegian, Sámi, and Kven (Finnish immigrants). The Norwegians had come north from about 1300 onward, and because they came as fishermen and populated islands at the entrance of fjords, they did not have territorial disputes with the Sámi population who lived in the end of the fjords or at the mountain plateau. What is remarkable for Finnmark in this time period is the almost complete absence of private property.²¹⁶ The Norwegian population, who lived closest to the Norwegian Sea, lived in small fishing communities (“fiskevær”). The rights to collect firewood on the shore and to fish in the sea surrounding the community belonged to the group who lived there; the land and water was communally managed.²¹⁷ Although a firm conclusion on land ownership cannot be found from this period, Tønnesen assumes that the rights to use the land and water were usufruct and not a private property right.²¹⁸ Before 1700, the coastal Sámi population in the fjords lived a half nomadic lifestyle.²¹⁹ They used the land according to customary rights, and the Sámi from one siida (Sámi village) knew where the geographical boundaries of hunting and berry picking were.²²⁰ However, one group could invite another group to occasionally cross the boundaries when natural conditions were favourable to heavier use.

The Sámi were largely self-sufficient before 1740, while the Norwegian fishing settlements depended on trade from the south.²²¹ Bergen had a trade monopoly and the conditions were less than favorable.²²² A few bad fishing seasons were disastrous for the Norwegian fishing communities, and therefore the population declined between 1567 and 1805 despite new waves of Norwegian settlements into

²¹⁵ Morantz, *The White Man's Gonna Getcha*, 233. Morantz, *An Ethnohistoric Study*, 125-126.

²¹⁶ The exceptions confirm this absence.

²¹⁷ Tønnesen, *Retten til Jorden i Finnmark*, 47.

²¹⁸ Tønnesen, *Retten til Jorden i Finnmark*, 49.

²¹⁹ The Sámi is often divided into “coastal Sámi” and “mountain Sámi” which reflect the area where they lived and the work they did. They spent the summer by the fjord, the fall and spring by the fjord in good weather and forest in bad, and the winters were spent in the mountains. (Tønnesen, *Retten til Jorden i Finnmark*, 49.) According to Paine, some continued this pattern until the 20th century. Paine, *Coast Lapp Society*, 60.

²²⁰ Tønnesen, *Retten til Jorden i Finnmark*, 51.

²²¹ Paine, *Coast Lapp Society*, 42-43.

²²² Paine, *Coast Lapp Society*, 31.

Finmark.²²³ The Sámi population increased six times in the same time period.²²⁴ In addition to drowning at sea, Russian plundering was likely the most common cause of death.²²⁵ However the Russians did not only bring death to Finnmark; they also brought trade, and an important trade relationship between the people in Finnmark and Russians traders began around 1740.²²⁶ The trade was technically illegal since it broke the Bergen monopoly, but the Russian trade was considered too important for the population in Finnmark, too costly to regulate, and the Bergen monopoly's exchange rate too harsh; therefore the provincial governor opened markets that the Bergen monopoly had demanded closed.²²⁷ The trade started as a summer trade with fish the Bergen traders did not want to buy; the Russians salted and processed the fish on the ship, and could therefore bring it to markets in Russia.²²⁸ The trade, called the pomor-trade, was done as barter: the Russians bought fish and pelts and sold rye and other goods.²²⁹ There were no middle men in the trade and a *lingua franca* developed, which "every man who traded with the Russians was able to use."²³⁰ Especially during years of war when trade from the south decreased, the pomor-trade became the life-line for people in Finnmark.²³¹

The trade in fish made the sea the focal point for the coastal Sámi's economic activity. Other factors had pushed for this shift; one was the encroachments of mountain Sámi on the coastal Sámi areas. The different focus Paine and Tønnesen have in their interpretations of why there was an increase in complaints from coastal Sámi about the mountain Sámi between 1690 and 1740 can give a complementary understanding of the shift: Paine's focus is on a new pattern of land use and Tønnesen's focus is on the

²²³ Paine, *Coast Lapp Society*, 31.

²²⁴ The Sámi population also counted the mountain Sámi.

²²⁵ In an interview with Anders Larsen, Paine was told that when a whaling community spotted a Russian ship, the entire community fled to the chapel. The Russians swam "like eider ducks" to the island and set fire to the chapel. Paine, *Coast Lapp Society*, 38.

²²⁶ Paine notes that while the Norwegians suffered more from the plundering, the Coast Sámi in particular profited from the trade. Sources have different dates, but the majority say from 1740-1917, i.e. Paine, *Coast Lapp Society*, 55; "Pomorhandel," <http://varangermuseum.no/no/vardo/artikler/Pomorhandelen.9UFRvM41.ips>. accessed, May 10th, 2014, The trade was declared legitimate in 1796 with a Royal Resolution. First it was legal only between July 15th and August 15th during the "maggot time" when fish could not be dried.

²²⁷ Paine, *Coast Lapp Society*, 48.

²²⁸ Paine, *Coast Lapp Society*, 52. The trade was lucrative for the Russians, since the church had instated a number of fasting days where the population could only eat vegetarian food or fish. "Pomorhandel," <http://varangermuseum.no/no/vardo/artikler/Pomorhandelen.9UFRvM41.ips>. accessed, May 10th, 2014.

²²⁹ Paine, *Coast Lapp Society*, 50-51. "po" means near, and "mor" ocean. (Russian).

²³⁰ Paine, *Coast Lapp Society*, 50.

²³¹ Paine, *Coast Lapp Society*, 53.

customary norms regarding land use. The mountain Sámi had, at the 17th century, increased their reindeer herds, and whereas they previously had kept a few tame reindeer for dairy products and transportation, they started to rely on domesticated reindeer for meat as well. When the mountain Sámi brought their larger herds to the coast, on what was regarded, by custom, as the coastal Sámi's land, the latter complained that it scared the wild reindeer they hunted away.²³² Tønnesen sees as Paine did, that the specialization of reindeer herding increased the mountain Sámi's need for grazing lands. Tønnesen interpreted the roots of the complaints against the mountain Sámi as evidence that the mountain Sámi broke customary boundaries, but also that the mountain Sámi needed to change these boundaries to continue their new, more specialized economy.²³³

Immigration of the Kven from Finland in the 1700s challenged the ways in which land had been used. As these immigrants cleared portions of the forest for farming, the need for private property arose.²³⁴ The Kven land use influenced the coastal Sámi, who started farming in the sixteenth century.²³⁵ The divisions in land use cannot be drawn along ethnic lines, but rather by occupation: the Norwegian, Finnish and Sámi farmers on one side and the reindeer herding Sámi on the other.²³⁶ Despite the clearing of farms, land use was still organized and managed by the village societies.²³⁷ Shortly after King Frederick III passed *Kongeloven*, Finnmark was surveyed. When asked about land ownership between 1685 and 1690 by the state officials, the commoners said they had land rights pertaining to each other, but that the king was the owner of the land.²³⁸ The rights to "private" farm land was customary in nature, and the farmers lacked an official document of ownership. *Kongeloven*, however, did not legally clarify the ownership situation in Finnmark. The State did not collect a rental fee of the land use, nor did it sell the land to the commoners; Tønnesen argues that this indicate that the state lacked a solid legal base for its ownership claims.²³⁹ He found it intriguing that that the king only asserted his rights over "Crown" land in a handful of places in

²³² Paine, *Coast Lapp Society*, 33.

²³³ Tønnesen, *Retten til Jorden i Finnmark*, 62-66.

²³⁴ Tønnesen, *Retten til Jorden i Finnmark*, 59.

²³⁵ Many of the Sámi farmers did however, continue a seasonal lifestyle up until the early 1900s.

²³⁶ Tønnesen, *Retten til Jorden i Finnmark*, 69-70. See also Trond Thuen, *Quest for Equity: Norway and the Saami Challenge*. (St. Johns: Institute of Social and Economic Research Memorial University of Newfoundland, 1995), chapter 4: 82-98.

²³⁷ Bygdelag translated to village society.

²³⁸ Tønnesen, *Retten til Jorden i Finnmark*, 72, the exception was on Sørøya. These answers may also say something about the power relations between the king's officials and the subjects.

²³⁹ Tønnesen, *Retten til Jorden i Finnmark*, 74.

Finnmark.²⁴⁰ Tønnesen backs up his claims that the Crown did not have legal ownership of the land with the absence of taxes and land fees in Finnmark before 1700.²⁴¹ He therefore questions the commonly held notion that the Crown was the legal owner of the land.

The Nordic states' uncertain territorial rights in Sápmi/ Fennoscandia, further cast doubt on how solid the king's claims to Finnmark were. The borders were not well defined, and the Sámi people were taxed by several states, often simultaneously.²⁴² Borders were agreed upon in 1751, when the Treaty of Strömstad, to which the Lapp Codicil was an addendum, was signed, and in 1826, in a border agreement with Russia. Although the Lapp Codicil can be seen as a confirmation of Sámi rights to land, the beneficiary of territorial rights was the king. The Lapp Codicil confirmed the king's territorial limits, and since the Sámi's use of land across the borders were guaranteed, it assured Sámi neutrality in potential state conflicts.²⁴³ Moreover, the border agreement presented the state with an opportunity to solidify land claims in Finnmark. *Jordutvisningsresolusjonen*, a law that was passed on May 27, 1775, called for land surveys in Finnmark, with the intention of dividing the land into plots for farming, since neither Norwegians nor Sámi could own land in Finnmark before 1775.²⁴⁴ Similar to English law, the concept of first occupancy was used also in the Danish/Norwegian interpretation of laws. The "first occupant" of that land, was the one who had cleared and settled it, and in such cases the surveyors had to divide the land according to existing boundaries.²⁴⁵ The resolution, however, is *not* seen as a way to create private property rights in Finnmark:

The Appointed Farms (the word can mean place, parcel of land or small farm) is given over to the commoners as property with condition: a. that rights of inheritance must here not be applicable; b. those, who assume the farm as property, are obligated to build; and c. if the place were to fall desolate, and stay empty over three years, such a plot will, after legal evidence has been gained thereof, fall back to the king, to be transferred to others.²⁴⁶

²⁴⁰ Tønnesen, *Retten til Jorden i Finnmark*, 41. These places were: a) Sørøya, the only inheritable estate in Finnmark, b) Alta salmon fisheries were taxable and c) Loppekalven, the rights to collect rent/landvard.

²⁴¹ Tønnesen, *Retten til Jorden i Finnmark*, 35. Newer scholarship tends to agree with Tønnesen.

²⁴² Lantto, "Borders, Citizenship and Change," 545.

²⁴³ Lantto, "Borders, Citizenship and Change," 545.

²⁴⁴ Paine, *Coast Lapp Society*, 31.

²⁴⁵ The Royal Resolution of 1775 (Kongelig Resolution ang. Jorddeling i Finnmarken samt Boplades udvisning og skyldlægning sammesteds av 27.5.1775). The law was quoted in Tønnesen, *Retten til Jorden i Finnmark*, 136-139.

²⁴⁶ Øyvind Ravna, "Hva må til for at finnmarksloven skal lede til at samene får anerkjent sine landrettigheter?" *Retfærd* 31, no. 2/121, (2008): 29, http://www.retfaerd.org/gamle_pdf/2008/2/Retfaerd_121_2008_2_s26_57.pdf. "7. Det anvisendes Pladser overlades Almuen til Eiendom med Vilkaar: a. at den i Norge gjeldende Odelsret ei her må finne sted; b. de, som antage pladsen til Eiendom, blive pligtige same at bebygge; og c. dersom Pladsen forlades øde, og

The parcels of land were given away and the property was vested in the Crown and as such was more comparable with the property rights on Canadian reserves than with private property rights.²⁴⁷ Evidence that people in Finnmark did not have private property rights was also found in the Constitution regarding suffrage rights.²⁴⁸ Only men who owned land could participate in elections; however, an exception was made for Finnmark where men who had continuously farmed land for five years could vote.²⁴⁹

The population in Finnmark ignored the resolution of 1775. Tønnesen found several reasons why the land surveys were not completed: they took longer time than expected “in this land full of rocks,” and surveys were therefore only done in the western parts of Finnmark.²⁵⁰ Tønnesen argues that the biggest problem with the resolution was that it did not consider the Sámi traditions, including the coastal Sámi’s pattern of movement.²⁵¹ Also, the population had norms that regulated land use, and they did not share the new ideas behind the reforms. For the mountain Sámi the resolution was of no importance since they did not need one piece of land to farm anyway. The attempt of the state to transform land rights from usufruct rights towards property rights failed.

One may wonder if the lack of private property rights throughout Finnmark made the usufruct rights stronger. Some evidence suggests that conditions were indeed favourable for usage rights in Finnmark. On the surface it may look like customary rights were strong, especially since they were acknowledged in the legislation. For instance, in the law of 1854, the parliament indirectly recognized the usufruct rights of Sámi reindeer herders. The law stated that the commons were set aside for the population in the vicinity to use and as such conformed to the traditional Siida or village management of the surrounding land. The law also stated that reindeer herding was reserved for those who had been involved

blive uden Beboere øde hendstaaende over tre Aar, er saadan Plads, efter derom ervervendes lovligt Bevis, Kongen igjen hjemfalden, og bliver til andre at overdrage” Tønnesen, *Retten til*, 137.

²⁴⁷ Payment for land in Finnmark was not collected until 1863. Ståle Dyrvik, “11. Income and Power,” in *Norway: A History from the Vikings to our Own Times*, trans. Michael Drake (Oslo: Universitetsforlaget AS, 1995), 163.

²⁴⁸ *Grunnloven* §50 litra b from 2.6.1821. (Norway’s Constitution). From Tønnesen, *Retten til*, 149.

²⁴⁹ Tønnesen, *Retten til Jorden i Finnmark*, 149. Use that had rights attached to it. They also had to be over 25.

²⁵⁰ Kongelig Resolution ang. Jorddeling i Finnmarken samt Bopladses udvisning og skyldlægning sammesteds av 27.5.1775. Paragraph 2 Copied from: Tønnesen, *Retten til Jorden i Finnmark*, 137. 148-149.

²⁵¹ Tønnesen, *Retten til Jorden i Finnmark*, 150.

in the occupation for generations.²⁵² However, usage rights argued by “time immemorial” had not been codified into Norwegian law.²⁵³ Instead *prescriptive* or customary rights had been codified into law, and could be used in Finnmark as in the rest of the country to prove a usage right.²⁵⁴ The user had to prove 20 to 50 years of use, good faith that the use was legal, and passivity by the owner.²⁵⁵ The tradition of rights to the commons has strong roots in Norway, and supplemented private property rights rather than opposed them; possession of a farm gave rights to commonly managed areas.²⁵⁶ Expropriation of the commons (for instance to hydropower projects) would also give the users rights to compensation.²⁵⁷ The difference between southern Norway and Finnmark was that the land rights on Crown land in Finnmark were not based on private property rights.²⁵⁸

The state saw itself as the real owner of the land in Finnmark, and acted as the “guardian” of its resources. Regulation on forestry to protect it for future users was one step for the state towards assuming rights in Finnmark. The forests were protected against commercial use, and the users had to be part of a village society.²⁵⁹ The local communities were seen as the owner of land rights in legislation regarding Finnmark. This is particularly evident with the “cloudberry prohibition” in 1953. Increased cloudberry picking by people from other parts of the country prompted restrictions, so that only people from Finnmark County could pick freely.²⁶⁰ These rights were based on customary uses, and although the cloudberry fields were “open access” commons, the population in the local communities knew what fields they could

²⁵² Tønnesen, *Retten til Jorden i Finnmark*, 198.

²⁵³ Tønnesen, *Retten til Jorden i Finnmark*, 169.

²⁵⁴ Hevd, established custom or prescriptive right or title.

²⁵⁵ Tønnesen, *Retten til Jorden i Finnmark*, 168-170. The use is not in conflict with owner’s wish for land use, which in Finnmark was the Crown.

²⁵⁶ Tønnesen, *Retten til Jorden i Finnmark*, 176.

²⁵⁷ Tønnesen, *Retten til Jorden i Finnmark*, 176.

²⁵⁸ Tønnesen, *Retten til Jorden i Finnmark*, 179, Ot. Prp. 21/1848 “Finnmarksalmenningen ansett som statens” Fishing in Alta River is in the gray zone, because the rights to fish was based on riparian rights that belonged to the *user* of a farm, that could produce 140Vog (§1 of 1889 version) or 2500 kg hay (§1 of 1968 version of Alta Laksefiskeri Interessentskap’s policies).

²⁵⁹ Tønnesen, *Retten til Jorden i Finnmark*, 208-210. 222. The rights of village societies were “transferred” to municipalities in the 1965 law, and the rights are therefore still with the local communities.

²⁶⁰ Einar Eythórsson, *Norsk Institutt for Kulturminneforskning (NIKU) Oppdragsrapport 43/2011, Felt 2 Unjárgga gielda / Nesseby kommune, Sakkyndig utredning for Finnmarkskommisjonen* <http://www.domstol.no/upload/finn/sakkyndige%20utredninger/felt%202%20sluttrapport.pdf>, 134; Tønnesen, *Retten til Jorden i Finnmark*, 276. The Sámi committee of 1956 suggested that the people belonging to the adjacent village had the first right to pick. NOU 1994:21 *Bruk av land og vann i Finnmark i historisk perspektiv*, [The Use of Land and Water in Finnmark in a historical Perspective], 239.

pick from and not.²⁶¹ *Reindriffts loven* did not set aside a certain geographical area for a defined group of people to create a registered right.²⁶² Instead the emphasis was on creating rights to subsistence, the right to practice reindeer husbandry for instance. However, Norwegian “judicial traditions perceive a “right to subsistence” as less protected than land title rights,” and this crucial difference give the users less autonomous protection of their usufruct rights and more dependence on the state to secure the rights.²⁶³

The Sámi were unable to change their fragile legal situation or fight for better economic conditions because they lacked a strong regional organization; however, Finnmark had well-developed local resource management organizations, such as Alta Laxefiskeri-Interesseselskab [Alta Salmon-fishing Partnership]. The Alta Salmon-fishing Partnership was created to manage the local villagers’ communal rights to fish salmon in Alta River.²⁶⁴ The partnership created local written norms for the fishing, and thus conforms to one of the requirements to establish a special privilege in Norwegian law: a strong organization.²⁶⁵ It is interesting to note that Alta Laxefiskeri-Interesseselskab used Ostrom’s principles of long-enduring CPR-institutions. For instance, it had clearly defined boundaries, limited the people with rights to fish in the Alta River to 100 people in 1862, and it had paid monitors in addition to the 100 people who were allowed to fish in the River.²⁶⁶ The situation on the Neiden River was similar: a defined group of people (skolte Sámi) had lived in the River valley for generations, and managed the salmon fishing communally. The group had fishing rights based on continuous use and as farmers with riparian rights.²⁶⁷ However, when a Finnish immigrant (and farmer) who had been excluded from fishing in the river took the issue to court in 1848, the 1775 resolution was used to grant fishing rights to all the farmers in Neiden Valley, not only the original group who had used the River.²⁶⁸ Although in both the Alta River and Neiden

²⁶¹ Eythórsson, *NIKU Oppdragsrapport 43/2011*, 134. People who picked unripe berries were not told not to, but called “unripe berry-picker” (this was an insult). Marshes close to roads were often reserved for elderly people. (From interviews in Nesseby).

²⁶² Tønnesen, *Retten til Jorden i Finnmark*, 188. The reindeer herding law of 1833, amended in 1933.

²⁶³ Tønnesen, *Retten til Jorden i Finnmark*, 188.

²⁶⁴ It is remarkable that many of the rights to resources in Finnmark were given to “bygdelag” or village councils/communities. This was done in the resolution of 1775, and repeated in 1965, when the rights were given to the “kommune” or local government/city council. See Tønnesen, *Retten til Jorden i Finnmark*, 223.

²⁶⁵ Tønnesen, *Retten til Jorden i Finnmark*, 181.

²⁶⁶ Tønnesen, *Retten til Jorden i Finnmark*, 246.

²⁶⁷ Tønnesen, *Retten til Jorden i Finnmark*, 255.

²⁶⁸ Tønnesen, *Retten til Jorden i Finnmark*, 255-256.

River the management of the fishing was done by local people, management of resources in larger areas, such as forestry was not in local control.

The Norwegian influence on Finnmark became stronger from the late 1800s to the early 1900s. A steep population increase in Norway brought many migrants north in search of land.²⁶⁹ Southern farming traditions were introduced at the expense of nomadic economic activities.²⁷⁰ Ways to transfer land from the Sámi to the Norwegian-speaking population can for instance be seen in the *Law of 22nd May, 1902*, when Norwegian language skills became a necessity to acquire land in Finnmark.²⁷¹ There are different arguments for why language skills became connected to land ownership in Finnmark. Thuen argues that it was part of a trend of Social Darwinism that fit with nationalist ideas on the eve of independence while Ravna mentions a national security aspect.²⁷² The reasons are most likely a combination of several factors, including a way to speed up land sales. The result was paradoxical: the Sámi had to learn Norwegian to be allowed to buy land that their ancestors had used for centuries.

Governing land in Eeyou Istechee

The *Indian Act* had failed to assimilate Canada's First Nations into the Confederation. However, the *Act* had effectively diminished the Indigenous peoples' governing structures and undermined economic viability on the reserves. Harold Cardinal wrote: "The white man's government has allowed (worse, urged) its representatives to usurp from Indian peoples our rights to make our own decisions and our authority to implement the goals we have set for ourselves."²⁷³ What the *Indian Act* and other government policies had done to create despair in many First Nations communities was also acknowledged by government bureaucrats, and in the 1960s mandate of *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies*, was to look for a way the Indigenous population could live with

²⁶⁹ Edgar Hovland, "16: Recovery and Growth in the Norwegian Economy, 1815-75," in *Norway: A History From the Vikings to Our Own Times*, trans. Michael Drake, (Oslo: Scandinavian University Press, 1995), 231. The population increased from 0.9 million to 1.8 million between 1815 and 1875, despite mass emigration. Many emigrants went north first, before they sailed to America.

²⁷⁰ Ravna, "Hva må til," 30.

²⁷¹ *Lov av 22. Mai 1902*, §7, *Om afhændelse af statens jord og grund i Finnmarkens amts landdistrikt*, quoted in Ravna, "Hva må til," 30.

²⁷² Ravna, "Hva må til," 30.

²⁷³ Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig Ltd., Publisher, 1969), 8.

“equality and dignity within the greater Canadian society.”²⁷⁴ This survey, called the Hawthorn Report, has been cited as one of the inspirations of the JBNQA, and deserves a closer investigation.²⁷⁵

One of the main concerns voiced in the Hawthorn Report was the lack of economic opportunities for the Indigenous peoples in Canada. For obvious reasons this section will only focus on the inhabitants in or near Eeyou Istchee. The view the authors have of the “isolated bands along the whole large wooded belt of the country, whose populations specialize to a high degree in hunting, fishing and trapping,” is that they exhibit “much the same characteristics as developing nations.”²⁷⁶ These activities were not seen as self-sufficient, with the exception of a few nomadic bands who could only make hunting a livelihood by using “externally-owned Crown lands.”²⁷⁷ Since the hunting and trapping activities were not sustainable the inhabitants of these communities had become dependent on government relief.²⁷⁸ A solution to avoid relief dependency and low incomes was for the rural inhabitants to gradually move to urban centers for better paying jobs.²⁷⁹ The authors do stress that this was not the only way out of poverty, and that economic development also had to consider social and cultural aspects.²⁸⁰

Employment was naturally seen as the most important objective to achieve economic development. However, the Hawthorn Report noted that population pyramid posed a challenge in many first nations’ communities. The Report had samples from thirty-five bands, and 49% of the populations in these samples were under the age of sixteen.²⁸¹ In Mistassini 50.1% were under sixteen and Rupert House (Waskaganish) it was 50.3%.²⁸² Social security payments such as child tax benefits and pensions were seen as demoralizing men who worked in traditional resource based industries, since these payments were often

²⁷⁴ H. B. Hawthorn and M. A. Tremblay, editor, *A Survey of the Contemporary Indians of Canada: Economic Political, Educational Needs and Policies*, Ottawa: Indian Affairs Branch, 1967, 5.

²⁷⁵ *Report of the Royal Commission on Aboriginal Peoples. Volume 1: Looking Forward, Looking Back* [RCAP], Ottawa: Minister of Supply and Services, 1996, 317.

²⁷⁶ Hawthorn, *A Survey of the Contemporary*, 26.

²⁷⁷ Hawthorn, *A Survey of the Contemporary*, 27.

²⁷⁸ Hawthorn, *A Survey of the Contemporary*, 62.

²⁷⁹ Hawthorn, *A Survey of the Contemporary*, 140-141. The Report have six steps of progression from (1) “hunting, fishing, food and fuel gathering” to (6) “full time employment and residence in urban communities.”

²⁸⁰ Hawthorn, *A Survey of the Contemporary*, 182, from Summary and Recommendations on Economic Development. Recommendation # 3.

²⁸¹ Hawthorn, *A Survey of the Contemporary*, 45.

²⁸² Hawthorn, *A Survey of the Contemporary*, Table XIII, Age and distribution of band population, 98.

higher than wages paid to workers.²⁸³ The Report did not take into account that these payments often supported the family hunting lifestyle, and that much of the work in the northern hunting and fishing communities to produce pelts for sales was done by women and children.²⁸⁴ For instance, in an interview Mary Bearskin, an elderly woman from the Fort George area, revealed that she was “a very good hunter” and that she also “loved cleaning everything, including the fish.”²⁸⁵ The statistics in the Hawthorn Report had been created to fit a Euro-Canadian system of organizing work and family life and were not adequately changed for a different reality.

Despite obvious shortcomings, the Hawthorn Report touched on the importance of a land base for self-government within a provincial jurisdiction.²⁸⁶ The Report clearly identified self-government, as autonomy at the local, municipal level.²⁸⁷ However, while the structure of local communities under provincial jurisdiction is a “temporary constellation,” based on property ownership and political rights, the land on reserves is communal, the band not only owns the land together, but also the assets gained from the resources of that land, and the membership mostly defined by birth.²⁸⁸ The Report thus identifies the *Indian* status as ‘not only a legal, but a political condition.’²⁸⁹ Some bands had under section 82 of the *Indian Act* raised local taxes for local projects, but the Report acknowledged that the source of local revenues in form of individual taxation was not sufficient to effectively run any “substantive aspect of local government activity” in the early 1960s.²⁹⁰ Nevertheless, the Hawthorn Report advised self-governance on the municipal level as this was the only level that “that Indians can acquire any collective freedom.”²⁹¹ In 1968

²⁸³ Hawthorn, *A Survey of the Contemporary*, 61.

²⁸⁴ The Report assumed that only men ages 16 to 64 worked, i.e. 46, 48.

²⁸⁵ Richardson, *Strangers Devour the Land*, 152. Regine Flannery, *Ellen Smallboy: Glimpses of a Cree Woman's Life*. (Montreal and Kingston: McGill-Queen's University Press, 1995), 14. Ellen Smallboy recalled that she could set snares by herself at five or six, and that these skills assured her family's survival when her father died.

²⁸⁶ Hawthorn, *A Survey of the Contemporary*, 263.

²⁸⁷ Hawthorn, *A Survey of the Contemporary*, 263. The authors of the Report wrote that it was not as “independent” nation states. This point was important to make in the report as a perception that the Indigenous population were outside the Canadian community. When Sámi rights were defined in Norway, the commission made the point that the Sámi could not claim “nation state” status under international legislation.

²⁸⁸ Hawthorn, *A Survey of the Contemporary*, 270-271, 273.

²⁸⁹ Hawthorn, *A Survey of the Contemporary*, 263.

²⁹⁰ Hawthorn, *A Survey of the Contemporary*, 282.

²⁹¹ Hawthorn, *A Survey of the Contemporary*, 293. This recommendation had the support of both the 1946-48 and the 1959-61 Joint Senate and House of Commons Committees, in addition to “virtually all interested groups.” Hawthorn, 292.

consultation meetings were held to revise the *Indian Act*. Indigenous people wanted “greater self-government; more funds for economic and social development; settlement of land claims; protection of treaty rights; and constitutional recognition of aboriginal rights.”²⁹² Chapter 2 will reveal if any of these wishes materialized.

Conclusion

When the English incorporated the land in North America into their legal framework through the *Royal Proclamation of 1763*, they used a top down approach to satisfy the English elite and not a nation-to-nation agreement accepted by the tribes who lived on the land. Likewise, the *Lapp Codicil of 1751* was an agreement to establish firmer borders between Denmark-Norway and Sweden and done without consultation with the local inhabitants. In both Canada and Norway the geography played a role: the legal codes were drafted to suit the goals of elites in the power centres – to keep peace in the land and thus ensure livelihoods. The impact the codes had on lived experiences was marginal in the rest of the century, and the local laws could still be practiced. As the central authority grew thicker roots in the soil, through settlements and time, layers of new laws encroached on the local laws, which became known as *customary* and thus less salient in the eyes of the authority. However, Indigenous peoples ignored the states’s push for privatization of land, and continued to use the land and water communally. In cases where local laws were codified into the state laws, such as those involving village societies’ control of local resources, the government officials experienced less friction with the local inhabitants. The endurance of the locally established laws will therefore be the underlying concept for the next chapter shedding light on why the hydropower developments were resisted so strongly.

²⁹² John Leslie, research consultant to the 37th PARLIAMENT, 1st SESSION, Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, COMMITTEE EVIDENCE CONTENTS, Tuesday, March 12, 2002.

Chapter 2: Confrontations and resistance over closures of the commons.

In this chapter I examine the background for the legal and political actions taken by the Sámi and the Cree, before I look at the *Kanatewat* case, an interlocutory injunction the Cree filed after *Bill 50* was introduced, and *Rt 1982*, the Supreme Court case the Sámi filed after the parliament had refused to change their stance in the Alta River hydropower development.²⁹³ While the first chapter described how the Sámi and James Bay Cree had social organizations that were on a par with non-Indigenous populations before their rights slowly dissolved through legislative measures, and a loss of unity due to technological and economic changes, the second chapter concerns how the Sámi and the Cree seemingly regained some of the rights that were lost through the same channels. The chapter is called *confrontations and resistance* for several reasons; both are central to the Indigenous peoples' agency as they challenged the ideas of the dominant society. The etymology of *confrontation*, is the "action of bringing two parties face to face" and *resistance*, is "make a stand against, oppose."²⁹⁴ Bringing two parties face to face while making a stand was exactly what the Eeyouch and the Sámi did when the Eeyouch brought in an unusually large number of witnesses for the *Kanatewat* case, and the Sámi staged a drama that was captured by the media. Successful political and strategic use of media enabled the Eeyouch and Sámi to challenge the prevailing ideas of land governance.

The governments' goals in the 1970s were not much different from when the *Royal Proclamation* and the *Lapp Codicil* were written; the government of Québec wanted to gain a presence and thus control over land, and the government of Norway wanted to utilize resources and fill its treasury. The 1960s and 70s brought changes to how Indigenous rights were viewed. Attempts by the Liberal government to abolish the *Indian Act* with the infamous *White Paper* of 1969 spurred protests across Canada. The intention behind the *White Paper* was to make Canada's Indigenous people full citizens "of the communities and provinces;" however, the means to do it - to privatize their land - showed a poor understanding of what the

²⁹³ "The interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to keep matters in *status quo* until the hearing or further order." *Legal Dictionary Online*, s.v. "interlocutory injunction," last accessed, 24/6/2014.

²⁹⁴ *Online Etymology Dictionary*, s.v. "confrontation," s.v. "resistance," last accessed, 24/6/2014. <http://dictionary.reference.com/browse/confrontation>.
<http://www.duhaime.org/LegalDictionary/I/InterlocutoryInjunction.aspx>.

land meant to the culture.²⁹⁵ A few court cases in both Canada and Norway paved the way for the Sámi and Cree to claim their rights to land and water, and to discuss the cultural significance of land. The two most important cases were the *Calder* case in British Columbia in 1973 and the *Altevatn* case in Troms in 1968.²⁹⁶ In British Columbia, the Nisga'a argued that they had the right to hunt and fish outside the hunting and fishing season, which was regulated by the province for commercial and recreational use. In Troms, Sámi from two "siidas", Talma and Saarivuoma, argued that a hydropower development had destroyed access to reindeer grazing areas and fishing rights claimed from time immemorial, and demanded compensation for the loss. These two cases also challenged perceptions about what constituted property rights in the two countries, and the states' relationship to its Indigenous subjects. The cases, *Calder* and *Altevatn*, indicated that the courts could be a place to discuss Indigenous rights, and were thus important to the Cree and Sámi beyond the precedence these cases set before the interlocutory injunction was filed by the Cree in 1973, and the Alta Case was filed by the Sámi village of Masi and others in 1982.

In the *Calder* case, the Western definition and philosophy of land ownership of the day were challenged, while at the same time Indigenous rights and legal perceptions were discussed using European concepts of private property rights and legal language.²⁹⁷ The main topic of the *Calder* case was to establish that an exclusive occupation and use of land and water granted aboriginal title to land and thus could be considered real property.²⁹⁸ The first part of the appellants' argument in the case was to prove that the Nisga'a had occupied and used the "1,000 square miles in and around the Nass River Valley, Observatory Inlet, Portland Inlet and the Portland Canal, all located in northwestern British Columbia" since before the White man came to the land, and that their interpretation of use was *legal* in nature.²⁹⁹ Anthropologist Wilson Duff's book *Indian History of B.C.* (1964) used in the case stated: "It is not correct to say that the Indians did not 'own' the land but only roamed over the face of it and 'used' it," and the

²⁹⁵ Jean Chrétien, *Statement of the Government of Canada on Indian Policy*, Canada: Department of Indian Affairs and Northern Development, 1969, 5, 6.

²⁹⁶ British Columbia is a Province in Canada and Troms one of the 19 Counties in Norway.

²⁹⁷ The Nisga'a's rights were called usufruct, which is a term grounded in Roman and Civil law: "The right to use and derive profit from a piece of property belonging to another, provided the property itself remains undiminished and uninjured in any way." <http://dictionary.reference.com/browse/usufruct?s=t>.

²⁹⁸ *Calder et al. v Attorney General of British Columbia*, [1973] S.C.R. 113, (Can.). [*Calder et al.* cited to SCR].

²⁹⁹ *Calder et al.*, *supra* note at 313.

patterns of use and ownership were “different from those recognized by our system of law, but were nonetheless clearly defined and mutually respected.”³⁰⁰ There is no universally accepted definition of what law is; however the last part of the quotation explains the Nisga’as’ land use and occupation were organized by law.³⁰¹

The *Altevatn* case was about Swedish Sámi reindeer herders’ use of unregistered (umatrikulert) Crown land that had been dammed and what kind of compensation they would be entitled to.³⁰² The debate was complicated: first, to whom would compensation be paid, if any, and second, the influence of international relations between Norway and Sweden on the outcome of the case. During the court case, different forms of legal claims to the land and water arose. The hydropower company, Norwegian Water Resources and Energy Directorate (Norges Vassdrags- og Elektrisitetsvesen, NVE) argued that if the Swedish Sámi could prove exclusive grazing and fishing rights, neither the Norwegian Sámi nor the Norwegian government as the owner of the unregistered crown land could ask for compensation. NVE’s argument reiterates a Blackstonian exclusive “sole and despotic dominion” over a defined piece of land, where in fact there were several owners of land rights and the boundaries were fluid.³⁰³ The case was complicated because of some the Sámi who had rights to use the areas around Altevatn lake as a summer grazing area and the lake for household fishing were Swedish and therefore foreign subjects. However, to extinguish the Swedish Sámi’s rights would break an international treaty between Sweden and Norway, the *Lapp Codicil*, and the hydropower developer was thus not only accountable to a group of Sámi, but also the Swedish state.

The Nisga’as’ ownership claims to the land and water from time immemorial appealed to the laws that formed the basis of Canada’s constitution. A territorial claim was established through a quote from David Mackay of 1888:

What we don’t like about the Government is their saying this: “We will give you this much land.” How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land

³⁰⁰ *Calder et al.*, *supra* note at 318.

³⁰¹ Brian Z. Tamanaha, “A Non-Essentialist Version of Legal Pluralism,” *Journal of Law & Society* 27, no. 2, (2000): 301-302; Hart, *The Concept of Law*, 1.

³⁰² Umatrikulert means the land was unregistered or not separated from the crown land.

³⁰³ Blackstone quoted by Getzler, *A History of Water Rights*, 159. See also Mirow, “The Social Obligation of Property,” 194.

that way, and yet they say now that they will give us so much land – our own land. (...)If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours for thousands of years. If any strange person came here and saw the land for twenty years and claimed it, he would be foolish.³⁰⁴

Mackay used the rationale of a nation-to-nation relationship between the Nisga'a and the government, to argue that the acquisition of his land had not happened through conquest, and was not taken by force. The Nisga'a's lawyer, Thomas Berger, used the same tactic in the *Calder* case as he had done in *Regina v. White and Bob*; he used older laws such as the 1763 *Royal Proclamation* and archive material to prove that the Nisga'a indeed had rights to land.³⁰⁵ The land had not been purchased by the British government and therefore by establishing a territorial occupation by the Nisga'a over thousands of years Berger argued that the land in fact belonged to the Nisga'a. In the *Calder* case, Justice Norris concluded that Indian rights existed before the *Royal Proclamation* and were confirmed by the 1854 treaty with James Douglas.³⁰⁶

NVE argued that that the rights the Swedish Sámi had were built on a treaty, and therefore it was the Swedish and Norwegian government that had to solve the conflict. They questioned if the case could be argued from a private law base.³⁰⁷ History was used to back up these statements by NVE, and they recalled that the Danish-Norwegian government had tried to limit the Sámi's use of land and water, and that even the *Lapp Codicil* acknowledged Sámi rights as long as the use was consistent with *the interests of the state*.³⁰⁸ They used the border closure between Norway and Russia in 1926 as an example: the Sámi use of land was disregarded and no compensation paid. Moreover, NVE questioned the Sámi's right to a distinct geographical area, since the state had previously exercised the right to control the number of reindeer, reduced the areas allowed for reindeer herding or moved the Sámi from areas that had been used from time

³⁰⁴ *Calder et al.*, *supra* note at 319. This was said before the first Royal Commission first visit to the Nass Valley. Spelling from the original document.

³⁰⁵ Douglas C. Harris, "A Court Between: Aboriginal Treaty Rights in British Columbia court of Appeal," *BC Studies*, no. 162 (2009): 140.
http://content.ebscohost.com/pdf23_24/pdf/2009/7J2/01Jun09/44062893.pdf?T=P&P=AN&K=44062893&S=R&D=a9h&EbscoContent=dGJyMNxb4kSeqa44zdnyOLCmr0uep7VSsq%2B4TbCWxWXS&ContentCustomer=dGJyMPGut0%2B0qLZluePfgex44Dt6fIA. Between the Indian Act of 1927 (149 A) and the Indian Act of 1951 Indian land claims had been criminalized, and therefore no cases were available from that time period.

³⁰⁶ Harris, "A Court Between," 141. "James Douglas, the chief factor of the Hudson's Bay Company at Fort Victoria, concluded a set of fourteen agreements with Aboriginal peoples on Vancouver Island between 1850 and 1854." Harris, "A Court Between," 139.

³⁰⁷ *Rt-1968-429*, 433. (privatrettslig) "Inhabitants in one country cannot claim against another country even if they practice the rights [their] state can claim." NVE in *Rt-1968-429*, 434.

³⁰⁸ *Rt-1968-429*, 433.

immemorial.³⁰⁹ NVE argued that the Sámi's usufruct rights only existed as long as they did not conflict with state interests.³¹⁰ According to the power company, the state's interest was to provide Northern Norway with electricity. The NVE and local power producers met in 1953 to discuss how to connect the power production in Northern Norway to the national power network.³¹¹ Only a larger power source could justify the expense of connecting Troms to the national power network, and the building of Innset power plant, which caused the Altevatt case made Troms part of the national power network.³¹²

Federal lawyers in the *Calder* case also questioned the legal base, as understood from common law, of the Nisga'a's claims to land and water rights.³¹³ First, they questioned if the *Royal Proclamation of 1763* was legally binding for British Columbia, since the area mentioned in the Proclamation did not include land on the west side of the Rockies.³¹⁴ However, its absence could hardly be seen as a reason *Indian title* to land did not exist: when Douglas could not get money from London to purchase land from the First Nations, he made a proclamation that "all lands in British Columbia and all mines and minerals thereunder belonged to the Crown in fee."³¹⁵ Even if neither the *Douglas Proclamation* nor the *Royal Proclamation* were seen as valid legal documents to prove the Nisga'a's rights to land and water, both pointed to the fact that the newcomers to North America acknowledged that the land was occupied before their arrival.³¹⁶ In the absence of conquest and purchase of land, the ultimate title to land in the Crown may be seen as a subtle way by the state to establish possession of land. With the ultimate possession vested in the Crown, the usufruct rights to such land were "dependent on the goodwill of the sovereign."³¹⁷ Thus it is not surprising that British Columbia affirmed the *Royal Proclamation of 1763* when the colony entered Confederation in 1871.³¹⁸ However, ultimate title in the Crown and acknowledgment of *Indian title* on the

³⁰⁹ *Rt-1968-429*, 434.

³¹⁰ *Rt-1968-429*, 434.

³¹¹ Pilskog, "I Spenninga," chapter 2.

³¹² Pilskog, "I Spenninga," chapter 2. The connection to the national power network and the first year of production of power from Innset was in 1960. The MA thesis was inspired by Hughes, *Networks of Power*. Troms is the county south of Finnmark.

³¹³ Martland, Judson and Ritchie.

³¹⁴ *Calder et al.*, *supra* note at 328. See also Royal Proclamation.

³¹⁵ *Calder et al.*, *supra* note at 331.

³¹⁶ *Calder et al.*, *supra* note at 345, 351.

³¹⁷ *Calder et al.*, *supra* note at 313, reference to *St. Catherine Milling*.

³¹⁸ *Calder et al.*, *supra* note at 313, 315 (when the Colony of British Columbia entered the Confederation the British Columbia Terms of Union was signed, Term 13 states: "The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government and a policy as liberal as that hitherto pursued by the British

Crown land could be used to prove that British Columbia had made laws that were *ultra vires* or beyond their legal authority.³¹⁹ Noteworthy also is that English law was used to “prove” the Nisga’a’s rights to land, and that the arguments were not based on Nisga’a customary laws.

The NVE disputed the Swedish Sámi’s rights to be guarded from expropriation on criteria of ownership, and maintained that the Swedish Sámi reindeer herding was characterized as *tolerated use*, and was not based on a right from time immemorial. First, the area used was large, the use moved from place to place, and had no firm geographical limits. Possessive rights, NVE argued, warranted a well-defined area. Second, the use was not exclusive even to one *siida*.³²⁰ In addition to Talma and Saarivuoma, who constituted the appellants, the towns of Kõnkämä and Lainiovuoma had summer grazing around *Altevatn*, and Norwegian Sámi used the area seasonally; in the winter for reindeer grazing, and in the spring for fishing.³²¹ Therefore the NVE argued that an eventual compensation was to be paid to the Swedish state, to the “lappfond,” and not the individual Sámi reindeer herder.³²² Because the cross border use of grazing areas was based on an international treaty, NVE argued that disputes were to be solved by state to state negotiations. In this way, the NVE tried to avoid the much deeper question of Sámi views of ownership, and emphasized the states’ interests.

The Nisga’a did not win the *Calder* case; nevertheless, the Supreme Court of Canada had for the first time admitted that *Indian title* “has never been lawfully extinguished.”³²³ For title to be extinguished there had to be a pre-existing title on the land, which in this case would have originated from a native jurisprudence.³²⁴ Native jurisprudence was not something that was foreign to common law. The British had colonized enough land with a pre-existing jurisprudence to know that law had governed societies before the

Columbia Government shall be continued by the Dominion Government after the Union.” The reserves in the Nass area was confirmed by the federal government in 1913 under the powers of section 91(24) of the *BNA Act* (“Indians, and Lands reserved for the Indians.”).

³¹⁹ *Calder et al.*, *supra* note at 354.

³²⁰ *Siida* was not used in the case, instead a less precise term “lapp-town” (*lappeby*) was used. The term “Sámi town” is the Swedish legal term for *siida*. The term *Siida* means more than just the physical Sámi town, it also describes relationships.

³²¹ *Rt-1968-429*, 436.

³²² *Rt-1968-429*, 436.

³²³ *Calder et al.*, *supra* note at 422. The words of Pigeon J.

³²⁴ Jurisprudence derives from Latin, and means “the study, knowledge, or science of law,” however, in North America it is linked to the philosophy of law. From *Legal Dictionary Online*, s.v. “Jurisprudence,” last accessed, 28/8/2014. <http://legal-dictionary.thefreedictionary.com/Jurisprudence>.

British presence imported the Common Law.³²⁵ The legal conceptions held by some Indigenous peoples, in the words of Lord Sumner in South Rhodesia, “*though differently developed, are hardly less precise than our own.*”³²⁶ The challenge was what this was to mean in legal disputes over land; since the Nisga’a had customary laws that provided rights to land and water, did this mean their understanding of their laws should be incorporated into the Canadian laws? The *Calder* case shows that the Nisga’a laws had been retained and had relevance for the people who used them. Nisga’a laws were what H.L.A. Hart called primary rules of obligation, but lacked the common law secondary rules of recognition.³²⁷ It is clear that the tension found in the different opinions of what to call *laws* originated in the divergent ways of organizing a society.

The argument that Sámi rights pre-existed any legal rights the Crown had to land was made in the *Altevatn* case. The evidence used to prove these claims were the geographical names in the area surrounding *Altevatn*.³²⁸ These names showed that the area had been used exclusively by nomadic Sámi, who, as a result of the *Strömstad Treaty* of 1751, became either Norwegian or Swedish.³²⁹ The *Lapp Codicil* confirmed the Sámi’s rights, and despite the Russian Empire’s abandonment of the Sámi’s rights when the borders were closed between Norway and the Grand Duchy of Finland in 1852, Norway and Sweden kept the laws in the *Codicil*.³³⁰ In 1905, Norway was forced to uphold the agreement from 1751 (despite wishes to abandon these rights) during the independence settlement with Sweden.³³¹ In addition to international treaties and national laws, the Sámi’s fixed use in an area from time immemorial was eligible for compensation after Norwegian and Swedish case law traditions.³³² Although the NVE tried to limit the Swedish Sámi’s access to compensation, their rights were so clearly defined in *Norwegian legislation* that

³²⁵ *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399. in *Calder v. A.G.B.C.*, [1973] S.C.R. 313, 354.

³²⁶ *Re Southern Rhodesia* [1919] A.C. 211, in *Calder et al.*, *supra* note at 387. Emphasis in original document. Lord Sumner also said that “Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society.” *Ibid*.

³²⁷ Hart, *The Concept of Law*, 98. Obligations: when demands for conformity are great, social sanctions short of violence are made. For Hart the sovereign’s recognition of rules is what change customs into law; however, by his definition only social organizations with a *sovereign* can therefore have (real) laws.

³²⁸ *Rt-1968-429*, 435.

³²⁹ Lantto, “*Borders, citizenship and change*,” 545-546. The *Lapp Codicil* was an addendum to the treaty.

³³⁰ The Sámi’s rights were also compatible to Norwegian and Swedish national legislation. (Hevd)

³³¹ *Rt-1968-429*, 436.

³³² *RT-1968-429*, 436. My translation.

NVE did not win the case. The dam had already been built, and it was a question of compensation for land that had been expropriated that was discussed primarily; however, this could not be done without simultaneously touching on the legal protection of the particular Sámi land use.

The *Calder* case and the *Altevatn* case challenged legal perceptions in their respective countries. The *Calder* case has become a landmark in Canadian case law, as it challenged authorities' views on Indigenous land rights in Canada.³³³ Through the arguments in the case the Nisga'a's customary laws were translated into the English Common law without diminishing them to mere "norms." Experiences from the British Empire were used to show that a sophisticated interpretation was necessary when "translating" concepts of ownership from one legal philosophy to another. For instance, Berger cited a case from Nigeria to emphasize that when "interpreting the native title to land, not only in Southern Nigeria, but other parts of the British empire, there is no such full division between property and possession as English lawyers are familiar with."³³⁴ And although this sophistication was not used by all of the judges in the *Calder* case, it was an important step towards recognizing First Nations' land rights, for as Borrows mentions, legal principles not derived from the dominant culture "often encounter daunting obstacles before they are accepted."³³⁵ On one hand, the "translation" of Nisga'a legal concept into Common Law gave the Canadian law a multi-cultural grounding, as it can be seen as intercultural communication and a way to find common ground.³³⁶ On the other hand, incorporating Nisga'a legal concepts into Canadian jurisprudence is perhaps not so different from what King George III did in 1763; as long as a peaceful agreement where the ultimate power of land is with the crown, a variety of concepts to communicate state power is welcomed.

The *Altevatn* case acknowledged a protection for the reindeer herders' rights to land and water comparable to the protection private property owners can expect, and what is remarkable is that these were rights of *nomadic* users, not property owners' rights to the village commons. The legal base the reindeer herders had in their claims to use land and water was thoroughly examined in the *Altevatn* case, and it is

³³³ Lorraine Weir, "'Time Immemorial' and Indigenous Rights: A Genealogy and Three Case Studies (*Calder*, *Van der Peet*, *Tsilhqot'in*) from British Columbia," *Journal of Historical Sociology* 26, no. 3 (2013): 383, doi: 10.1111/johs.12028.

³³⁴ *Calder et al.*, *supra* note at 355.

³³⁵ John Borrows, "With or Without You: First Nations Law (in Canada)" *McGill Law Journal* 41, (1996), 658.

³³⁶ Borrows, "With or Without You," 664.

referenced in later cases where the reindeer grazing rights have been questioned.³³⁷ The *Altevatn* case opened up the courts as a venue for the Sámi to discuss rights to land and water. A long legal process for the Sámi in all the Nordic countries to justify their rights to land and water therefore began with the *Altevatn* case.³³⁸ The rights to land and water, however, did not benefit all Sámi equally as exposed in the Alta case. In the Alta case the reindeer herders in Alta were able to gain compensation in the form of money from the expropriation of reindeer grazing lands, but the Alta Laksefiskeri Interessentskap, the communally-owned salmon co-operative, was not eligible for compensation for their loss of fish.³³⁹ One can perhaps be cynical and think that in the *Altevatn* case it was not the Sámi culture or ethnic connection to the geographical area around *Altevatn* that gained protection, only the economic activity of reindeer herding.

James Bay Region Development Act: Bill 50

In October of 1970, kidnappings of a British trade Commissioner and a Québec politician by the Front de Libération du Québec (FLQ), a radical separatist group, showed that a serious discontent was present in Québec.³⁴⁰ The FLQ's Manifesto, which was read on Radio-Canada, declared: "In the coming year Bourassa is going to get what's coming to him: 100,000 revolutionary workers, armed and organized!" and "We have had enough of promises of work and prosperity."³⁴¹ Clearly, Premier Bourassa needed something that would stimulate belief in the future of Québec and create jobs.³⁴² In addition, the Dorian Report of 1968 recommended that the government should increase its presence in Northern Québec, and not give "Ottawa free rein to fill this space."³⁴³ Bourassa's solution was to create a massive hydropower project modeled after the Tennessee Valley Authority (TVA), where a series of dams on a river opened up

³³⁷ *Rt-1985-532*, 534-535. And *Rt-1975-1029*, 1032 are two cases where the reindeer herders' rights were justified by the *Altevatn* case.

³³⁸ Anett Sasvari and Hugh Beach, "The 2011 Swedish Supreme Court Ruling: A Turning Point for Saami Rights," *Nomadic Peoples* 15, no. 2 (2011): 130. doi: 10.3167/np.2011.150208.

³³⁹ Alta River and *Altevatn* are situated in two different counties.

³⁴⁰ "The October Crisis," CBC Learning. <http://www.cbc.ca/history/EPISCONTENTSE1EP16CH1PA4LE.html>. Last accessed 11/7/2014.

³⁴¹ "The FLQ Manifesto," Marcel Rioux, *Québec in Question* (1971), trans. James Boake, Front de Libération du Québec: Manifesto of October 1970. Last accessed, 11/7/2014. <https://www.marxists.org/history/canada/quebec/flq/1970/manifesto.htm>.

³⁴² Éric Gourdeau, "Genesis of the James Bay and Northern Québec Agreement," in *Reflections of the James Bay Northern Québec Agreement*, ed. Alain-G. Gagnon and Guy Rocher (Montréal: Québec Amérique, 2002), 18, and Desbiens, *Power from the North*, 21-25.

³⁴³ Desbiens, *Power from the North*, 9, 30.

the territory for mining and forestry, and “to make Québec an economically powerful modern state.”³⁴⁴ It was troubles in southern Québec that prompted the decision to build the largest hydropower project in the world. Or as Cree leader, Matthew Coon-Come writes it was not done in agreement with the people who lived on the land, but in the office of Premier Robert Bourassa.³⁴⁵

In the quest to transform Québec TVA-style, the *James Bay Regional Development Act*, also known as *Bill 50*, was passed to establish the James Bay Development Authority with powers to develop and manage the building of dams, the forestry industry, the mining, and tourism, or in Bourassa’s words “to guarantee an integrated and balanced development of the whole of the territory’s resources.”³⁴⁶ Most of *Bill 50* is about corporate regulations; however, along with sections on dollar amounts of shares that belong to the public domain and clauses on temporary replacement of board members are expanded powers to extract resources from the James Bay territory.³⁴⁷ These sections were like invasive weeds on the land; they may have seemed innocent at first glance, but without resistance they could do some real damage.

Section 3 and 5 were the two main objections the Eeyouch had to *Bill 50*. Section 3 gave the Corporation extended powers and was unconstitutional.³⁴⁸ In hindsight, it may be puzzling that the authors of *Bill 50* ignored the *Constitution Act* of 1867, as constitutional issues are taken seriously in court, and especially since the *Indian Act* is written as a result of section 91(24) of the Constitution.³⁴⁹ Hydro Québec’s history, however, had shown *Indian* land could be expropriated; Manic 5 was built as if the Innu’s land was a *terra nullius*.³⁵⁰ In addition Francophone nationalism put the province in a delicate

³⁴⁴ Bourassa, *James Bay*, 8. The TVA had been part of the philosophy of the first nationalization attempts of hydropower, Adélar Godbout was a New Deal admirer and his power expropriations led to the establishment of Hydro Québec in 1944.

³⁴⁵ Matthew Coon-Come, “Different Laws for Different Peoples,” in *Justice for Natives: Searching for Common Ground*, ed. Andrea P. Morrison (Montreal & Kingston: McGill-Queen’s University Press, 1997), 162.

³⁴⁶ Bourassa, *James Bay*, 68.

³⁴⁷ *James Bay Region Development Act*, ch.34, C-50, s. 25,10 (1971) (Can.). The bill met with opposition from some unions who claimed it was “the biggest scheme of political patronage in the history of Canada.” (Desbiens, *Power from the*, 42) Québec’s guts to challenge legal principles have been attributed to the tension between the federal and the provincial government where the *North* federal government adopted “alert neutrality” (Carlson, *Home is the Hunter*, 210).

³⁴⁸ *James Bay Region Development Act*, ch.34, C-50, s. 25,10 [1971], s. 3: “The Corporation shall have the rights and privileges of a mandatary of the government. The property of the Corporation shall form part of the public domain, but the performance of its obligations may be levied against such property.” (by mandatary they mean representative, mandataire in the French version of the act)

³⁴⁹ Section 91(24) of the British North America Act states that “Indians, and Lands reserved for the Indians” is under federal jurisdiction. BNA Act 91(24). Chrétien, *Statement*, 7.

³⁵⁰ Desbiens, *Power from the North*, 35.

situation vis-à-vis the federal government, which made the federal government apprehensive of giving much assistance to the Cree.³⁵¹ Sections 27-31 of *Bill 50*, sets out rights of the Corporation including the power to expropriate land in the James Bay for public use, expand on how the expropriation of land was to be carried out, “in the manner provided for in the Code of Civil Procedure for expropriations by the government of Québec.”³⁵² From this section in *Bill 50* one can infer that the inhabitants in the James Bay were seen as provincial subjects. This is an interesting change in provincial relations to the region, since in 1936, after the James Bay territory was transferred from the Dominion of Canada to the Province of Québec, Québec had argued in court for the Inuit to be treated as if they had *Indian* status, because that freed the Province from responsibility of providing education and health care to Northern communities.³⁵³ Yet when land rights were the issue, as in *Bill 50*, the inhabitants of the Territory were deemed to be Québec residents, without the legal protection against expropriation as a population covered by the *Indian Act* would have. *Bill 50* was therefore not only unconstitutional, it also went against previous legal practices in Québec.

In Section 5, *Bill 50* addressed concerns over environmental issues that were important to the Québécois. It states: “The Corporation must see to the protection of the natural environment and prevent pollution in the Territory.”³⁵⁴ Bourassa described section 5 thoroughly in his book *James Bay*, and praised the forward thinking that had led the politicians to consider the environment.³⁵⁵ Bourassa wrote that the hydro-electric development was passed in the spirit of the environmental bill the Québec government had passed in 1972.³⁵⁶ The electrical needs of Québec were to be covered by clean hydropower instead of less environmentally friendly alternatives.³⁵⁷ Bourassa also refuted other possible environmental concerns such as the range of climate changes, and the effects on flora and fauna.³⁵⁸ Yet the court case that followed

³⁵¹ Carlson, *Home is the Hunter*, 210.

³⁵² *James Bay Region Development Act*, ch.34, C-50, s. 25,10 [1971], s. 29.

³⁵³ Desbiens, *Power from the North*, 9. The Supreme Court sided with Québec in 1939.

³⁵⁴ *James Bay Region Development Act*, ch.34, C-50, s. 25,10 [1971], s. 5.

³⁵⁵ Bourassa, *James Bay*, 81, 82.

³⁵⁶ The Québec National Assembly had passed an environmental bill in 1972. Bourassa, *James Bay*, 81, 82. Bourassa claims that the choice of a hydropower complex on the La Grande instead of a river further to the south was because of concerns for flora and fauna; however, soil samples showed that southern rivers could not support dams as well as the La Grande.

³⁵⁷ Bourassa had covered the expense and damages of alternatives in earlier chapters.

³⁵⁸ Bourassa, *James Bay*, 89-92.

questioned the environmental soundness of scientific findings that supported Hydro Québec; a number of these observations had been brought forward by the Eeyouch.

Regional and national Aboriginal movements had gained strength in the decade before *Bill 50* was introduced. The Indians of Québec Association, which had been strengthened through the Indigenous opposition to the *White Paper* of 1969, together with the Cree opposed *Bill 50*'s mandate to expropriate land and open the territory up for resource extraction, without following legal procedures in regards to land acquisition.³⁵⁹ The inhabitants of the territory filed a permanent injunction arguing that the *James Bay Region Development Act* was *ultra vires*.³⁶⁰ They did not obtain a permanent injunction, only an interlocutory, or temporary, order of injunction.³⁶¹

Fragmented political opposition

While the Cree were able to go to court shortly after the hydropower plans had been made official, the Sámi did not chose the legal route in the first round of confrontation. A look at the political and historical context will shed light on why the Sámi chose a different route to protect the land and resources that formed the base of their culture. When the borders closed between the Grand Duchy of Finland and Norway in 1852, the Sámi lost access to land, were relocated and lost their economic base.³⁶² In reality, these enclosures of land made part of the reindeer-herding Sámi's job illegal, as seasonal migration was restricted. The closing of these borders had not been implemented because the population of the area wanted changes; it was instead the states who wanted to define the land they governed. The national borders can be seen as laws in a very concrete form, as they are the perimeters between legal systems' control of the population and resources. The change in border crossings was based on the sovereigns' needs, against the populations' needs and wishes. Or, as anthropologist Harvey Feit testified in the

³⁵⁹ Carlson, *Home is the Hunter*, 209. Salisbury, *A Homeland for the Cree*, 54-55. The Indians of Québec Association (IQA) and the Arctic Institute of North America funded the first regional meeting in James Bay. The Cree withdrew from the IQA in 1974 (with good reasons) and formed the Grand Council of the Crees of Québec.

³⁶⁰ *Kanatewat et al. v James Bay Development Corp. et al.*, [1975] 1 S.C.R. 48, [*Kanatewat et al.* cited to SCR]. In plain English: the Cree sought to stop the hydropower development because statutes of bill 50 went beyond the powers of the Province of Québec, and it is important to note that the injunction is interlocutory and not perpetual.

³⁶¹ *Ultra Vires*: A decision which is beyond the powers or authority of the person or organization which made it.

³⁶² I acknowledge that loss of land meant much more than loss of the material base, and that land was part of the Sámi culture, language and spirituality.

Kanatewat case: “the central issue is not so much the speed of change but that people desire change, that people themselves are in control of the changes.”³⁶³ Clearly, the Sámi were not in control of the changes, and did not want them. This period saw social unrest among the Sámi; it came in many forms, as zealous religious following, substance abuse, and political activism.³⁶⁴ The famous Kautokeino uprising in 1852 where two Norwegian senior officials were killed by a group of fifty-seven members of a *siida* demonstrated the Sámi sentiment. The Norwegian government reacted harshly to the Sámi’s actions; the two leaders were executed, sixteen got servitude, seven men sent to jail in Oslo and nine women were incarcerated in Trondheim.³⁶⁵

The “Norwegianization” process in the late 1800s and early 1900s assimilated minorities into the emerging nation’s national identity. For the Sámi, choice of occupations determined their identity to some extent, as the Sámi in professional roles were expected to conform to a Norwegian identity.³⁶⁶ Since the Sámi professionals and university educated intellectuals bore much of the cost of belonging to two identities, it is therefore not surprising that it was this group, who after World War One, were the first to redefine the Sámi status within the Scandinavian context.³⁶⁷ Change in policies issued from the central government would not happen without an organized entity that could speak for the Sámi population; however, the Sámi population had not previously been organized as a single entity historically, and efforts to unite its different segments into one political unit with a strong voice for change were met with resistance.³⁶⁸ Sámi rights, however, were addressed at different levels of the political arena; and through a

³⁶³ *Kanatewat et al. supra note* at 364.

³⁶⁴ Lantto, “Borders, Citizenship and Change,” 548. The religious revivalist movement is called *laestadianerism*, and it can be interpreted as a protest movement in itself, as it was preached illegally outside the official Lutheran state church.

³⁶⁵ Johan Brox, “Kautokeino Opprøret: Kautokeino 1852,” *Dag og Tid*, April 17, 1997, <http://old.dagotid.no/arkiv/1997/16/kauto1.html>. This uprising was spurred by a religious movement, which was preached illegally outside the state church. The youngest offender was a 16 year old girl, and the oldest was a 60 year old woman. The women killed the merchant who sold alcohol to members of the community, while the men killed the policeman. The entire *Siida* community was involved: young, old, men and women.

³⁶⁶ Thuen, *Quest for Equity*, 130.

³⁶⁷ Sámi intellectuals who farmed or herded experienced less identity tensions than the professionals.

³⁶⁸ Harald Eidheim, *Aspects of the Lappish Minority Situation*, 2nd ed. (Oslo: Universitetsforlaget, 1974), 45.

network of contacts with people from the majority society, the Sámi intellectuals created awareness of Sámi issues in the political sphere.³⁶⁹

In addition, the shift to a wage economy triggered a cultural transformation and social systems that had existed for generations were crumbling. For instance, nomadic reindeer herders from the Kautokeino district, who brought their herd to the coast, relied on sedentary Sámi families during the spring and autumn to move the herd from the mainland across a sound to an island.³⁷⁰ The relationship between the nomadic and sedentary was reciprocal; the herders supplied reindeer products in exchange for services such as help during the crossing of the sound.³⁷¹ However, the exchange of favours was delayed, as the herders waited for the optimal time to slaughter livestock, and rewards for labour were therefore not instant as in a cash economy. When the Labour government made funds available for industrial developments in 1935, and a monetary economy replaced the exchange economy, the relationship between the sedentary and nomadic Sámi changed.³⁷² The crossing had been a family event; however, many of the coastal Sámi men were engaged in wage labour on Norwegian fishing boats, and could not participate during the spring crossing. Although the reindeer-herding Sámi continued their way of life, the sedentary Sámi became less interested in helping with the crossing of the sound. The nomadic Sámi were increasingly seen as backward by the coastal Sámi, and combined with schools that taught students that the Sámi language was inferior to the Norwegian language, it is not surprising that many of the younger Sámi started to identify as Norwegian. Opportunities to speak Sámi were limited to the home, as Norwegian language skills became essential for the men who were engaged in fishing. The economic situation of the coastal Sámi was therefore an important factor in the changing perceptions of the Sámi identity.

When the Soviet troops entered Norway in 1944, the German army deployed scorched earth tactics in the north.³⁷³ Before the burning took place a Sámi community could be distinguished from Norwegian communities, however, the rebuilding of Finnmark, was done using standardized

³⁶⁹ Eidheim, *Aspects of*, 39-43.

³⁷⁰ Eidheim, *Aspects of*, 26 Eidheim did a case study and interviewed members of these families about the time period 1900-1940.

³⁷¹ Eidheim, *Aspects of*, 26-29. The local Sámi helped with boats and personnel, and the size of the family mattered, men, women and children helped with the crossing. The nomadic and sedentary Sámi shared the language, religion and oral traditions; however, they did not compete for the same resources.

³⁷² Thuen, *Quest for Equity*, 30-31, in reindeer herding communities, cash flow was less gender based than it was in the coastal economy as the handicraft, duodji, could generate more income than meat production.

³⁷³ Eidheim, *Aspects of*, 30, Thuen, *Quest for Equity*, 74.

architecture.³⁷⁴ The Sámi identity was not displayed architecturally anymore, and it became more “privatized.” That the cultural identification became less public was also indicated by the Sámi who spoke Norwegian in public, but Sámi at home. The situation was different for the reindeer-herding Sámi, because their use of the Sámi language was preserved by their occupation. Since the Sámi language has been constructed in a northern context, traits of a Northern ecology are reflected in the vocabulary. By the use of hundreds of different descriptive pre- and suffixes the Sámi language can accurately distinguish one particular reindeer from another.³⁷⁵ In addition, the reindeer herders also had laws to keep their position in society intact; especially after reindeer herding in Norway became an occupation exclusively for the Sámi.³⁷⁶ The reindeer-herding Sámi had some protection in the legislation, a form of Indigenous status, while the coastal Sámi had no protection from the state, and were more ambiguous in their wishes to retain a Sámi identity.³⁷⁷

The coastal Sámi shift to assume a Norwegian identity was complex. Bjørklund used census data to illustrate that coastal Sámi who had identified as Sámi before World War II recorded themselves as Norwegian after the war.³⁷⁸ Thuen found that intermarriage and a shift from local economic integration with the reindeer herding Sámi to the Norwegian economy changed the relevance of identity. Thuen writes that “[t]oday, some may perhaps still be hesitant to define themselves as Norwegians, but the majority of them undoubtedly find it even more irrelevant to ascribe themselves a Saami identity.”³⁷⁹ The coastal Sámi’s cultural identity was challenged from both the state’s assimilation attempts, from the economic conditions and their lack of a distinguishable cultural symbol, such as a Sámi occupation.

The cash economy divided one Sámi community against another, but it also divided the genders within a community. Traditionally, along most of Norway’s long coastline, the women bore most of the

³⁷⁴ Eidheim, *Aspects of*, 30. Paine also writes about how 1944 destroyed the material Sámi culture.

³⁷⁵ Hugh Beach, “The Saami of Lapland,” *The Minority Rights Group*, no.55 (1988): 5. Colour, age, sex, the form or absence of antlers, nature etc. The same is true for snow; the language can describe snow in use, consistency and so forth.

³⁷⁶ Felleslappeloven of 1883, and confirmed in the Reindeer Act of 1933.

³⁷⁷ Government of the Northwest Territories. Special Report Prepared for the Aboriginal Rights and Constitutional Development Secretariat. *Lapland: The Native North in Norway*, Peter Jull, Yellowknife: 1988, 53-58.

³⁷⁸ Einar Eythórsson, “The Coastal Sámi: a ‘Pariah Caste’ of the Norwegian Fisheries? A Reflection on Ethnicity and Power in Norwegian Resource Management,” in *Indigenous Peoples: Resource Management and Global Rights*, ed. Svein Jentoft, Henry Minde and Ragnar Nilsen. Delft: Eburon Delft, 2003, 151.

³⁷⁹ Thuen, *Quest for Equity*, 157.

responsibilities for agricultural production, while the men supplied the family with fish, in addition the income was supplemented with berry picking and hunting.³⁸⁰ However, as the cash economy engulfed the inhabitants in Finnmark, the government saw the men as the owners of resources, and this undermined women's status in the economy.³⁸¹ The post-war economic changes in Sámi communities therefore led to women's loss of status and self-sufficiency within the family and the community. To sum up, the Sámi identity was fragmented not only by locale, but by gender; the varying language skills further split the Sámi communities and prevented pan-Sámi identification. This lack of unity and group identification is important for the understanding of why there was no Sámi consensus against the hydropower development.

To establish Sámi organization that could influence the central government was crucial if the Sámi identity and culture beyond the reindeer herders were to be preserved. The reindeer herders' organization (Norske Reindriftsamers Landsforbund, NRL) was founded in 1947, with a mandate to negotiate meat prices and influence policies in regards to land use.³⁸² The organization has been criticized for its narrow focus on economic matters and as such ignoring cultural matters. However, the main stakeholders in the organization were reindeer-herders, who through the occupation had secured a Sámi identity. The members of the NRL therefore had firm roots in the Sámi culture. Their cultural identity intersected with economic utilization of resources, and they used the organization to argue for the reindeer-herders' specific economic and political needs, like any other farm-based organization.³⁸³ On the other end of the spectrum was the Sámi Association (Samenes Landsforbund, SLF). This organization was founded in 1979 with a mandate to show the Sámi connection to the Norwegian nation state. The people behind this organization were people of Sámi background who had been partly or fully assimilated. This organization was accused of opposing

³⁸⁰ Jorunn Eikjok, "Gender, Essentialism and Feminism in Sámiland" in *Making Space for Indigenous Feminism*, ed. Joyce Green (Black Point, N.S.: Fernwood Publishing, 2007), 108. (Eikjok was one of the women who participated in the hunger strike in Oslo in 1979). The change had happened earlier in the south. Jull, *Lapland: The Native North in Norway*, 63. Paine described the disappearance in hunting as a livelihood as a result of declining profitability, and berry picking as becoming more profitable when it was taken out of the cash economy when the berries could be preserved in freezers. The gender distinction was not absolute, and women participated in fishing and men in farming – according to Paine, Sámi women were more likely to fish than Norwegian women. Berry picking was a social event, enjoyed by men and women of all ages.

³⁸¹ Eikjok, "Gender, Essentialism," 109.

³⁸² Jull, *Lapland: The Native North in Norway*, 17-18. See NRL website: <http://www.nrl-nbr.no/>.

³⁸³ A peek on their website in comparison to sheep farmers association reveals many similarities.

Sámi rights, because they did not believe that the Sámi were Indigenous with special rights to land.³⁸⁴ Crucial to SLF's stand against Sámi land rights was the century old conflicting views of reindeer herder's land use in the fjords. The main Sámi rights lobby, the National Association of Norwegian Sámi (Norske Samers Riksforbund, NSR), was founded in 1968.³⁸⁵ This association worked towards gaining more rights to land and water from the premises that the Sámi had a unique history, language and way of life. Despite overlapping interests of these organizations much energy was used on internal disputes rather than in developing a common ground.

Kanatewat et al. v. James Bay Development Corp. et al., 1975

The success of the *Kanatewat* case was partly due to the choice of the right historical moment and the limited scope of the action, an interlocutory injunction. The court did point out that the interlocutory injunction was not to “determine legal rights to property, but merely keep[s] the property in its actual condition until the legal title can be established.”³⁸⁶ The court case was about keeping the land question at a status quo, and to assure that the Province of Québec had the consent of the original inhabitants before any developments were done in the Territory. The controversy surrounding the *White Paper* in June, 1969, a policy that aimed to transfer responsibility of social programs for *Indians* from the federally operated Department of Indian Affairs to the provinces and abolish the *Indian Act* and *Indian title* to land, led to a vocal unification of Indigenous peoples across the country; organizations such as the Indian Brotherhood (formed in 1968) gained political strength, and government officials realized that welfare state reforms would not make up for loss of land.³⁸⁷ The *White Paper* was met with protests across the country, for instance, a bridge was blocked near Montreal.³⁸⁸ In Québec, the October Crisis had also made the government wary of confrontations. It was in this climate that the bands in Eeyou Istchee joined together and filed the injunction.

³⁸⁴ Ragnar Nilsen, “From Norwegianization to Coastal Sámi Uprising,” in *Indigenous Peoples: Resource Management and Global Rights*, ed. Svein Jentoft, Henry Minde and Ragnar Nilsen (Delft: Eburon academic Publishers, 2003), 175.

³⁸⁵ Thuen, *Quest for Equity*, 41.

³⁸⁶ *Kanatewat et al. supra note* at 89, quoted from Kerr, *On Injunctions*, 6th edition.

³⁸⁷ Donal Purich, *Our Land: Native Rights in Canada* (Toronto: James Lorimer & Company Publishers, 1986), 183.

³⁸⁸ Donald Purich, *Our Land*, 184.

The concerns over hydropower brought people in Eeyou Istchee together. A meeting in July 1971 was the first meeting where all the chiefs were together at one time.³⁸⁹ The threat of “an invasion” made regional co-operation necessary, and the injunction unified the inhabitants of Eeyou Istchee politically. This is evident from the number of people behind the injunction: “The total Cree population in the territory contemplated by the JBRDA and Great Whale River is 5,638.”³⁹⁰ Of these, 2,440 were adults, and over half of that population, 1,271, were behind the individuals who were named in the injunction: they had signed the powers of attorney, and all these individuals were represented in the case.³⁹¹ The Mistassini, the Nemaska, the Eastmain and the Chisasibi had developed relationships before the trial; many of the younger people had gotten to know each other in residential schools in Ontario, and there was also radio communication between villages.³⁹² They shared an interest in keeping the land intact, since nearly everyone depended on what the land could give.

The injunction was filed to declare *Bill 50* unconstitutional. As said above, the main objections to *Bill 50* were the assumptions behind the bill that the Eeyouch did not have title to the land and that the hydropower project would be done in an environmentally responsible way. The main arguments in the *Kanatewat* case were that the natives had possessive rights to the territory and any developments in the territory would destroy the environment. The judgment of the *Calder* case had been passed in January 1973, and the temporary injunction was accepted by the court on June 21, 1973. Lawyers in the *Kanatewat* case followed the same line of arguments and drew on the same court cases Berger had used in the *Calder* case.³⁹³ First, the Cree and Inuit proved that their ancestors had lived in the territory from before contact with settlers. Church records and HBC diaries from the 18th century were used to show that their ancestors had lived in the territory from a time that preceded contact with the Europeans.³⁹⁴ To further establish *Indian title* to the land, witnesses described details of how the land was used. The possessive rights in turn could solidify the environmental concerns. The Cree hunters and fishers, mothers and fathers, saw that if

³⁸⁹ Salisbury, *A Homeland for the Cree*, 3.

³⁹⁰ *Kanatewat et al. supra note* at 21.

³⁹¹ *Kanatewat et al. supra note* at 22 and 142.

³⁹² Salisbury, *A Homeland for the Cree*, 3-5. Radio communication is difficult so close to the magnetic North Pole.

³⁹³ Although the case included the Inuit in Québec, in the following court case only the Cree voices will be heard.

³⁹⁴ *Kanatewat et al. supra note* at 19.

the land was spoiled, the use of the land was destroyed. In Blackstone's terms, the enjoyment of the land was destroyed. In Cone Come's terms, it was a way of life that would be destroyed by the dams on Chisasibi River.³⁹⁵

European land ownership ideas were used to prove the Eeyouch' rights to the Territory. Feit described how the elders saw the development as an opportunity to restructure the relationship between Cree and non-natives in order to influence the developments and modify them to fit Cree land use.³⁹⁶ Communication in terms understood by non-Cree could help achieve this long term goal. The Cree occupation of the territory had been established by diaries and church records, and the relationship between the Eeyouch and the fur traders and missionaries was described as "one of the best that has occurred historically in this country between native and non-native."³⁹⁷ Notably, the land had not been acquired through an armed conflict nor had it been surrendered to the crown.³⁹⁸ The *Québec Boundaries Extension Act* was quoted, "the province of Québec will recognize the rights of the Indian inhabitants in the territory above described to the same extent and will obtain surrenders of such rights in the same manner as the Government of Canada has heretofore recognized such rights and has obtained surrenders thereof."³⁹⁹ The wording in the *Extension Act* not only confirmed the rights the Eeyouch had according to the *Royal Proclamation* of 1763, but also made it clear that further legal attempts such as the Dorian Report of 1968 to undermine the rights to land would be tremendously hard to prove in court.⁴⁰⁰

In the descriptions of land use, the Eeyouch documented the pattern of use that might be misunderstood by a non-Indigenous audience. For instance, possessive rights to property can be granted after continual usage has been proved. The definition of private property was telling as it referred to land (or objects) that a person could use and enjoy.⁴⁰¹ The word *use* is a key word in the description, and under the word lies a Lockean assumption of use: rights to land are gained through transforming the land

³⁹⁵ Coon-Come, "Different Laws for Different People," 164.

³⁹⁶ Harvey A. Feit, "James Bay Cree Self-Governance and Land Management," in *We are Here: Politics of Aboriginal Land Tenure*, ed. Edwin N. Wilmsen (Berkeley and Los Angeles: University of California Press, 1990), 70.

³⁹⁷ *Kanatewat et al. supra note* at 36.

³⁹⁸ *Kanatewat et al. supra note* at 92- 93.

³⁹⁹ *Kanatewat et al. supra note* at 93, citing *Québec Extension Act*, s. 2(c).

⁴⁰⁰ *Kanatewat et al. supra note* at 94-101. First part of sentence.

⁴⁰¹ *Stanford Encyclopedia of Philosophy*, s.v. "Property and Ownership," last accessed 11/7/2014. <http://plato.stanford.edu/entries/property/#2>.

extensively and visibly through farming, but also that it is the use of land that gives it its value.⁴⁰² The Indigenous land use of hunting, trapping and fishing leaves fewer visible traces in the landscape, and the use is often more apparent when it ends than when it is occurring.⁴⁰³ The description of the Eeyouch' pattern of land use was compared to farming: "the hunting and trapping grounds are worked along the same concepts as farms. During certain years, they are left fallow and this allows the animals to re-multiply and to be conserved."⁴⁰⁴ This quote showed that even though land remained unused for some time, this did not mean that the owner lost possession of the land; furthermore, it could be seen as responsible ownership not overburdening the land. The area of *Bill 50* was compared to a farm or a garden in "a state of equilibrium" with a warning that any developments in the territory would harm animal reproduction.⁴⁰⁵ The equilibrium and a description of communally owned land as a sustainable option of land management lent a voice to both the European visions of the Indian as a wise protector of the environment, and that a "Tragedy of the Commons" would happen if the area was to accommodate 16,000 workers.⁴⁰⁶

Despite the environmental tone of section 5 *Bill 50*, on the importance of protecting the environment, actual studies on the effects the dams would have on the climate, the flora and the fauna were inadequate. For instance, no study had been done by Hydro Québec on how the changes in water levels would affect the fish in the La Grande River.⁴⁰⁷ The variation in the river below LG-2 (dam and power house) was predicted to be thirty feet.⁴⁰⁸ Damages to fish life were expected to be serious. One of the main grievances brought forward by the Eeyouch was the effect of culverts used in road construction.⁴⁰⁹ The spokesperson for Hydro Québec, Terrien, admitted that the siltation around culverts, the difficulties they caused for small fish, and on spawning areas had not been analyzed or examined.

The different values and lifeworlds were evident from the testimonies assessing the environment; the lawyers and university-trained experts were obsessed with numbers: How many square miles did a trap line contain? How many fish did the appellants catch? Western experts had an enclosed view of the land,

⁴⁰² Oskal, "Political Inclusion of Saami as Indigenous Peoples of Norway," 242.

⁴⁰³ William Cronon, *Changes in the Land*, 49-51 and 161.

⁴⁰⁴ *Kanatewat et al. supra note* at 43 (see also 28)

⁴⁰⁵ *Kanatewat et al. supra note* at 39, farm, 40, garden 38. Richardson, *Strangers Devour our Land*, 123-124.

⁴⁰⁶ *Kanatewat et al. supra note* at 36-40. Last part of the sentence was not from the injunction.

⁴⁰⁷ *Kanatewat et al. supra note* at 82. Also called the Chisasibi River.

⁴⁰⁸ *Kanatewat et al. supra note* at 69.

⁴⁰⁹ *Kanatewat et al. supra note* at 79.

even though the trap line was not fenced in, the questions of quantity reveals a way of thinking that was better suited for a land divided into measurable plots. Much of the environmental assessment on which Judge Malouf based the decision therefore came from university-trained scientists, who measured the environment in numbers.⁴¹⁰ Quantifying the environment was not part of the Eeyouch's values. Mr. George Pachano tried to explain: "No I didn't keep track of the amount of fish that I catch in a year, it wasn't intended by the Creator who created the fish that the Indian should keep track of all the fish that he kills."⁴¹¹ From Pachano's statement it is clear that the economic system and the cultural values were tightly connected. The media of money had not colonized the Eeyouch's way of viewing the resources in the territory. This was confirmed in later testimonies about how much the damaged environment would cost the Eeyouch: "It will be like losing my life. When you talk about money, I do not really know the value of it. I do not use it very often. I am not like the white man but if I was maybe I would know more about it."⁴¹² Since the environmental impact had not been properly assessed, the judge concluded that Québec Hydro Electrical Co. was acting with recklessness in regards to the environment.⁴¹³ Section 5 of *Bill 50* aimed at protecting the environment; however, it was not realistic to combine environmental protection with a hydropower development of such proportions as those planned for the La Grande (Chisasibi).

Although the testimonies of the Eeyouch did not demonstrate to the court that the environment would be destroyed in a quantifiable way that was comprehensible to non-Indigenous citizens, they were able to show the court the depth and quality of the relationship between the people and the land. Firstly, the Eeyouch could not convert the value land had into a pure monetary value. The questioning of Job Bearskin by O'Reilly, the appellants' lawyer, is telling:

O'Reilly: How much money damage will be caused to you?

Bearskin: When you talk about the money, it means nothing. There will never be enough money to pay for the damage that has been done. I'd rather think about the land when I

⁴¹⁰ *Kanatewat et al. supra note* at 76. For instance how the sturgeon would lose important spawning areas, salmon would be land-locked, and desirable fish species such as trout and whitefish would decrease.

⁴¹¹ *Kanatewat et al. supra note* at, 336.

⁴¹² *Kanatewat et al. supra note* at 355.

⁴¹³ *Kanatewat et al. supra note* at 82. Recklessness in the use of science was also found in the collection of evidence. For instance their prediction of an energy shortage was based on maximum peak demands not average demands, which exaggerated growth figures. (375-392).

think about the land, I think about the children: what will they have when that land is destroyed? The money means nothing.⁴¹⁴

The culturally specific ways of thinking of land, water flora and fauna were so different that the court acknowledged that the Eeyouch “are unique in their occupation of the land, their use of the land, their concept of the land.”⁴¹⁵ The judge understood that land was central to the practice of culture, the way of life and to the language of the Eeyouch.⁴¹⁶ While the scientist who testified proved that the hydropower developments would cause harm to the environment, the Cree linked the environmental protection to their cultural survival.⁴¹⁷

The fact that everyone used the land, not only male trappers, was recounted. Community usage was, however, not communicated clearly even by renowned anthropologists. Where the anthropologists often focused on the division of labour specifically on male hunters who left the camp, the Eeyouch would tell how hunting, trapping and fishing was a family event, for instance “most people who are able to hunt, fish and trap do so.”⁴¹⁸ The difference in interpretation follows non-Indigenous ownership ideas that placed the male as the exclusive owner of the resources, the one whom the government communicated with about resources. In a community that depended less on cash than an urban economy, work was not valued by the cash it generated.⁴¹⁹ Instead, community relations were important, because a family’s well-being depended on reciprocity, gift giving and everyone doing their part. For instance when Matthew Neeposh, a hunter from Mistassini, was asked by Maître Le Bel, a lawyer for Hydro Québec, if he went alone to the trap line, Neeposh answered that six people went with him, including women and children.⁴²⁰ The same was said about fishing, for instance Mrs. Sally Matthew from Fort George testified that when fishing in the first rapids on the La Grande River groups of people “sometimes stayed for several days.”⁴²¹ The community use of land and water is much clearer in testimonies from the Eeyouch than from the majority of

⁴¹⁴ Court excerpts from: Richardson, *Strangers Devour the Land*, 121.

⁴¹⁵ *Kanatewat et al. supra note* at 323.

⁴¹⁶ *Kanatewat et al. supra note* at 325.

⁴¹⁷ *Kanatewat et al. supra note* at 326.

⁴¹⁸ *Kanatewat et al. supra note* at 32.

⁴¹⁹ Salisbury, *A Homeland for the Cree*, 5, 93-96. Salisbury writes that in 1971 only 23% of the income is from wages, and the involvement in the cash economy was small.

⁴²⁰ Injunction quoted in Richardson, *Strangers Devour the Land*, 40.

⁴²¹ *Kanatewat et al. supra note* at 32.

anthropological sources. In testimonies from the Eeyouch the larger community is always part of the land, not even children are excluded.⁴²²

The community involvement in land use was one that was found in the commons in England before the enclosures. The “income” from the land in the form of meat was recorded by Salisbury as 57% in 1971, and he acknowledges that the income earned from cash could not buy the amount of meat of the conventional Eeyouch diet. A switch from the traditional way life where the land provided much of the “income” to a cash economy where the food was purchased in commercial shops may therefore be seen as downward social mobility if the result was a diet of wonder bread and bologna, compared to prime cuts of caribou or goose liver. The Eeyouch faced similar dilemmas as the users of the commons in England. The wages earned could hardly make up for the lost income from the land, when “closures” in the form of massive dam structures closed off previously productive sections of land. As in England, it was the most productive parcels of land at that time that ceased to be commons, and the economic interests of the more powerful forced the original users into dependency on cash.

The Alta Case, 1982

The Alta Case was filed as a reaction to the *Royal Resolution of June 1979* after political actions had failed to stop the hydropower development. The background of the resolution was that parliament gave NVE a license to develop hydropower in Alta River in November 1978, as a result of the findings in St.prp. nr.107, a proposition from the government to the parliament on the Alta hydropower development.⁴²³ NVE had initially planned a hydropower development that would dam land beyond the Norwegian national border and into Finland. The second proposal was much smaller and seemed like a reasonable compromise made by NVE. Despite objections from four of the members of parliament to the plans, the result of a discussion in parliament on June 6th 1979 was to allow construction to start. On June 15th 1979 a *Royal Resolution* made it clear that the building of Savtso powerhouse on Alta River followed the *Watercourse*

⁴²² The meaning of community was later written into *The James Bay and Northern Québec Agreement*. Some non-native researchers have been amused by the “need to bring the family along” (Berkes) others have ignored it (Salisbury), some has been embarrassed to enter what he saw as the female domain (Richardson). In sources created by Eeyouch the children are visible and included in work and leisure.

⁴²³ Rt-1982-241 (54-82), 243 and NOU 1994: 21, *Bruk av Land og Vann i Finnmark i Historisk Perspektiv* 12.2.2 Konflikter (conflicts).

Regulations Law of 1917.⁴²⁴ This decision in parliament was met with political actions in Alta, with a blockade of the construction machinery in July, a blockade that later became a “permanent” fixture on the road to the construction site.⁴²⁵ The protests were joined by thousands of people from other areas of Norway and abroad; however, as the protests grew into a movement they became more about saving a river and less about the distinctive rights the Sámi had to land and water.⁴²⁶ Some therefore decided to stage a protest in Oslo, the capital of Norway, with a plea that Sámi land rights needed to be settled in court before the dam was built.

To win the sympathy of Norwegians, seven Sámi activists, wearing traditional costumes, set up a *lavvo* in front of the parliament Oslo on October the 7th. The tent was erected on Eidsvoll Plass, a square named after the town where the Norwegian constitution was signed.⁴²⁷ An ultimatum was delivered to the government that stated that a hunger strike would be carried out unless the Sámi legal rights to land and water would be discussed in court.⁴²⁸ When their demands were ignored, they started a hunger strike and signaled that they would rather die than give up their Sámi culture.⁴²⁹ The hunger strike was accompanied by performances of *joik*, Sámi music, and the tales of Sámi legends. The Sámi group attracted support from diverse places: politicians from opposition parties, an Arctic explorer, professors, random bystanders and the media.⁴³⁰ The organizers insisted that the hunger strike be kept non-violent, and the spokesperson, Mikkel Gaup, urged the supporters to refrain from violence when some of them attacked police.⁴³¹ The peaceful demonstration appealed to a large segment of the Norwegian population who did not identify with violent, often left-wing, demonstrations and political views.⁴³² The demonstration was strategic, it

⁴²⁴ *Rt-1982-241 (54-82)*, 243. Vassdragsreguleringsloven, of 14th December 1917.

⁴²⁵ Øystein Dalland, *Demningen*, (Karasjok: Davvi Media, 1987), 37-41. Protesters had already blocked the construction road. The Sámi woman Ruth Rye Josefson gathered around 30 protesters in front of the construction equipment in July 1979, together with Håkon Henriksen and Tore Bongo. The organizers were clear that the protests had to be led from Alta, and that people of Sámi background had to be part of the protests. (Some of the organizers feared a communist [AKP-ml] “coup” of the protests).

⁴²⁶ Robert Paine, “Ethnodrama and the ‘Fourth World’; the Saami Action Group in Norway, 1979-1981,” in *Indigenous Peoples and the Nation State: Forth World Politics in Canada, Australia and Norway*, ed. Noel Dyck (St.Johns, Nfld: Institute of Social and Economic Research Memorial University of Newfoundland, 1985), 193-194.

⁴²⁷ Paine, “Ethnodrama,” 194-195.

⁴²⁸ Paine, “Ethnodrama,” 195.

⁴²⁹ Paine, “Ethnodrama,” 227.

⁴³⁰ Paine, “Ethnodrama,” 195-198. A couple of professors were arrested, i.e. Nils Christie.

⁴³¹ Paine, “Ethnodrama,” 196.

⁴³² Paine, “Ethnodrama,” 215.

instigated a public debate on the Sámi place in the nation and actions, symbols and signs were used to convey a message that words alone could not.⁴³³ The government did listen, and the prime minister withdrew governmental support for the Alta developments until the issue had been discussed in parliament.⁴³⁴

The parliament discussed the developments a second time in May 1980, but came to the same conclusions: the negative consequences of the hydropower developments were not substantial enough to halt development.⁴³⁵ The Sámi rights in *Altevatn* were successfully communicated by using an economic and international relations perspective, the issues discussed were economic in character and therefore measurable. The Alta case was filed to stop the building of a hydropower dam. It questioned the validity of the *Royal Resolution of June 15, 1979*, to build a dam on the grounds that it was a human rights violation; that the land was crucial to the survival of the Sámi as an ethnic group. These objections to the development were not easily measured or proved.⁴³⁶ The case also questioned the soundness of democratically elected politicians' judgment.⁴³⁷ The hydropower development was challenged in the Alta county court (herredsrett) and the verdict was that the reindeer herders were allowed compensation, Alta Laksefiskeri Interessentskap's demands for compensation for salmon fishing was not granted.⁴³⁸ The case was appealed and was argued in the Supreme Court between November 3rd and December 18th, 1981, and became the first case in Norwegian history that challenged a hydropower project that had the parliament's approval.⁴³⁹

⁴³³ Deflem, "Law in Habermas's Theory of Communicative Action," 116.

⁴³⁴ Paine, "Ethnodrama," 199-200.

⁴³⁵ *Rt-1982-241 (54-82)*, 243.

⁴³⁶ According to Habermas the media of the lifeworld, "background convictions common to all subjects acting communicatively" is qualitative, and it is a cultural conception that cannot be "measured." See Habermas, *The Theory of Communicative Action: Volume 1*, 70, and Denise Vitale, "Between Deliberative and Participatory Democracy: A Contribution on Habermas," in *Habermas II*, Volume 3, ed. David M. Rasmussen and James Swindal (London: SAGE Publications Ltd., 2010), 27.

⁴³⁷ Politicians in Norway have had a higher esteem than politicians in most countries; the transformation from being one of the poorest countries in Europe to one of the richest in less than a century is often credited to wise political decisions. In Jull's words: "The Nordic states see the main role of government as directing policies from the enlightened centre to rescue remote people from regional backwardness" (Jull, *Lapland: the Native North in Norway*, 13)

⁴³⁸ *Rt-1982-241 (54-82)*, 242-243. They were granted money to cover costs.

⁴³⁹ NOU 1994: 21, *Brak av Land og Vann i Finnmark i Historisk Perspektiv*, 12.2.2 Konflikter (conflicts) <http://www.regjeringen.no/nb/dep/jd/dok/nouer/1994/nou-1994-21/35.html?id=374803>.

The arguments against the Royal Resolution of 1979 were based on international human rights legislation. They argued that the Resolution was going against the UN convention on civil and political rights, particularly article 1 and 27.⁴⁴⁰ The goal of the plaintiffs was not economic compensation for lost access to land and resources, but to keep land and resources that had cultural meaning intact. The Sámi were just starting to win recognition as Indigenous, and their arguments were therefore not grounded in common acceptance. That the Sámi had not been recognized as Indigenous is clearly illustrated by the fact that Norway did not ratify the ILO 107 from 1957, because at the time the Norwegian government did not acknowledge that any groups within the state boundaries were mentioned in the convention.⁴⁴¹ Popular perception held that since the Sámi were integrated in the majority society, they could therefore not be Indigenous.⁴⁴² The Alta case can therefore be seen as a milestone in a legal acknowledgement of the Sámi as Indigenous.

To discuss the Indigenous perspective in the case, Professor Robert Paine was called as an expert.⁴⁴³ He argued that there was a deep connection between the traditional Sámi use of the land and the Sámi culture, and that the case was about much more than hydropower development on Alta River; it was about the Sámi's rights "to be or not to be."⁴⁴⁴ Paine also made a point that the cultural effects were not limited to the reindeer herding Sámi, but affected the Sámi culture as a whole.⁴⁴⁵ Moreover, studies had shown that even small areas used to move reindeer from one location to the next were crucial for the

⁴⁴⁰ The International Covenant on Civil and Political Rights was signed by Norway and Canada at different times. Norwegian literature refer to it as UN Convention of 1966, when the treaty was first adopted, in Canadian literature it is often referred to as the UN convention of 1976, the time when it came into force. *Rt-1982-241 (54-82)*, 242, 293.

⁴⁴¹ Susann Funderud Skogvann, *Samerett*. 2nd ed. (Oslo: Universitetsforlaget, 2009), 122. Although not ratified by Norway, ILO 157 was used in the court case.

⁴⁴² University of Tromsø Website. "The thought that the Sámi were an indigenous people was quite foreign to both the Nordic authorities and the great majority of the Sámi down to the 1980s." Henry Minde, "The International Movement of Indigenous Peoples: an Historical Perspective," from Publication Series Centre for Sámi Studies. Last accessed 11/7/2014.
<http://www.Sámi.uit.no/girji/n02/en/003minde.html#Anchor--Th-55373>

⁴⁴³ *Rt-1982-241 (54-82)*, 271.

⁴⁴⁴ *Rt-1982-241 (54-82)*, 271.

⁴⁴⁵ Paine had prepared a document *Dam a River, Damn a People? Saami (Lapp)Livelihood and the Alta/Kautokeino Hydro-Electric Project and the Norwegian Parliament* for the jury that thoroughly explained the for instance economic benefits reindeer herding had for a community.

continuation of the industry, and the consequences were that Sámi social survival was threatened.⁴⁴⁶ There was no available land that could be exchanged for what would be lost. Some of the research used in the court case was done for the hydropower project initially proposed, and with a scaled down project the consequences were assumed to be less intrusive on Sámi livelihood. The conclusion from the plaintiffs, that “while the damage of the original development plans had been underestimated, the importance of the scaled down plans had been overestimated,” were refuted by the state consultant who claimed that it was “nonsense” to try to quantify spillover effects, and he therefore claimed that the consequences the development would have on Sámi livelihood had been adequately analyzed.⁴⁴⁷

The government’s analysis of the cultural importance of the land focused on the fact that the majority of the Sámi did not participate in reindeer herding.⁴⁴⁸ This argument was timely, since the consensus among the Sámi was not unanimous. For instance, during the drama in Oslo in 1979, one of the Sámi organizations, the SLF, actually condemned the demonstration.⁴⁴⁹ The rift between the assimilated and traditional Sámi was deep, and the government was more interested in recognizing a Sámi culture that was not connected to land and water. As Canada experienced Indigenous demands on self-determination the Norwegian government may have wanted to reduce the Sámi cultural expressions to music, language and handicraft.

Just like the *Kanatewat* had, the Alta case also invited expert witnesses to assess the environmental consequences of converting a river into a lake. The minor concerns were changes in temperature in the river, erosion and ice formation.⁴⁵⁰ The fear regarding temperature and erosion was that they may have had grave consequences for the fish. Both experts and local inhabitants had strong reservations about the hydropower development based on knowledge of the local ecosystem as part of a larger system that reached beyond the dam. Algae production in estuaries to the Alta River above the dam

⁴⁴⁶ *Rt-1982-241 (54-82)*, 272. Based on Brandteberg and Bjørklunds inquiry “Alta-Kautokeinooutbyggingen og dens ringvirkinger for reindrift og Sámisk kultur.” (Alta-Kautokeino developments and its ripple effects for reindeer herding and Sámi culture).

⁴⁴⁷ *Rt-1982-241, (54-82)*, 273 and 275. “stort sett noe tøv” statskonsulent Villmo.

⁴⁴⁸ *Rt-1982-241 (54-82)*, 274. I doubt that the government played on a lack of Sámi unanimity, but rather got fixed on numbers which was weighed against other numbers.

⁴⁴⁹ Paine, “Ethnodrama,” and why they reacted as they did see Eidheim, *Aspects of*, 50-58. Eidheim wrote about ethnic identity as a stigma.

⁴⁵⁰ *Rt-1982-241 (54-82)*, ice and temperature change: 305-309, erosion: 309-310.

was mentioned as important food for fry below the dam. These concerns were brought to the parliament; the majority's conclusion was that although the experts disagreed, enough research had been done to assure that the development would not destroy the best salmon river in the country.⁴⁵¹ Concerns from the local inhabitants were not discussed seriously in the assessment of the facts in the case. For instance, it was argued that local worries over ice were based on misleading information from an environmental group.⁴⁵² In the Alta case the use of science backed up the NVE's argument that the developments were safe. The few occasions when local knowledge of the area was mentioned, it was disregarded as uninformed compared to the conclusions drawn by experts employed by the industry directorate or wildlife directorate.

In the Alta case the economic interests of the reindeer-herding Sámi were demonstrated: they received compensation for the land lost to roads and dammed water. Financial compensation was awarded, because there was no land available for compensation to the herders. In solving the problem with a sum of money, the government made it plain that the Sámi did not have a different status in the legislation than any other group or person that had land confiscated. Although the political activism in the form of protests came to an end with the Alta verdict, the Sámi fight for status as Indigenous in the legislation started with the verdict. A public reflection on the Norwegian treatment of Indigenous people started, because the government would not be recognized as a legitimate player in international disputes that involved Indigenous populations if the Sámi issue went unsolved. To solve the Sámi issue therefore became a new goal of the government.

Conclusion

The Eeyouch, as established in testimonies in court, demonstrated clearly their place in the Northern Québec landscape. Although their statements were backed up by evidence, the James Bay Development Corporation and Hydro Québec had less powerful arguments or hard facts to justify their stand, but the corporation had something the Eeyouch lacked: government backing. The government plans of damming the Chisasibi were developed to solve a problem of unemployment, become *maîtrez chez nous*

⁴⁵¹ *Rt-1982-241 (54-82)*, 318. The Conservatives (Høyre) formed the government, however, the Labour Party (Arbeider Partiet) won more seats during the 1981 election and had more seats in the parliament. No party has had majority since 1961, and the governments are formed as coalitions or as minority governments.

⁴⁵² *Rt-1982-241 (54-82)*, 308.

and expand both government and electric power.⁴⁵³ Québec sought to govern the north and to utilize the vast resources from territory that on the map was identified as Québécois'. The formula used during the earlier phase of the Quiet Revolution where reforms in the hydropower sector had become the economic engine that electrified a cultural self-esteem met with opposition, not the least from the inhabitants and original owners of the land.

Hydropower played a similar role in Norway as it did in Québec during the Quiet Revolution; it was the engine behind economic expansion, and although private companies and capital developed the first rivers, the *Water Right Reversion Act* assured national control of the resource.⁴⁵⁴ This *Act* was a way for the Norwegians to become masters in their own house. The story of the early developments in the south, of generating wealth for the nation by attracting industry, was to be repeated in the north. However, in the north, those who lost access to land because of flooding benefited the least from it. Firstly, electricity, while it revolutionizes life in settled housing, is less important to a transhumance lifestyle. Secondly, while the electricity produced by hydropower initially became the base for industry and work that paid well, it generated a need for the reindeer herders to increase flock sizes to keep up economically with a more industrialized economy while at the same time limited the physical space for grazing. Hydropower development therefore had consequences for the landscape that went beyond the dammed river, since it transformed the economic situation for herders and their interaction with the environment. The outcome of the Alta case also shows the Norwegian government had not revised its underlying hopes of generating taxable income. The reindeer herders were granted compensation because their economic activity was seen as taxable and controllable. The people with fishing rights were not compensated because the economic value was not measurable. Fish contributed indirectly to the economy as a base for the tourism industry in Alta. The coastal people's enjoyment of salmon from (whether they were Sámi or not) fjord fishing was not studied at all; their economic activity could easily be absorbed into either full-time fishing employment or fish farming. Norway had, like Québec, historically been economically disadvantaged. The Norwegian and the Québécois government had a utilitarian view of nature: as a source of economic wealth and nation-building. The landscape was a place where nature work and culture intersect were known and

⁴⁵³ Bourassa, *James Bay*.

⁴⁵⁴ Hjemfallsloven, 18th September 1909. Before 1900 hydropower developed on larger rivers were owned by foreign companies.

communicated by the Eeyouch and the Sámi in the courtroom, but the meaning of territorial traditional land use was not clearly understood by the majority society. The Sámi and Eeyouch had a long road ahead before they could feel like they were masters of their own houses.

Chapter 3: The right to be consulted: “We have endured as the Crees because we have adapted to changes in the land”

The first chapter described how the Indigenous populations were “nations” almost equal to the dominant population, before their rights slowly dissolved through legislative measures, and the second chapter showed how the bottled up discontentment erupted in conflict during the early phases of hydropower development. In the third chapter, I examine the governments’ responses to the legal and political actions taken by the Sámi and the Cree, and show how changes to the legislation gave these populations regional control of the land and water; affected not only the lives of the Indigenous people but also the landscape. Important to this analysis is how the Eeyouch and Sámi took control of their own futures when they resisted the governments’ rules. The word *they* is important, because the changes were communally fought and community building was at the root of change. The community building happened simultaneously to the local community gaining control of the resources and land in their vicinity.

The hydropower developments connected large areas of the landscape with roads, transmission lines and dams; the local communities were therefore drawn into regional politics as a result of these constructions. Historian Wittfogel, who wrote about water management in ancient civilizations, argues that large scale hydraulic structures necessitated political organization, and while the engineering created the physical base for control, the organizational skills the leaders developed during construction were as essential to despotic rule as the dams, canals and roads.⁴⁵⁵ An estimate of how many workers were needed, where to get raw material for the constructions, and a system of food supply for the workers all had to be managed. Wittfogel writes “[t]he effective management of these works involves an organizational web which covers either the whole, or at least the dynamic core, of the country’s population. In consequence, those who control this network are uniquely prepared to wield supreme political power.”⁴⁵⁶ Even if “despotic rule” was not Bourassa’s aim, he saw hydropower as a way to display Québec’s organizational skills, and to gain more control in the north. In his book *James Bay* he wrote “The James Bay development is a firm illustration that we again control our economy, in accordance with Québec’s priorities and needs.”⁴⁵⁷ Studies, for instance the Dorian Report that was published in 1971, had suggested that the

⁴⁵⁵ Wittfogel, *Oriental Despotism*, 26.

⁴⁵⁶ Wittfogel, *Oriental Despotism*, 27.

⁴⁵⁷ Bourassa, *James Bay*, 121.

Québécois government assert more power in the north.⁴⁵⁸ Hydropower has in fact been seen, both symbolically and economically, as the tool to decolonize Québec from English domination.⁴⁵⁹ The territory of James Bay was no exception.⁴⁶⁰ Likewise, the Norwegian governments' politics after World War Two modernized and expanded state control to develop the economy.⁴⁶¹ Moreover, in his analysis, Wittfogel argued that knowledge was an important aspect of organizing and controlling people. He mentions that roads and collections of data gave the ruler valuable knowledge of the state.⁴⁶² The regional control gained from large technologically-advanced, hydraulic projects did not only have an ancient precedent. Modern dams in the Soviet Union, Egypt and in the United States had the same effect of developing and exhibiting state power in a region.⁴⁶³ The gathering of information about the hydraulic area by the "rulers" in Québec and Norway became public knowledge, and since the ruler did not have a monopoly on the knowledge, the local people added "outside" knowledge and expectations of governance that could enable them to effectively govern the regional area. Therefore I argue in this chapter that the hydropower developments with the changes they brought to the landscape, the data collection ahead of the developments and the information exchanged during the legal procedures were effectively used by the Indigenous communities to achieve regional governing structures in Finnmark and the Eeyou Istchee.

A milestone in Canadian legal history as the first modern day treaty, the *James Bay and Northern Québec Agreement* (hereafter JBNQA or the *Agreement*) has become the standard other agreements are

⁴⁵⁸ Caroline Desbiens, "'Water all around, you cannot even drink': the scaling of water in James Bay/Eeyou Istchee," *Area* 39, no. 3 (2007): 261, doi: 10.1111/j.1475-4762.2007.00735.x.

⁴⁵⁹ Caroline Desbiens and Étienne Rivard, "From passive to active dialogue? Aboriginal lands, development and *métissage* in Québec, Canada," *Cultural Geographies* 21, no. 1 (2013): 102, doi: 10.1177/1474474013487485.

⁴⁶⁰ "What the government of Québec is doing here is taking the opportunity to extend its administration, its laws, its services, its governmental structures throughout the entirety of Québec; in short, to affirm the integrity of our territory." John Ciaccia's opening remarks, at the opening of the standing Parliamentary Committee of the National Assembly of Québec on Natural Resources and Lands and Forests. *The James Bay and Northern Québec Agreement*, Éditeur officiel du Québec, 1976, xvi.

⁴⁶¹ Chad N. Briggs, "Science, Local Knowledge and Exclusionary Practices: Lessons from the Alta Dam Case," *Norsk Geografisk Tidsskrift/Norwegian Journal of Geography* 60, (1998): 151, doi: 10.1080/00291950600723146.

⁴⁶² Karl August Wittfogel, *Oriental Despotism: a Comparative Study of Total Power*, (New Haven: Yale University Press, 1957), 56.

⁴⁶³ Rassweiler, *The Generation of Power*; Donald C. Jackson, *Building the Ultimate Dam: John S. Eastwood and the control of Water in the West*, (Lawrence, Kansas: University Press of Kansas, 1995); John Waterbury, *Hydropolitics of the Nile Valley*, (Syracuse: University Press, 1979); Marc Reisner, *Cadillac Desert: The American West and Its Disappearing Water*, (New York: Viking, 1986).

measured against.⁴⁶⁴ Since the *Agreement* holds such a prominent position in Canadian legal history, it has been written about extensively. The most commonly cited book is Richard Salisbury's *A Homeland for the Cree*. While Salisbury indicates that the development of a regional identity and governing structure was a result of Cree adaptation to the changes in the region after the JBNQA was signed, he maintains that the changes were consistent with the cultural and societal organization of the James Bay Cree.⁴⁶⁵ He wanted to revise the views that the *Agreement* caused adverse changes in the Cree society, and instead show how Cree culture influenced the *Agreement*. Salisbury analyzed key components of the treaty: health, economic development, education and government to show continuity, and demonstrated the increased structural control the James Bay Cree gained in the region in only a few years, despite gaining closer relations with the world markets.⁴⁶⁶ However, Salisbury is traditional in his interpretation of work and governance, concerning men as the primary provider and the one with agency in the family, rather than the family as an economic unit with ties to a larger community unit. For instance in his description of hunting and trapping "the hunter" seemed to be alone in his endeavor, and likewise the business owners are men who work hard.⁴⁶⁷ Salisbury did, however, refute concerns raised in the Hawthorn Report on welfare dependency in northern First Nation's communities when he compared the payments going to James Bay (\$28 million per year) with resources extracted from their land (\$2,800 per year).⁴⁶⁸

The first indication that the JBNQA arose from a greater sensitivity to Eeyouch traditions and community building needs, and not the federal or provincial governments' wishes, is found in the criteria of eligibility for benefits. The *Indian Act* of 1951 tried to limit the number of people with *Indian* status, an aim that has been consistent through every amendment of the *Indian Act* from the first to the latest versions of

⁴⁶⁴ *Report of the Royal Commission on Aboriginal Peoples. Volume 2, part 2: Restructuring the Relationship*. [RCAP], Ottawa: Minister of Supply and Services, 1996, 721. There is an additional *Northeastern Québec Agreement* (NEQA); this agreement is similar to *The James Bay and Northern Québec Agreement*, but added more territory.

⁴⁶⁵ Salisbury, *A Homeland for the Cree*, vii.

⁴⁶⁶ Salisbury, *A Homeland for the Cree*, 135-138.

⁴⁶⁷ Salisbury, *A Homeland for the Cree*, 21, 114. The lone hunter image was reinforced by a comment that the hunter may be accompanied by a teenage son, (21) and quite different from the hunter's Neeposh description when testified in court (see chapter 2), business owners: (114).

⁴⁶⁸ Salisbury, *A Homeland for the Cree*, 104; Hawthorn, *A Survey of the Contemporary*, 61-62.

it.⁴⁶⁹ One of the few benefits the *Indian Act* provided was a legal assurance of *Indian* rights to land.⁴⁷⁰ It was the fear of losing rights to land that sparked the opposition to the abolishment of the *Indian Act* with the *White Paper* of 1969. Harold Cardinal described the relationship: “[w]e would rather continue to live in bondage under the inequitable *Indian Act* than surrender our sacred rights.”⁴⁷¹ The *Indian Act* of 1951 only gave status to males who were direct descendants of a man who was a member of a band in 1874 and his wife or unmarried daughter.⁴⁷² Entitlement to the “sacred rights” was expanded in the JBNQA to include those who were registered under the *Indian Act* and living in one of the eight Cree communities, a person of Cree ancestry ordinarily resident in the Territory, a person of Indian or Cree ancestry and a member of a Cree community, a person who is a legitimate or illegitimate descendant in the male or the *female line* of a person entitled to be enrolled and adopted children of any of these.⁴⁷³ An Enrollment Commission prepared a list of persons entitled to be enrolled; however, a Cree community could add people of Cree ancestry even after the lists had been created.⁴⁷⁴ The expansion of eligibility criteria meant that government officials could not decide who had the right to harvest resources from the land and water, as this power was now transferred to the Eeyouch. This shift in eligibility criteria also made the JBNQA justifiable and credible, because it conceded that the Eeyouch depended on land for *cultural* survival, not just as a source for annuities and income. Perhaps most important was the change in the legal paradigm: it went from an individualistic to a communal attachment to land.

⁴⁶⁹ Canada. Status of Women. *Seeking Alternatives to Bill C-31: from Cultural Trauma to Cultural Revitalization through Customary Law*, Jo-Anne Fiske and Evelyn George Ottawa: Status of Women Canada, 2006, 19-22.

⁴⁷⁰ The term *Indian* is used to refer to people with *Indian* status only. Aboriginal people without status did not have land rights.

⁴⁷¹ Cardinal, *The Unjust Society*, Cardinal, focused on rights to land, and did not challenge the power structures of the *Indian Act*. When the “Red Paper” was published, it stated: “The legal definition of registered Indians must remain. If one of our registered brothers chooses, he may renounce his Indian status, become “enfranchised”, (...)” Indian Chiefs of Alberta, *Citizens Plus*, 5. This assumed that only men had these “sacred rights” since women and children could be enfranchised without consent, and reveals an individualistic rather than communal approach.

⁴⁷² The *Indian Act*. R.S., c.149, s.11(b), (c), (d), (f), 11(e), illegitimate children could get status unless someone protested.

⁴⁷³ *The James Bay and Northern Québec Agreement*, Éditeur officiel du Québec, 1976, 3.2.1.a) The eight communities were: Waswanipi, Mistassini, Old Factory, Fort George, Eastmain, Rupert House, Nemaska and Great Whale River. Subsequent agreements have expanded the number of communities that benefit under the *The James Bay and Northern Québec Agreement*. (Hereafter JBNQA). JBNQA 3.2.1 b), c), and 3.2.2. a), b). My emphasis.

⁴⁷⁴ JBNQA 3.3.6 a) and b) and 3.2.3. a), b), c). The Enrollment Commission consisted of five members: four were appointed by the Grand Council of the Crees (of Québec), the Northern Québec Inuit Association, the government of Québec, and the government of Canada. The fifth member was chosen by the other four.

Shedding the patriarchy of the *Indian Act* indicated that the Eeyouch had kept their culture alive, despite assimilation attempts from the state. The people of James Bay had not had a geographical and climatic base favourable to the development of a strong social hierarchy; every man, woman and child had to put in an effort to assure the survival of the family and community.⁴⁷⁵ These natural realities were concretized in how social status was defined in James Bay: high social status depended on how much a person or hunting unit could humbly provide for the community.⁴⁷⁶ Hunting was done by men and women, and children assisted in trapping. The women also butchered and processed the kill into pelts, therefore both Toby Morantz and Sherry Farrell Racette wrote that women in the Eeyou Istchee were valued by their work.⁴⁷⁷ The lack of written records on the work children and women did is consistent with the world views of record keepers, who recorded whom they bought fur from, but not how it had turned into pelts.⁴⁷⁸

Colonization was a harder task in the James Bay territory as it was so far removed from the agricultural and commercial landscape of the power centre. The Royal Commission on Aboriginal Peoples found that “[u]p to about 1950 the effects of settlement and resource development were probably greatest in the railway belts of northern Ontario and Manitoba, perhaps least in northern Québec.”⁴⁷⁹ Because the hunting and trapping lifestyle had continued in the Territory until 1975, complementary gender roles were acknowledged and counted on, and therefore women and children were seen as part of the productive community.⁴⁸⁰ Many of the female and male duties overlapped, and the biggest difference was perhaps the

⁴⁷⁵ All historic accounts mention starvation as part of the Eeyouch way of life.

⁴⁷⁶ Naomi Adelson, *‘Being Alive Well’ Health and the Politics of Cree Well-Being* (Toronto: University of Toronto Press), 63-64. A hunting leader or tallyman can be male or female, called *Kaanoowapmaakin* or *Kaanoowapmaakin Esquow* (female). Eeyou Indoh-Hoh Weeshou-Wehwun (Traditional Eeyou Hunting Law), Approved by the Board of Directors of the Cree Trappers’ Association in June 2009. Cree values in hunting were also used as values for the leaders and governance structures. 4.15.

⁴⁷⁷ Sherry Farrell Racette, “Nimble Fingers and Strong Backs: First Nations and Métis Women in Fur Trade and Rural Economies,” in *Indigenous Women and Work: From Labour to Activism*, ed. Carol Williams (Chicago: University of Illinois Press, 2012), 150-151. Racette wrote on women’s work generally, but she mentions specifically women in Eastmain during a time when the HBC saw women as a “heavy burden” on the company, traders at Eastmain replied that the Indian wives were not a burden as they were out hunting in the winter, and provided for the clothing of themselves and their children.

⁴⁷⁸ Women were not named in the records, but recorded as “woman from...”

⁴⁷⁹ *Report of the Royal Commission on Aboriginal Peoples. Volume 2, part 2: Restructuring the Relationship*. [RCAP], Ottawa: Minister of Supply and Services, 1996, 513.

⁴⁸⁰ F. Berkes and K. Ohmagari, “Transmission of Indigenous Knowledge and Bush Skills Among the Western James Bay Cree Women of Subarctic Canada,” *Human Ecology* 25, no. 2 (1997): 200, doi: 10.1023/A:1021922105740. Research has shown that gender specific knowledge is more common in Eastern James Bay than in Western James Bay because of opportunities to continue hunting with the help

distance travelled from to camp to the hunting sites; therefore all had the knowledge of the landscape, and their role in it.⁴⁸¹ The women's traditional knowledge and roles to strengthen families and communities were especially important during transition times. For instance when Fort George was moved and rebuilt as Chisasibi, one woman said that in order to save the community "we have to get up and carry our men."⁴⁸²

The 1996 *Royal Commission on Aboriginal Peoples* viewed examples of community involvement and consensus as building blocks to create a political future from the Eeyouch experience. The strong consensus among the Eeyouch of condemnation for the James Bay Project was rooted in concerns of what these developments would do to the land and water, which were "essential for the continued vitality of the physical, spiritual socio-economic and political life and survival of the Indigenous peoples for generations to come."⁴⁸³ The environmental destruction was noticed by the Eeyouch with the road building during the first phase of the development. Protection of the environment was important for the Eeyouch, and history had taught them that resource extraction from the territory could do severe damage to the environment.⁴⁸⁴ Section 22 in the JBNQA with the legislated environmental review processes added a layer of security to

of the Income Security Program. Where the hunting of economic reasons is often carried out by all male hunting parties in the Western James Bay, the Eastern James Bay has retained the hunting as a family practice. (219) That women's place in the landscape was also part of the Eeyouch world view can be seen in curriculum development where high school hunting classes are gender divided, and although much of it overlaps between the two classes some are divided for historical and spiritual reasons.

⁴⁸¹ *Report of the Royal Commission on Aboriginal Peoples Volume 2 part1: Restructuring the Relationship*. [RCAP], Ottawa: Minister of Supply and Services, 1996, 495. Gendered tasks were developed to maximize effort and movement in space. Death or injury constantly forced men and women to cross gender barriers. Caroline Desbiens, "Speaking the land: exploring women's historical geographies in Northern Québec," *Canadian Geographer* 51, no. 3 (2007): 360-372, doi:10.1111/j.1541-0064.2007.00184.x.

⁴⁸² Susan Jacobs, "Building a Community in the Town of Chisasibi," in *Aboriginal Autonomy and Development in Northern Québec and Labrador*, ed. Colin H. Scott (Vancouver: UBC Press, 2001), 309.

⁴⁸³ Clem Chartier cited in *Report of the Royal Commission on Aboriginal Peoples. Volume 1: Looking Forward, Looking Back* [RCAP], Ottawa: Minister of Supply and Services, 1996, 490-491. See also Catherine James, "Cultural Change in Mistassini: Implications for Self-Determination and Cultural Survival," in *Aboriginal Autonomy and Development in Northern Québec and Labrador*, ed. Colin H. Scott (Vancouver: UBC Press, 2001), 329.

⁴⁸⁴ The high fur prices in the late 1920s and early 1930s caused over-hunting of beaver in Eastern James Bay. The territory became an "open access commons," and when the Eeyouch saw that the beaver was hunted towards extinction by others, their reaction was to harvest what they could before the resource was gone. This incident has later been used by researchers on the James Bay Cree to prove that the Eeyouch had the ability and knowledge to deplete the resources if they wanted to, but that they did not do it under normal circumstances. It also shows the adaptability of the Eeyouch: although destructive of the land, the Eeyouch did not passively watch others reap the benefits from their land, but made sure they got part of it even when it went against their value system. Feit, H.A. "James Bay Cree Indian Management and Moral Considerations of Fur Bearers" (*Native People and Renewable Resource Management*. The Symposium of the Alberta Society of Professional Biologists, 1986), 58.

the inhabitants of Eeyou Istchee, since it gave them *control* of the land use: if any of the proposed developments “might affect the environment or the people of the Territory” the Eeyouch had to be part of the decision process.⁴⁸⁵ Section 22 states that:

A special status and involvement for the Cree people over and above that provided for in procedures involving the general public through consultation or representative mechanisms wherever such is necessary to protect or give effect to the rights and guarantees in favour of the Native people established by and in accordance with the Agreement.⁴⁸⁶

This meant a protection of Cree hunting rights, economy and “wildlife resources.” However, while the *Agreement* has protective clauses it does not dismiss the rights to “develop in the Territory.”⁴⁸⁷

At first glance it looks like section 22 is a replication of section 5 in *Bill 50*: written to appease the public who may not read all the ways to get around the environmental protection. In support of this kind of thinking is wording such as: “minimizing of the negative environment and social impacts of development” and that it strongly implies that the federal or provincial minister makes the final decision whether to develop in the Territory.⁴⁸⁸ However, the detailed list of developments that are automatically subject to assessment, gave the Eeyouch a firm base to override state or corporate interests.⁴⁸⁹ Mining and forestry have been two areas where the Eeyouch actively engaged in decision making. They used two strategies: manage the resources themselves and engage in resistance. For instance, in 1982, the Eenu of Waswanipi started forestry operations, and although there were mixed feelings about forestry in the community, the community-owned operation listened to local concerns and adopted a checkerboard pattern of harvesting instead of clear cutting.⁴⁹⁰ And lately, a moratorium has been called an all uranium mining in Eeyou Istchee.⁴⁹¹

⁴⁸⁵ JBNQA, 22.1.4. *Control* of the land was not hierarchical as understood in European languages.

⁴⁸⁶ JBNQA, 22.2.2. c).

⁴⁸⁷ JBNQA, 22.2.2. d), c), and f).

⁴⁸⁸ 22.2.4. b) and 1). 22.3.32. The responsible federal and provincial minister can decide to not act on recommendations made by the Advisory Committee or to modify their recommendations.

⁴⁸⁹ JBNQA, 22 schedule 1.

⁴⁹⁰ “Waswanipi: A Forestry Program Success Story,” Eeyou Eenu Magazine, Winter 2005 #2, 22. (Eenu are people inland.)

⁴⁹¹ Will Nicholls, “Monkey Business, *The Nation*, (Serving Eeyou Istchee since 1993) December 28, 2012, 3.

Section 22 gave the Eeyouch the rights to co-manage the natural resources with the provincial and federal governments.⁴⁹² However, it was not widely believed that the Eeyouch had the scientific and educational background to contribute more than marginally in co-management.⁴⁹³ Ironically, concerns over Cree management abilities diminished after scientific studies of Cree wildlife models had been carried out. Anthropologist Harvey Feit found that despite wildlife conservation sought by both biologists and native peoples, “political polarization” had prevented knowledge to flow between the groups.⁴⁹⁴ Feit sought to provide the link between the two knowledge systems. He found that when the Eeyouch were the sole managers of the resources and when outside competition to harvest animals was limited, the Eeyouch were able to keep a very stable beaver population. A religious belief that animals give themselves to the hunter was the paradigm behind the hunting ecology Feit described.⁴⁹⁵ According to Feit, the Cree had two main strategies to hunt beaver in the wintertime: trapping and waking the beaver family.⁴⁹⁶ The first was the most widely used, although it was less efficient than the second. Waking and harvesting the entire beaver family was done during times when the hunters were in transition and needed to catch food quickly.⁴⁹⁷ Trapping was more time consuming for the hunter, but affected the beaver population less, and therefore made a trap line productive longer.⁴⁹⁸ It surprised western scientists that the Eeyouch consistently chose a hunting strategy that was efficient only in the long run.

Feit also recognized how the Eeyouch collected scientific data on the viability of the beaver population on a trap line. The senior stewards of the trap line “can list the number, size and sex of each of the beavers they caught the last time they hunted it.”⁴⁹⁹ The steward also looked for signs around the hunting sites to determine the health of the colony. In addition, the women who turned the animals into

⁴⁹² RCAP calls it “the first claims-based fish and wildlife co-management regime between Aboriginal and non-aboriginal governments in Canada” Volume 2 (734).

⁴⁹³ In the 1970s aboriginal peoples were seen as victims, not positive contributors in knowledge production. This notion that is reiterated in book reviews by Frank G. Vallee and James C.E. Smith review of *A Homeland for the Cree* as too optimistic and positive, because he did not paint a grim picture of the Cree.

⁴⁹⁴ Feit, “James Bay Cree Indian Management,” 49.

⁴⁹⁵ Much research has been done on the Eeyouch and their belief system; see for instance Carlson, *Home is the Hunter*, and Adrian Tanner, *Bringing Home Animals*.

⁴⁹⁶ Feit, “James Bay Cree Indian Management” 55.

⁴⁹⁷ Feit, “James Bay Cree Indian Management” 55.

⁴⁹⁸ When a trap-line was over-harvested, the “owner” let it go fallow for one to three years to let the game recover. Feit, “James Bay Cree Indian Management” 57.

⁴⁹⁹ Feit, “James Bay Cree Indian Management” 52. The beaver is a “male” animal and hunted only by men.

pelts could verify the number of offspring the female had had from scars found on the beaver's uterus.⁵⁰⁰ The knowledge of the renewable resources in this example was gained as a communal effort. Management of the resources was understood as respect for the land and the animals that lived on the land or in the water. Matthew Coon-Come said that there is no word in Cree for governance and sovereignty; instead they use the word *care*.⁵⁰¹ By the word care, Coon-Come refers to the culture of reciprocity between land, animals and humans, and thus resists the European notions of a hierarchy in the landscape.⁵⁰² The settler philosophy of controlling land by dividing it up into perfect squares was therefore completely opposite to Aboriginal philosophy where it is not just the people who control the land, but the land also controls and cares for the people.⁵⁰³

The Eeyouch had customary laws that regulated their use of the land and the resources. In 2009, the Cree Trappers Association presented a written law that was based on customary hunting laws to be approved by the Annual General Assembly. The written version of the law was based on oral traditions, and it was written down with the intention of implementing Eeyouch laws in the conservation and management of the resources in Eeyou Istchee. The laws had been transmitted orally across generations, and by writing these laws down and translating them into English the laws evolved from a pure customary law into the realm of policy. This also communicated to communities and managers beyond the local community that the local customs were legal in their form, and that they had a history.⁵⁰⁴ However, the hunting law does not get its validity through being written into a legal form, or being consistent with the moral codes of the people it was written to govern, but rather from the procedure of making it into a law.⁵⁰⁵ The theory of communicative action describes the procedure of transforming the norms into law. The

⁵⁰⁰ Feit, "James Bay Cree Indian Management" 52.

⁵⁰¹ Matthew Coon-Come, "Question Period Panel Two: The Current Picture: Progress or Impasse?" in *Justice for Natives: Searching for Common Ground*, ed. Andrea P. Morrison (Montreal & Kingston: McGill-Queen's University Press, 1997), 190.

⁵⁰² Desbiens and Rivard, "From Passive to Active Dialogue," 108. The term co-management as a European concept, with a clear separation between nature and people, and human control over nature.

⁵⁰³ *Report of the Royal Commission on Aboriginal Peoples. Volume 1: Looking Forward, Looking Back* [RCAP], Ottawa: Minister of Supply and Services, 1996, 118.

⁵⁰⁴ Hart, *Concept of Law*, 48, some laws originate in customs. Hart wrote that conception of rule of recognition which provides a system of rules with its criteria of validity. (Hart, *Concept of Law*, 107). Customary law is perhaps closer to the European notion of Natural law in that it is derived from spirituality. Borrows, "Let Obligations be Done," 210, wrote that "behind the written word is a historical lineage stretching back through the ages, which aids in the consideration of underlying constitutional principles. Indigenous legal principles are part of this unwritten tradition."

⁵⁰⁵ Habermas, *Between Facts and Norms*, 135.

hunting law was a result of communication with elders and hunters who were socially anchored in Eeyou Istchee, and who used the mandate found in 28.5 of the JBNQA and converted it into a language that was understood outside their own social group.⁵⁰⁶ Writing the law down, the Cree Trappers Association let the principle guide not only hunters, but also people in other governing positions in the territory, for instance the CRA.⁵⁰⁷ The hunting law is interesting in that it corresponds to Habermas's description of law as "a system of knowledge and a system of action."⁵⁰⁸ First, the law comes from traditional knowledge of the animals and plants in the landscape, and the social norms of the human inhabitants of the landscape. Second, it goes beyond the natural law-like customary norms in that it connects the breaking of the rules to the "artificially produced facticity found in the threat of sanctions"⁵⁰⁹ The sanctions are gradual and consensus based: from individual warnings to the loss of title as a kaanoopmaakin (hunting leader).⁵¹⁰ Consensus was part of every step to solve a dispute.

The Eeyouch hunting law embraces the democratic idea found in the concept of modern law.⁵¹¹

The introduction of the law states:

Eeyou law is the body of law passed down from generation to generation. But it does not consist of static principles, practices and institutions from the distant past, but rather constitutes an evolving body of ways of life that adapts to changing situations and readily integrates new attitudes and practices.⁵¹²

The law promises a democratic process in the law making in that the principles are discussed and a consensus formed; however, because of the process in which this legal document is a part, something deeper is signified. The law is about governing the resources, and as self-legislation signals a reconstructive

⁵⁰⁶ Habermas, "Civil Society, Public Opinion, and Communicative Power," 500-501; Isaac Masty, *Traditional Eeyou Hunting Law*, (Cree Trapper's Association: Activity Report 2012-2013), 29. JBNQA 28.5.6 e). Section 28 and section 22 of JBNQA are closely linked.

⁵⁰⁷ *Mission Statement*, (Cree Trapper's Association: Activity Report 2012-2013), <http://creetrappers.ca/>, 2. Last Accessed, 10/7, 2014.

⁵⁰⁸ Habermas, *Between Facts and Norms*, 114. Habermas does not try to define law, rather describe law.

⁵⁰⁹ Habermas, *Between Facts and Norms*, 30.

⁵¹⁰ Hunting Law, individual warnings (11.2), get assistance of other Kaanoowapmaakin in deciding upon and applying reasonable sanctions (11.3), loss of title as Kaanoowapmaakin (13.7) and finally involve the regional office of Eeyouch Kantoo-hoodoo Emmahmoueech (25.1)

⁵¹¹ Habermas, *Between Facts and Norms*, 31. The purpose of the Hunting Law is to promote "conservation and management of wildlife and other living resources," (1.2) .

⁵¹² *Eeyou Indoh-hoh Weeshou-wehwun*, Traditional Eeyou Hunting Law, 2. Italicized in original.

approach to land governance.⁵¹³ By balancing tradition with change, and connecting a customary law to a treaty, the hunting law states an Eeyou's obligations in the co-management relationship set out in section 22 of the JBNQA, and it governs the hunting rights of the JBNQA section 26.⁵¹⁴

The Sámi Rights Commission (Samerettsutvalget)

The Sámi Rights Commission was established in 1980 in the wake of the protests that showed the government could not ignore the rights of the Sámi people.⁵¹⁵ The Commission's mandate was to "examine the questions of the [Norwegian] state's legal obligations towards the Sámi"⁵¹⁶ The first government report NOU 1984:18 became the basis for the Sámi parliament, and for the changes to the constitution §110a.⁵¹⁷ The Sámi Rights Committee had sixteen members with a broad Sámi and Norwegian composition in addition to specialists within jurisprudence and history.⁵¹⁸ Because the Commission was so detailed in its findings, and became the forum where the Sámi rights were discussed in depth, it is pertinent to analyze the findings.

The Commission report is very detailed and comprehensive; therefore my focus will be on how the Sámi use of land and water led to a new understanding by the government that the Sámi had legal rights to be consulted in questions of usage rights. The Commission's definition of who constituted the Sámi population is not rigid. Ethnicity was derived from heritage (bloodline) belonging to an area, cultural

⁵¹³ Habermas, *Between Facts and Norms*, 115, 126; Desbiens, "Speaking the Land," 362, writes about a woman, who in 2003, asked to take over her brother's trap-line. At the time it was normally men who got the ownership of trap-lines; however, the tradition of the land had not excluded women and in the hunting law (written down in 2009) trap-lines can be taken over by "another Eeyou, male or female, with sufficient competence, understanding, and knowledge of the lands and animals" (hunting law, 13.1).

⁵¹⁴ John Borrows, "Let Obligations Be Done" in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, ed. Hamar Foster, Heather Raven, and Jeremy Webber, (Vancouver: UBC Press, 2007), 201.

⁵¹⁵ Kirsti Strøm Bull, "Finnmarksloven – Finnmarkseiendommen og Kartlegging av Rettigheter i Finnmark" in *Finnmarksloven*, ed. Hans-Kristian Hernes and Nils Oskal (Oslo: Cappelen Akademisk Forlag, 2008), 149.

⁵¹⁶ Arnt Ove Eikeland, "Urfolksrettigheter i Finnmark og Larador" in *Finnmarksloven*, ed. Hans-Kristian Hernes and Nils Oskal (Oslo: Cappelen Akademisk Forlag, 2008), 72.

⁵¹⁷ Hans-Kristian Hernes, "'Fra Stilla til Storm.' En Introduksjon om Finnmarksloven", in *Finnmarksloven*, ed. Hans-Kristian Hernes and Nils Oskal (Oslo: Cappelen Akademisk Forlag, 2008), 12. NOU 1984:18 *Om Samenes Rettsstilling*.

⁵¹⁸ Bård A. Berg, "25 år i skyttergravene? Fra kampen om Alta/Kautokeino-vassdraget til Bondevik-regjeringens forslag til Finnmarkslov" Presentation for Finnmark County's theme day, "Urfolk" [Indigenous Peoples], June, 15th 2004, 2. Carsten Smith was the leader of the commission.

norms, religious affiliation and social organization.⁵¹⁹ Because the Sámi and the Norwegian cultures have lived beside each other over such a long time period, the Commission acknowledged how an individual may belong to more than one ethnicity, and hence self-identification becomes important. Self-identification as Sámi in addition to “parents, grandparents or great-grandparents with Sámi as their mother tongue” became the definition of who could vote for the Sámi parliament.⁵²⁰ This is in stark contrast to the Canadian federal identification of the status *Indian*: first the state defined who was eligible to be a status *Indian* through the *Indian Act*, and then regulated intergenerational transmission and status. Further the *Act* determined membership in the band (first Nation).

A special concern for the Sámi was that when their rights were discussed, it was with a base in Norwegian jurisprudence, was formed with little input from the Sámi interests and legal traditions, and sometimes it even went against their customary laws.⁵²¹ The Commission found that reindeer herders’ collective rights to land and water had, to a certain degree, been incorporated into the Norwegian legislation in a way the coastal Sámi rights had not.⁵²² The Commission also recognized that the legal notions of the coastal Sámi were not necessarily the same as those of the mountain Sámi.⁵²³ The reindeer herders’ land use was regulated with a base in the *siidas*. Coastal village societies (*bygdelag*) were similarly organized, in that they comprised a group of stationary people with special rights to the local commons; however, the extent of these rights was not agreed upon.⁵²⁴ Their communal rights were further complicated or conflated by the fact that the village societies consisted of people from different cultural origins.

Collective rights require a higher level of sophistication in jurisprudence. For instance, a collective group is not static with regard to membership, and therefore the definition of who belongs to it presents a challenge. In Finnmark, the historic situation of Sámi, Kven and Norwegians sharing the land and therefore

⁵¹⁹ NOU 1984:18, *Om Samenes Rettsstilling*, 115-118.

⁵²⁰ NOU 1984:18, *Om Samenes Rettsstilling*, 118; *Sameloven LOV-1987-06-12-56*.

⁵²¹ NOU 1984:18, *Om Samenes Rettsstilling* 120, based on Henry Minde in Ottar 103, 1978. The Sámi customary laws differ as well, and the reindeer herding Sámi has different laws than the Coastal Sámi. Traditionally when Sámi interests and rights are mentioned, it is the Reindeer herding Sámi’s rights and interests that are discussed.

⁵²² NOU 1984:18, *Om Samenes Rettsstilling* 121.

⁵²³ NOU 1984:18, *Om Samenes Rettsstilling* 120.

⁵²⁴ NOU 1984:18, *Om Samenes Rettsstilling* 123. Rights to minerals and compensation for expropriated water falls was not agreed upon.

defining anyone as outside the Norwegian umbrella has been problematic. A collective group could mean anything from 2-3 farms in one community to the entire county of Finnmark.⁵²⁵ Locality, has weighed heavier in discussions about rights than ethnicity. This is where the heart of the discussion lies in the Norwegian context: if rights follow ethnicity, a large portion of the Norwegian and Kven population who had lived in the area for centuries could lose rights to local land and water. In addition, ethnicity as a measurable unit for rights had been seriously questioned as a result of the Third Reich's ethnic cleansing programs, and such beliefs did not resonate well with a large portion of the population in Finnmark or Norway. While the NSR were inspired by Indigenous politics in North America, driven by the civil rights movement, many Sámi cautioned against ethnicity as a base to ensure rights. Ethnicity was also a more foreign concept for the Sámi, who according to Paine did not have the term as part of their language.⁵²⁶ On the other hand, to use local population as a base for land rights could also be seen as an erosion of Sámi rights.⁵²⁷ For instance, some of the Sámi objected to sports-fishing and hunting when it came into conflict with their livelihood, in a similar way as we saw the Eeyouch did in the JBNQA.⁵²⁸

Berry picking on the other hand was something that both ethnic Norwegians and ethnic Sámi had utilized for centuries.⁵²⁹ Under the Directorate of Norwegian Forestry a Cloudberry Commission ("molteutvalg") was set to study the practices and legal implications of cloudberry picking.⁵³⁰ The recommendation from the Cloudberry Commission was to keep the rules simple, because the local population had long traditions of cloudberry picking for household consumption.⁵³¹ When the Cloudberry

⁵²⁵ NOU 1984:18, *Om Samenes Rettsstilling* 126. "Province" means the government entity of fylke, (Norway had 19 fylke).

⁵²⁶ Paine, *Coast Lapp Society*, 150-152.

⁵²⁷ NOU 1984:18, *Om Samenes Rettsstilling*, 126.

⁵²⁸ NOU 1984:18, *Om Samenes Rettsstilling*, 127, from Sámiisk Råd 1956. Samekomiteens instilling side 34.

⁵²⁹ Myrdene Anderson, "Woman as Generalist, as specialist, and as Diversifier in Saami Subsistence Activities," *Humboldt Journal of Social Relations* 10, no. 2 (1983), 180, Stable URL: <http://www.jstor.org/stable/23262324>. Tacitus (AD 98) made comments of how both the Sámi men and women hunted and picked berries.

⁵³⁰ NOU 1984:18, *Om Samenes Rettsstilling*, 147. Molte (Cloudberry) is a nutritious, delicious berry that that people feel passionate about. In legislation about access to the commons, cloudberries are described as glorious delights (herligheter), and it seem like these berries also have been interpreted as such by the people who were picked them.

⁵³¹ NOU 1984:18, *Om Samenes Rettsstilling*, 147; Anderson, "Woman as Generalist," 184. Anderson found that due to greater opportunities, (coastal) women were the berry pickers 70% of the time in the early 1980s. She emphasized "the flexibility of human systems." (193).

Commission publicized its recommendations in January 1973 it brought about a passionate discussion.⁵³² NSR argued (with lawyer Dunfjell) that cloudberry picking rights were similar to fjord fishing and grazing rights in the local commons and should be compared as such, since cloudberry picking was of importance to the Sámi villages way of life.⁵³³ Discussions about cloudberry picking were passionate, and after the cloudberry commission had sent their suggestions out to a hearing, 13 municipalities voted against it, two voted for it and four gave conditional support.⁵³⁴ Privileges to groups who had enjoyed rights previously were not explicitly mentioned in the first hearing, so in the final amendments to the law on the state's unregistered land in Finnmark that were made in 1977, it specifically mentioned privileges, and cloudberry picking was limited to the population of Finnmark, unless the berries were eaten on the spot. Villages could claim collective rights and further limit access to local cloudberry picking spots, but could not exclude people with special rights (reindeer herding Sámi.).⁵³⁵ This process, however, showed that collective rights to land use were not an archaic legal concept, but as Johan Eira from NRL pointed out, "this jurisprudence is current [among the Sámi] today."⁵³⁶

Connecting the Sámi to the land

As a result of the commotion surrounding Alta River, a meeting between the Secretary of State Eskild Jensen, politicians from the regional government and local municipalities, Sámi Organizations, agricultural organizations and Norsk Sameråd (NS) was organized in the fall of 1979.⁵³⁷ The government made it clear that the meeting was organized to discuss general rights, not the Alta case. Ideas that the Sámi were indeed an Indigenous population had just started to surface – introduced by people who were involved in international law.⁵³⁸ Suggestions about special Sámi rights to land and water based on their new status as Indigenous people had been made, therefore, what such rights would entail and if they could be

⁵³² "voldsom diskusjon"

⁵³³ NOU 1984: 18 *Om Samenes Rettsstilling*, 148. Sámi organizations (including NSR) had mentioned that certain village communities in the interior had had exclusive rights to cloudberry picking locally. Anderson found that cloudberry picking was an important part of the "underground economy" and strengthened relationships and reciprocity between nomadic and sedentary populations. (Sámi or Norwegian); Anderson, "Woman as Generalist," 187, and table 5, 188-189.

⁵³⁴ NOU 1984: 18, *Om Samenes Rettsstilling*, 149.

⁵³⁵ NOU 1984:18, *Om Samenes Rettsstilling*, 149-150.

⁵³⁶ NOU 1984: 18, *Om Samenes Rettsstilling*, 151, my translation

⁵³⁷ Protests at Stilla and in Oslo happened during the fall of 1979.

⁵³⁸ Henry Minde, "Sámi Land Rights in Norway: A Test Case for Indigenous Peoples," *International Journal on Minority and Group Rights* 8, (2001): doi: 10.1163/15718110120908367, 113. i.e. UN Conference about Racism from 1978, Initial stages of Cobo Report.

implemented were discussed.⁵³⁹ Many arguments were made to strengthen the cooperation between the peoples in Finnmark - Norwegians, Sámi and Kven - instead of introducing specific Sámi rights. Norvald Soleng, who was a member of NS and also on the board of Finnmark land sale office (jordsalg kontor) between 1980 and 1984, maintained that exclusive rights Sámi for Finnmark and to the resources in Finnmark “will not strengthen the cohesion between the people, but rather contribute to antagonisms between Sámi groups and between Sámi and Norwegians.”⁵⁴⁰ Also Liv Østmo (NSR) saw the questions of rights in Finnmark not being between Sámi and non-Sámi but between the local inhabitants, and the government that made decisions about local land use. Several of the participants in the meeting therefore saw the added benefit of more local control of natural resources.⁵⁴¹

Since the first Sámi conference in Jokkmokk in 1953, ensuring a viable economic framework was part of the agenda and to “solidify the rights to use the resources in the local area.”⁵⁴² The Alta conflict illustrated that local rights to resources had to gain more weight than customary rights could give. The strategy of solidifying economic viability in the local region would also ensure the cultural base of the Sámi. Problems with the strategy arose when reindeer herding, fishing and farming were seen as bringing lower economic returns than hydropower.⁵⁴³ The reindeer husbandry was complemented by other economic practices such as hunting, fishing, berry picking and duoddji (Sámi handicraft).⁵⁴⁴ The NRL was looking for a way to safeguard the natural resources for future generations and suggested a similar form of self-determination as the Greenlanders had secured in 1979 with veto rights and power to prevent technical interference in the landscape.⁵⁴⁵ The long history of reindeer herders’ land use intersecting with other

⁵³⁹ Based on the 1966 UN Declarations on rights. Signing of the ILO no. 107 was discussed.

⁵⁴⁰ “Norvald Soleng,” The Norwegian State Administrative Database, last accessed, 11/7/2014. <http://www.nsd.uib.no/polsys/data/forvaltning/utvalg/person/4060>; NOU 1984:18 *Om Samenes Rettsstilling*. Original text: “vil ikke styrke samholdet mellom folkene, men det vil heller være med å skape motsetninger mellom samene imellom og samer og nordmenn.”

⁵⁴¹ NOU 1984:18, *Om Samenes Rettsstilling*, 152. Okkenhaug from the Norwegian Farmers association argued that there was more local control in the rest of the country for instance in the use of the local commons.

⁵⁴² NOU 1984:18, *Om Samenes Rettsstilling*, 138, quote from Jokkmokk konferanse. “trygga sin rätt att nyttja naturtilgångarna i sitt bosättningsområde.”

⁵⁴³ NOU 1984:18, *Om Samenes Rettsstilling*, 138. From the national convention of NRL June, 1982.

⁵⁴⁴ NOU 1994:21 *Bruk av land og vann i Finnmark i historisk perspektiv*, 273-274. Duoddji often brought in more cash than meat production.

⁵⁴⁵ NOU 1984:18, *Om Samenes Rettsstilling*, 138, from the NRL national convention in June 1982. The list of interferences the NRL wanted rights to stop were a) military shooting ranges b) hydropower c)

interests and how the law could revise the relationships between users, may have contributed to their willingness to gain rights through legal means.

The Sámi Rights Commission was looking for a way that people of different ethnic backgrounds could live in harmony. Force and assimilation would not achieve harmony, and the Commission sought the knowledge the local people had of culture and land.⁵⁴⁶ It was evident from many of the statements that land and water were the foundation of the Sámi culture. To quote Liv Østmo (NSR), “And people’s culture develop in relation to the land and resources one has. And if one of these important foundations is removed, or the most important foundation, namely the land, then it is very hard for a people to exist”⁵⁴⁷ Østmo’s words would become law a few years later, when Norway signed the ILO Convention No. 169 which underlines the cultural importance of land to Indigenous peoples.⁵⁴⁸

International meetings

International cooperation and meetings gave Indigenous peoples an opportunity to share experiences of conflicts with the government and corporations and learn from each other in order to find solutions. In the early 1970s Indigenous peoples were not represented in the UN system; this changed in the 1970s when groups such as the World Council for Indigenous Peoples (WCIP) got NGO status and therefore could attend meetings.⁵⁴⁹ The WCIP was founded in 1975, and the aims of the organization were to secure land rights for Indigenous people.⁵⁵⁰ Land rights were discussed at the WCIP conference in Canberra in 1981 through ways of incorporating Indigenous rights into the constitutions, and work towards

mining d) road and railway construction e) construction of cottages and other tourist developments f) industrial construction, including pipelines for oil and gas in the North Sea g) reforestation.

⁵⁴⁶ Henry Minde, “Sámi Land Rights in Norway: 122-123.

⁵⁴⁷ NOU 1984:18, *Om Samenes Rettsstilling*, 150. My translation. “Og folks kultur utvikler seg i forhold til det landet man har, og i forhold til de resurssene man har. Og dersom man tar bort en av disse viktige forutsetningene, eller den viktigste forutsetningen, nemlig land, så er det svært vanskelig for et folk å eksistere”

⁵⁴⁸ *Indigenous and Tribal Peoples Convention, 1989*, 27 June 1989, ILO Official Bulletin Vol 72, Ser A No 2 (entered into force 5 September 1991) [*ILO Convention No. 169*]. Article 13. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169; Ot.Prp. Nr. 53, 86.

⁵⁴⁹ Henry Minde, “Sámi Land Rights in Norway,” 115. The National Indian Brotherhood had got the NGO status earlier. WCIP got NGO status in 1979, The Grand Council of the Crees (Eeyou Istchee) got NGO status in 1987.

⁵⁵⁰ NOU 1984:18, *Om Samenes Rettsstilling*, 608. In Port Alberni, Canada.

legislation on land rights.⁵⁵¹ Before this meeting George Manuel, leader of the WCIP, “asked Canadian law professor Douglas Sanders to draft a text on juridical standards for Indigenous peoples on an international level.”⁵⁵² Although the draft did not receive much attention in Canberra, the Nordic Sámi Council took Sanders draft and consulted with legal experts in Oslo, who thought that a Declaration would have more impact than a Convention.⁵⁵³ The draft was handed over to the UN’s Working Group on Indigenous Populations (WGIP) who worked on it for 10 years before submitting it to the U.N. Commission on Human Rights for further discussion in 1994.⁵⁵⁴ The United Nations Declaration on the Rights of Indigenous People (UNDRIP) was adopted in 2007 after more than “twenty years of work by Indigenous peoples and the United Nations system.”⁵⁵⁵

International agreements are not only created by treaties, but also arise from state praxis.⁵⁵⁶ Traditionally when national and international law opposed each other, the national law had higher status (dualistic jurisprudence), however, in newer juridical praxis, this division has entered a grey zone. For instance, if an international law is of a higher character (for instance UNDRIP) the state may want to conform to such higher ideals and interpret the state law closer to the international (become more monistic).⁵⁵⁷ Unlike Conventions, declarations such as UNDRIP are not legally binding by the states that sign them; however, they suggest an international standard. Even when international legislation is not ratified by a country it can still be brought up in a court case.⁵⁵⁸ The International Labour Organization Conventions No. 107 and No. 169 specifically addressed Indigenous rights. ILO No.107 dealt with the discrimination experienced by Indigenous peoples, and attempted to be a legally binding instrument to reduce discrimination. Canada did not sign the ILO No. 107; however, the document had argued for

⁵⁵¹ NOU 1984:18, *Om Samenes Rettsstilling*, 609 Samenes Landsforbund was not part of Norsk Sameråd, and therefore not part of WCIP meetings. NRL and NSR did take part on the conferences arranged by WCIP, 609.

⁵⁵² Minde, “Sámi Land Rights in Norway,” 116.

⁵⁵³ Minde, “Sámi Land Rights in Norway,” 116.

⁵⁵⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly Resolution 61/295 on 13 September 2007.

<http://undesadspd.org/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>. Last accessed 11/7/2014.

⁵⁵⁵ United Nations Permanent Forum on Indigenous Issues. Declaration of the rights of indigenous peoples. <http://undesadspd.org/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>.

⁵⁵⁶ NOU 1984: 18, *Om Samenes Rettsstilling*, 156.

⁵⁵⁷ NOU 1984:18, *Om Samenes Rettsstilling* 158.

⁵⁵⁸ Rt-1982-241 (54-82), *Convention 107* was used in the court case, even if Norway had not ratified it.

Aboriginal political rights in states where these did not exist, and it is notable that status *Indians* in Canada gained the right to vote in federal elections in 1960.⁵⁵⁹ This is an example of how the customs of international law had consequences beyond the states that ratified it. Norway did not ratify ILO No. 107, because the definition of Indigenous peoples as tribal did not fit how the Sámi saw themselves or with how the Norwegian government saw the Sámi.⁵⁶⁰ Article 12 of the ILO No.107 was nevertheless used in the *Alta* case in 1982 about expropriation of land, but because the development were interpreted to be more limited than the words in Article 12 suggested, this was not discussed further.⁵⁶¹ The ILO No. 169, a revision of ILO No. 107, shed the assimilation aims of the latter.⁵⁶² Articles 6 and 7 of ILO No. 169 are particularly important, for laying out rights of the Indigenous peoples to be consulted and tie consultation to economic development of land used by Indigenous people.⁵⁶³ Norway adopted the *Convention 169* in 1990, which was also thoroughly analyzed in the preparatory work leading up to *Finnmarksloven*.⁵⁶⁴ Canada did not ratify the *Convention 169*; however, the convention can be used in court cases based on the Common Law doctrine of *precedence*.⁵⁶⁵ Although the ILO No. 169 can only be firmly relied on by the Indigenous peoples in countries that signed it, these cases can set a legal precedence in court, and other legal tools such

⁵⁵⁹ *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, adopted 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) [ILO Convention No 107]. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312252:NO. Article 3.3.; Up until 1960, *Indians* had to give up their status to gain the right to vote. “The term “Enfranchised Indian” means any Indian, his wife or minor unmarried child, who has received letters of patent granting him in fee simple any portion of the reserve which may have been allotted to him.” The *Indian Act*, S.C., c.18, s.5 (1876) (Can.).

⁵⁶⁰ Henry Minde, “Sámi Land Rights in Norway,” 114. Neither the government nor the Sámi saw themselves as indigenous as it was defined as tribal in the Convention No. 107. The term was used by Torvald Stoltenberg in a speech at the UN conference on racism in Geneva 1978. (He was Secretary of State at the time).

⁵⁶¹ *Rt-1982-241 (54-82)*, 23-40. The judges concluded that the Sámi interests had been “carefully analyzed in the court proceedings,” which had been done because of concerns for indigenous populations and ethnic minorities who were protected according to international conventions. (UN convention of 1966 on Civil and political rights, ILO-convention of 1957, and the Geneva conference of 1978 against racism).

⁵⁶² *ILO Convention No. 169*, article 36.

⁵⁶³ *ILO Convention No. 169*, article 6, 7 and 15.

⁵⁶⁴ Ot.prp.nr.53 (2002-2003) [*report on the Act relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act)*], 86, Article 6 and 7 of *ILO Convention No. 169* was mentioned as especially important in the preparatory documents (white paper) of *Finnmarksloven. Lov 2005-06-17, §3; Om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (Finnmarksloven)*. [*Act of June 17. 2005 no. 85 relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act)*]

⁵⁶⁵ Borrows, *Canada’s Indigenous Constitution*, 113. Precedence is “A court decision that is cited as an example or analogy to resolve similar questions of law in later cases.” From *Legal Dictionary Online*, s.v. “Precedent,” last accessed 11/7/2014. <http://legal.dictionnaire.thefreedictionary.com/Precedent>.

as declarations can be used as interpretations of national laws.⁵⁶⁶ International law, whether it is adopted or not, has a normative content, and with this follows expectations that states follow international standards.⁵⁶⁷

International covenants recognize Indigenous rights to a culture, to self-determination, and participation in decision-making processes.⁵⁶⁸ Indigenous peoples in both Canada and Norway interpreted the right to self-determination as not only being able to keep their distinctiveness within the nation state, but also holding rights to determine how the natural resources and land that supported the distinctiveness were to be used. Land and water played an important role in the Sámi and Eeyouch lifeworlds, but while human rights legislation aimed at securing Indigenous influence in decision-making over local resources, international free trade agreements posed limits on Indigenous peoples, causing them to demand greater control of the resources that formed the base of their livelihood.⁵⁶⁹ Energy trade was considered one of the major achievements of the Free Trade Agreement (FTA) and Québec had, with its extensive resources of hydropower, a strong commitment to the FTA.⁵⁷⁰ Development of wealth from rivers is under provincial jurisdiction and in Québec the FTA could be seen as a window of opportunity to expand trade in the energy sector. In 1989, the Great Whale hydropower development was scheduled to begin, but the project was not welcomed in Eeyou Istchee. The Eeyouch and Inuit used the media of the lifeworld, communication of values and influence, to oppose the Great Whale project in the territory. The communities had worked together to resist the first development, and when the Bourassa government signed hydropower contracts with the state of New York in 1988, the Cree and Inuit built a canoe-kayak hybrid to stop the developments that would happen as a result of the power contracts. The communities took turns as the crew on the boat on their ride from Ottawa to New York City. In a speech, Matthew Coon-Come compared the boat to

⁵⁶⁶ Mauro Barelli, "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples," *The International and Comparative Law Quarterly* 58, no. 4 (2009): 959–960, doi:10.1017/S0020589309001559.

⁵⁶⁷ Barelli, "The Role of Soft Law," 960.

⁵⁶⁸ Derek Inman, Stefaan Smis and Dorothee Cambou, "'We Will Remain Idle No More': The Shortcomings of Canada's 'Duty to Consult' Indigenous Peoples," *Goettingen Journal of International Law* 5 (2013) 1, 266, doi: 10.3249/1868-1581-5-1-inman-smis-cambou.

⁵⁶⁹ Free trade agreements such as EEC (or EFTA and EU), GATT, NAFTA and FTA.

⁵⁷⁰ Michel Duquette, "From Nationalism to Continentalism: Twenty Years of Energy Policy in Canada," *Journal of Socio-Economics* 24, no. 1, (1995), <http://encore.uleth.ca:50080/ebSCO-wb/ehost/detail?sid=51d6ede3-fd44-4e73-823bdf7535ccc139%40sessionmgr113&vid=2&hid=103&bdata=JnNpdGU9ZWwhvc3QtbGl2ZSZzY29wZT1zaXRI#db=a9h&AN=9506221356>. The FTA came into effect January 1989.

Noah's Ark: a journey to save the species and the ecosystem from a destructive flood.⁵⁷¹ The Eeyouch used dramatic, staged protests, just like the Sámi to get media on their side and convey politicians to rethink the contract. The strategy worked, and the \$17 billion contract was cancelled by New York governor Mario Cuomo in 1992.⁵⁷² The Sámi and the Eeyouch used "communicative power," in the form of "sensational actions" to raise public debates and political action to reach their goals.⁵⁷³ In a review of the JBNQA Martin Papillon wrote: "It would be hard to imagine Québec going forward with a major development project now without first obtaining the consent of the Crees and Inuit and without negotiating a revenue-sharing arrangement."⁵⁷⁴ To interpret the opposition to the Great Whale as only a political and economic power game would not give the Eeyouch the credit they deserve: these actions were also the lifeworld asserting influence over the media of money.

The Brundtland Report

Gro Harlem Brundtland was the Environmental Minister during the initial stages of the hydropower development, and Prime Minister during the court case. (1974-79, and 1981, Feb-Oct). In her diaries she wrote that the Alta affair affected her tremendously. Not only was she faced with difficult political decisions, she also met face to face with the people who were affected by her decisions. In 1981, when she was Prime Minister, fourteen Sámi women gathered in Brundtland's office.⁵⁷⁵ The meeting was short but the Sámi women stayed in the Prime Minister's office until the next morning when they were removed by the police.⁵⁷⁶ Six years later, *Our Common Future* was published, produced by the World Commission on Environment and Development and chaired by Brundtland. Perhaps based on her experiences, the Brundtland Report warns about destroying Indigenous and tribal communities in the name

⁵⁷¹ Alan Maitland, *As It Happens*, Radio Broadcast, March 27, 1990,4:04, <http://www.cbc.ca/archives/categories/society/native-issues/the-battle-for-aboriginal-treaty-rights/one-paddle-at-a-time.html> last accessed, 22/04/2014. An ecosystem the size of France.

⁵⁷² Alan Maitland, *As It Happens*.

⁵⁷³ Habermas, "Civil Society, Public Opinion, and Communicative Power," 509.

⁵⁷⁴ Martin Papillon, "Aboriginal Quality of Life under a Modern Treaty: Lessons from the Experience of the Cree Nation of Eeyou Istchee and the Inuit of Nunavik," *IRPP Choices* 14, no. 9 (2008): 17.

⁵⁷⁵ Rauna Kuokkanen, "Self-Determination and Indigenous Women - 'Whose Voice Is It We Hear in the Sámi Parliament?'" *International Journal on Minority & Group Rights* 18, no. 1 (2011): 42-43, doi: 10.1163/157181111X550978.

⁵⁷⁶ Kuokkanen, "Self-Determination," 43.

of development.⁵⁷⁷ She could ground her words on personal political experiences when she wrote: “hence the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibilities in resource use. And this recognition must also give local communities a decisive voice in the decisions about resource use in their area.”⁵⁷⁸ In 1989 she publicly admitted that the Alta hydropower development had been unnecessary.⁵⁷⁹

Nation building in Eeyou Istchee

The *Cree-Naskapi Act* came in place of the *Indian Act*, and ensured local governance, similar to what most municipalities in Canada have.⁵⁸⁰ The *Act* gave the Eeyouch control over A1 lands which “are not held subject to the *Indian Act*, however, as the relevant federal legislation is the *Cree-Naskapi (of Québec) Act*.”⁵⁸¹ Cree leaders such as Matthew Coon-Come had lobbied hard for the *Act*, and it was seen as a “significant achievement,” because the self-governance clause was backed with “legal and financial resources to assume this responsibility.”⁵⁸² It is also somewhat ironic that the leaders had to lobby so hard for the *Act*, since “[t]he act resembles municipal-style powers that the *Hawthorn Report* saw Indian reserve communities exercising.”⁵⁸³ Although it is doubtful that the researchers behind the *Hawthorn Report* could have imagined that the first local governance would happen in Eastern James Bay, this is also a statement of achievement for a local population working together. It is important that changes were not brought to the

⁵⁷⁷ The World Commission on Environment and Development. *Report of the World Commission on Environment and Development: Our Common Future*, Gro Harlem Brundtland. Oxford: Oxford University Press, 1987, 114.

⁵⁷⁸ *Report of the World Commission on Environment and Development: Our Common Future*, 115-116.

⁵⁷⁹ Tor Bjarne Christensen, “Aldri mer Alta” [Never again Alta] *Magasinet Natur og Miljø*, 22/02/2011, <http://naturvernforbundet.no/naturogmiljo/aldri-mer-alta-article23648-1024.html>. (Naturvernforbundet was one of the appellants in the Alta case.)

⁵⁸⁰ Paul Rynard, “Ally or Colonizer? The Federal State, the Cree Nation and the James Bay Agreement,” *Journal of Canadian Studies* 36, no. 2 (2001): 22, <http://encore.uleth.ca:50080/ebsco-w-a/ehost/detail?sid=a3562395-184c-43f7-92220e36dcab9763%40sessionmgr4005&vid=1&hid=4106&bdata=JnNpdGU9ZWZWhvc3QtG12ZSZzY29wZT1zaXRl#db=a9h&AN=5997580>. Although, as some scholars have pointed out, only 1.5% of the traditional territory. Thomas Isaac, *Aboriginal Law: Commentary and Analysis* (Saskatoon: Purich Publishing Ltd. 2012), 56-57.

⁵⁸¹ Bradford W. Morse, “Québec Secession and Self-Determination of First Nations,” in *Commission on Folk Law and Legal Pluralism*. Proceedings of the XII the International Symposium, Williamsburg, USA July 26-August 1, 1998.

⁵⁸² Duncan Marshall, “Native Resource Management at a Turning Point?” in *Native People and Renewable Resource Management*. The Symposium of the Alberta Society of Professional Biologists, 23-28, 27.

⁵⁸³ *Report of the Royal Commission on Aboriginal Peoples. Volume 1: Looking Forward, Looking Back* [RCAP], Ottawa: Minister of Supply and Services, 1996, 317.

territory by an Indian Agent, but by the people of Eeyou Istchee. This was also stated by the *Royal Commission for Aboriginal Peoples*: “Regardless of who begins it, the process of grouping and regrouping scattered elements to rebuild a nation will have to begin from within.”⁵⁸⁴

Nation building in the Eeyou Istchee had started with opposition to Bourassa’s announcement of hydropower developments with people from the entire territory challenging the legality of the plans. The Eeyouch were present in their own making; they did not live as others had defined them to do, but actively engaged, and continue to engage in the discourse about their own community and culture. Important outlets for discussions taking place within the territory are the *Eeyou Eenou Nation* magazine, started in 2001, *The Nation*, started in 1993, and The Grand Council of the Crees (Eeyou Istchee) website.⁵⁸⁵ These news channels were and are public, political voices of the Eeyou Istchee. Only part of the discussion can be captured from the written pages of these news sources, for as the *Eeyou Eenou Nation* magazine reveals, the main source of news in the territory happens through personal communication.⁵⁸⁶ The strong emphasis in the community on discussing political topics is found in different layers of the population.

The *Eeyou Eenou Nation* magazine organized a writing contest where high school students ages 14-19 wrote about ways to improve life in Eeyou Istchee. Cindy Cookish wrote about how the elders should not be put in the hospital where they “don’t belong.”⁵⁸⁷ She suggested an elders’ home close to the school, as this would not only create jobs in the community, but also be a place where the youth and the elders interacted: “They can teach us about the traditional way of life and more about our culture.”⁵⁸⁸ Another student, Lorraine Pachano, wrote that the youth should “be better informed of the JBNQA,” and “be aware of civil government, like laws and the rights of the Cree.”⁵⁸⁹ These suggestions from the youth also indicate that local politics had been discussed in their homes or in the community, that they had been

⁵⁸⁴ *Report of the Royal Commission on Aboriginal Peoples Volume 2 part1: Restructuring the Relationship*. [RCAP], Ottawa: Minister of Supply and Services, 1996, 315.

⁵⁸⁵ The *Eeyou Eenou Nation* magazine is produced in both English and Cree between 2001-2006. The magazine is linked to the Grand Council of the Crees (Eeyou Istchee), and the content is political. *The Nation* (serving Eeyou Istchee since 1993) is a bi-weekly production. The Grand Council of the Crees (Eeyou Istchee) website use mostly English, but also Cree and French.

⁵⁸⁶ Bill Namagoose, “A Message from the Editor,” *Eeyou Eenou Nation* August, 2002, 3. Salisbury also found that news spread very quickly through the territory despite challenges with radio and telegraph connections so close to the magnetic north pole.

⁵⁸⁷ Cindy Cookish, “Our Future,” *Eeyou Eenou Nation* August, 2002, 45.

⁵⁸⁸ Cindy Cookish, “Our Future,” *Eeyou Eenou Nation* August, 2002, 45.

⁵⁸⁹ Lorraine Pachano, “Our Community Essay,” *Eeyou Eenou Nation* August, 2002, 44.

socialized into the society, and that these girls believed that their voices mattered in the community.

Communication of ideas is a form of cultural transmission, and the girls seem to have a firm foundation in the cultural values as Cookish's essay reveals great respect for the interaction between generations, but also argues for a continuation of intergenerational communication within the modern facility of a senior lodge.⁵⁹⁰ She also sought a solution to two problems in her community: unemployment and interference on her cultural values by the healthcare system.

Communication between generations was also mentioned in the hunting law; as an important step to reach a consensus on the law.

Throughout, consistent with traditional Eeyou practice, a process of consensus was used to arrive at a final decision as to what to include in the document and how to do so. There were many and on-going discussions between the participants in the process and there was a thorough exchange of points of view.

In the course of the process, support for the initiative and for the contents of this document was sought and was received from all Eeyou communities and from all groups in those communities, from the Elders and the Youth, from Kanawapmaakinch and active hunters and trappers, from leadership and ordinary community members, as well as from the Grand Council of the Crees of Eeyou Istchee.⁵⁹¹

The cultural importance of the hunting world-view seems to be the glue between different generations of leaders. First, it demonstrated the important intergenerational communication and the process of consensus in Eeyou Istchee. The strong outrage over *Bill 50* arose from the lack of consultation and the lack of consensus for the TVA-style hydropower development scheme. The continued awareness of the importance of section 22 of the JBNQA, which states that the people in Eeyou Istchee will be consulted on new projects, exemplifies the amalgamation between land as important for the hunters and animals and land as a source of revenue for current and future generations.⁵⁹² Second, the hunting law, although written in 2009, was based on oral hunting regulations in the territory. The law is an example of the kind of legal tradition that had been held alive in the territory while the foreign laws of the Europeans were applied. The younger generation depends less on hunting as a livelihood, but the values described in the hunting law are

⁵⁹⁰ Habermas, *The Theory of Communicative Action: Volume Two*, 64.

⁵⁹¹ Cree trapper and Hunting organization "traditional Eeyou hunting law", 55.

⁵⁹² JBNQA 22.2.2.c).

applicable to any person in management, not only the hunting leader or resource manager.⁵⁹³ To connect traditions and values with new forms of livelihood thus keeps the culture vibrant.

The use of consultation is unique in that decisions are discussed with the aim of understanding and consensus, instead of using a majority vote. The consultation process is particularly important if voices of numerically weak groups are to be heard; consultations, according to ILO 169, shall happen in a base of equality, “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”⁵⁹⁴ However, they also need to be part of an open process where the involvement of a critical public can justify the law.⁵⁹⁵ The consultation process is a democratization of rights, in that they are discussed through dialogue; rights are not understood as something that are assigned or given, but they also involve others’ recognition.⁵⁹⁶ The Eeyouch, who used discussions of rights and consensus making in their legal tradition, adding consultations to the legal framework for their resources, as was done in section 22 of the JBNQA, made Canadian laws more democratic.⁵⁹⁷

Josefson writes that Finnmarksloven is unique in Norwegian jurisprudence, because the hearings leading up to the law took the form of dialogue.⁵⁹⁸ When the law was proposed in 2003, the Sámi parliament voted against it as it neither protected Sámi rights as it had aimed to do, nor followed the process outlined in ILO No. 169.⁵⁹⁹ There were, however, discussions about what the law should contain

⁵⁹³ Cree trapper and Hunting organization “traditional Eeyou hunting law”, 4-5.

⁵⁹⁴ Broderstad and Hernes, “Gjennombrudd ved Konsultasjoner?” 122, 126. *ILO Convention No. 169*, article 6.2. Ted Moses gave examples of how a consensus was reached with the government of Québec in the *Paix des Braves* discussions. The agreement gave the Eeyouch the benefit of “running their own affairs” and they communicated to the government that “we prefer smaller projects.” Ted Moses gave the interviewed in Cree in the documentary “Québec Special: Ouje-Bougoumou, Air Creebec and Linda & Gary’s Trucking,” *Venturing Forth* series 1, episode 11, directed by Brenda Chambers (Kelowna B.C. Filmwest Associates, 2001), DVD.

⁵⁹⁵ Habermas, *Legitimation Crisis*, 46, 88, 95.

⁵⁹⁶ Broderstad and Hernes, “Gjennombrudd ved Konsultasjoner?” 143.

⁵⁹⁷ The court cases regarding 22 is evidence of its importance.

⁵⁹⁸ Eva Josefson, “Stat, Region og Urfolk – Finnmarksloven og Politisk Makt” in *Finnmarksloven*, ed. Hans-Kristian Hernes and Nils Oskal, Oslo: Cappelen Akademisk Forlag, 2008. 91. Eva Josefson is the daughter of one of the protest organizers in the Alta conflict.

⁵⁹⁹ Josefson, “Stat, region og urfolk,” 97 and 102.

and who would support it.⁶⁰⁰ Josefson writes that the Sámi arguments were polished against the majority society's world-views, and she sees the process leading up to Finnmarksloven as a knowledge based-dialogue, where the Sámi parliament became an institutionalized knowledge base for Indigenous questions.⁶⁰¹ Josefson sees the Sámi parliament as an expansion of democracy, because it tackled the political powerlessness the Indigenous populations experienced within a numeric democracy.⁶⁰² Only one of the meetings between the government and the people in Finnmark was open for the public, however, the proposal to *finnmarksloven* was discussed both in the media and within political institutions⁶⁰³ To have a governing body such as Sametinget or the CRA puts the Sámi and the Eeyouch in a better position to have a dialogue with their governments, but also with international institutions.⁶⁰⁴

The *ILO No. 169* was influenced, among other things, by the needs of the Sámi and the Eeyouch. When the UN working group on Indigenous peoples was established in 1982 Norwegian researcher Asbjørn Eide was the first chairman.⁶⁰⁵ This group was open, and attracted "more participants than any other UN human rights body."⁶⁰⁶ The Grand Council of the Crees (Eeyou Istchee) became the first tribal group to attain NGO status in 1987 and became one of the ten Indigenous non-governmental organizations to gain access to the UN working group.⁶⁰⁷ The Sámi's contribution can be seen in the self-identification clause in the *ILO convention 169*, while the rights of consultation may have been drawn from the experiences in Eeyou Istchee. The *Eeyou Eenou Nation* magazine reiterates the importance of a consultation process:

⁶⁰⁰ Broderstad and Hernes, "Gjennombrudd ved Konsultasjoner?" 135.

⁶⁰¹ Josefson, "Stat, region og urfolk," 108-109.

⁶⁰² Josefson, "Stat, region og urfolk," 109. The parliament has changed over the last 20 years, and some of the women from Kuokkanen's article "whose voice is it we hear in the Sámi parliament?" were less positive to the parliament than Josefson. However, some of the concerns voiced by Kuokkanen's interviewees were the lack of land rights – and the parliament was instrumental in adding a section to the law. (Section five, about a commission that could solve disputes regarding collective and privately owned land).

⁶⁰³ Josefson, "Stat, region og urfolk," 107.

⁶⁰⁴ Desbiens and Rivard, "From Passive to Active Dialogue," 102, acknowledge that even if the regional governance structure could be seen as a "space for active cross-cultural dialogue," the governing institutions set up as a result of the JBNQA were based on southern Québec governance institutions. Ignatius Larusic agrees that it was the JBNQA that made governance structures of regional character necessary if the Eeyou were to deal effectively with Hydro Québec. (Ignatius La Rusic, "Remembering 1971," *The Nation*, July 2, 2010, <http://www.nationnews.ca/pdf/Nation-18-17.pdf>, 11-12).

⁶⁰⁵ Sander, "The UN Working Group on Indigenous Populations", 408 and 415.

⁶⁰⁶ Sanders, "The UN Working Group", 410. i.e. 380 participants in 1988.

⁶⁰⁷ Sanders, "The UN Working Group", 418, 417 and 419. (in that order).

The Cree have slowed development, making the question of how the natural resources will be used a Cree, Québec, Canadian and international issue. How development in the territory unfolds will be largely determined by how we see ourselves, now and in the future, whether we benefit from development, and whether any future proposals use resources sustainably and protect the environment and traditional Cree way of life. Just as the hunter must decide how many animals to harvest in a year, we must maintain our right to decide how the territory will be developed. Our role in protecting the land must also allow us to make jobs and opportunity for youth in the future.⁶⁰⁸

The quote captures the Cree as active agents in shaping their own future. Of course this was not mere rhetoric, but based on experiences.

By the 1990s the Eeyouch had experienced the intention behind treaty making in Canada: governmental or commercial interests in the land with Indian title.⁶⁰⁹ After the Québec government had signed the *Agreement* in 1975, “they [Québec] acted as though they could do whatever they wanted to do.”⁶¹⁰ The promises made to the Cree in the JBNQA were worthless words on paper when trap-lines were clear-cut without the consent of the Eeyouch.⁶¹¹ Therefore the Eeyouch have reacted when the *Agreement* has been ignored. The court has been used to ensure that the JBNQA environmental assessments take precedence over federal environmental assessments in Eeyou Istchee.⁶¹² Laws, however, did not become the Eeyouch’s only tool for a better future, and they did not shy away from backing up their claims with political actions. In the early 1990s, the Québec government experienced what the Cree resentment in the early 90s could do when the deal with the New York Power Authority fell through.⁶¹³

To get a consensus from the population in Eeyou Istchee on how to use the land was important, and discussions were held in the community whenever there was a new development proposed. Many sources describe the community involvement: Salisbury wrote how the Cree used the telephone to spread news between communities, and Richardson included a story of a communal burning of an inadequate and inaccurately translated document. When the *Eeyou Eenou Nation* magazine asked its readers to discuss

⁶⁰⁸ Ted Moses, “Questions and Answers about the Agreement in Principle (AIP),” *Eeyou Eenou Nation*, December 2001. 26, 1-36.

⁶⁰⁹ Eikeland, “Urfoiksrettigheter i Finnmark og Labrador,” 75.

⁶¹⁰ Matthew Coon-Come, “I Support the Agreement” *Eeyou Eenou Nation*, February, 2002, 43.

⁶¹¹ There was more political will to develop than to fulfill other terms of the *Agreement*.

⁶¹² “Report on federal negotiations,” *Eeyou Eenou Nation*, Winter, 2004, 12, 1-40. Section 22 of the JBNQA was argued in court in 2010, *Québec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557, and the rights of the Eeyouch to be part of the assessment as set out in the JBNQA.

⁶¹³ The Eeyouch find strength in their communities when political actions are needed. During the Idle No More protests, youth from Eeyou Istchee walked to Ottawa to protest Bill C-45, an omnibus bill that would give 99% of Canadian waterways less environmental protection. Matthew Coon-Come, “Grand Chief on Idle No More’s real meaning” *The Nation*, February 22, 2013, 10.

whether “the benefits of the present proposal [*Paix des Braves*] significant enough for Cree society to accept?” many people did that.⁶¹⁴ Habermas questioned: “[W]ho can place issues on the agenda and determine what direction the lines of communication take?”⁶¹⁵ He found that while political leaders took the initiative and the broader public was not influencing the process in the initial stages, the second stage involved support from the public; however, the initiative was still coming from within the political system.⁶¹⁶ Initiative from outside the political system did not happen until the third stage when groups from the periphery articulated a need for “serious consideration.”⁶¹⁷ Central to Habermas’s theories is that to avoid a crisis the government and the economy both need to have their legitimation from the people.⁶¹⁸ Hydropower developments generated large sums of money each year, and it could not be justified that the people who bore the brunt of the negative effects of these developments did not benefit from them. The need to consult with the local population on issues that affect their livelihood was therefore necessary both because of Indigenous ownership status, and as a decent democratic process for any citizen.

One of the climaxes of the nation building in Eeyou Istchee was *The Agreement Respecting a New Relationship Between the Cree Nation and the Government of Québec* or *Paix des Braves*, which was signed February 7th 2002. This was an agreement on a new economic relationship, a “nation-to –nation” relationship between the Government of Québec and the Grand Council of the Crees (Eeyou Istchee).⁶¹⁹ The purpose of *Paix des Braves* was to transfer community development to the Cree Nation, in exchange for consent for the Eastmain 1- A/Rupert Project.⁶²⁰ *Paix des Braves* incorporated recommendations from the *Royal Commission on Aboriginal Peoples* on revenue sharing of income derived from traditional Cree lands.⁶²¹ Revenue sharing was necessary to access funds that were substantial enough to run programs,

⁶¹⁴ Ted Moses, “Questions and Answers about the Agreement in Principle (AIP),” *Eeyou Eenou Nation*, December 2001. 27.

⁶¹⁵ Habermas, “Civil Society, Public Opinion, and Communicative Power,” 508.

⁶¹⁶ Habermas, “Civil Society, Public Opinion, and Communicative Power,” 508.

⁶¹⁷ Habermas, “Civil Society, Public Opinion, and Communicative Power,” 508.

⁶¹⁸ Habermas, *Legitimation Crisis*, the theme of the book.

⁶¹⁹ *The Agreement Respecting a New Relationship between the Cree Nation and the Government of Québec*, 2002. 2.5 a).

⁶²⁰ *The Agreement Respecting a New Relationship between the Cree Nation and the Government of Québec*, 2002. 2.5 a), b), f). The new project was also replacing the Nottaway-Broadback-Rupert development, agreed to in the JBNQA.

⁶²¹ Grand Council of the Crees: Critical Issue: *Paix des Braves*. <http://www.gcc.ca/issues/paixdesbraves.php>; “Effective government depends upon a sound economic base. Without an adequate land and resource base, and without flourishing economic activity, Aboriginal governments will have little access to independent sources of revenue.” *Report of the Royal Commission*

because, as mentioned in the *Hawthorn Report*, individual taxation is more limited in the North, while the costs of running programs are higher and require more funding.⁶²² On this background it is understandable that the Cree Regional Authority (CRA) were looking for independent sources of revenue to finance a Cree government and become more independent of federal funds. “It is not program monies [from DIAND] that are going to do things for us. They are not the solution. What...[the *Indian Act*] has done to us...[is that] it has deprived us of our independence, our dignity, our respect and our responsibility.”⁶²³ *Paix des Braves* was important to the international Indigenous community as it recognized Aboriginal peoples’ right to benefit from their own resources. Ted Moses saw the *Agreement* as a way for the Eeyouch to become a part of the Canadian economy.⁶²⁴ One of the consequences of the Eeyouch living in the periphery of the power centres, and further away from the control of the Indian Agents and new paragraphs of the *Indian Act* seems to be that the Eeyouch had more independence, dignity and respect when they started to work towards more autonomous governing structures.

Conclusion

Land had been lost as a result of hydropower developments; however, the Eeyouch and the Sámi used the “dam-enclosures” to gain control over the resources rather than being alienated and displaced. Their actions helped decentralize the governance system in Québec and Norway. The first step was to limit frictions in the local communities: in Finnmark, the Sámi population included the Norwegian and the Kven by insisting on land rights as an exclusive ethnic right, and the Eeyouch started with eliminating gender as the base for rights and continued with building a strong regional organization where the communities could build a united front instead of competing against each other. Community building was therefore at the base of the changes. The communities were also strengthened in what were the historic weaknesses – in

on Aboriginal Peoples Volume 2 part1: Restructuring the Relationship. [RCAP], Ottawa: Minister of Supply and Services, 1996, 281. It was the first agreement that implemented a major recommendation of the Royal Commission.

⁶²² *Report of the Royal Commission on Aboriginal Peoples Volume 2 part 1: Restructuring the Relationship*. [RCAP], Ottawa: Minister of Supply and Services, 1996, 281, 283, 285. For instance the Northern Allowances accounts for the higher costs of living in the north. Hawthorn, *A Survey of the Contemporary*, 282.

⁶²³ June Delisle, Kahnawake, Québec, 6 May, 1993 to *Report of the Royal Commission on Aboriginal Peoples Volume 2 part1: Restructuring the Relationship*. [RCAP], Ottawa: Minister of Supply and Services, 1996, 282. Borrows argues that “more First Nations must escape from the *Indian Act* to increase their law-making powers in accordance with their own priorities.” (Replace the *Indian Act* with treaties). Borrows *Canada’s Indigenous Constitutions*, 44. (Only peoples who have a sound treaty).

⁶²⁴ “An Interview with Ted Moses.” *Eeyou Eenou Nation*, Spring 2003, 8. “It is the first agreement to bring Aboriginal peoples into the larger economy.”

Finmark divisions based on ethnic differences were tackled, and in Eeou Itchee they supported fractions that Indian policies had 'attacked' for generations. The right to be consulted is perhaps the most important feature of both the JBNQA and Finnmarksloven; however, a sense of community is necessary for consultation to have any meaning.

Consultation with a community is in essence the lifeworld's legitimation process of law, and, according to Habermas, a necessity to avoid a societal crisis. The process for the Sámi and Eeyouch of securing laws with rights to be consulted conformed to Habermas's theories, but was an inversion of the ideal. When the government in Norway and Québec failed to consult with the Sámi and the Eeyouch on land use, the outcome of that neglect was a crisis. The Indigenous peoples tried to provoke a dialogue – in the court, in the Prime Minister's office, and on the Hudson River; they provoked media attention to communicate that the cultural values of the majority society was not shared by the minority. Simultaneously, the intersection of land and culture was also communicated in the international arena. Organizations gained NGO status and thus earned a platform of influence within the United Nations. In the resistance against land encroachments a consciousness of their own lifeworld emerged. Namagoose, writes that "We have endured as the Crees because we have adapted to changes in the land and to changes in the societies around us for thousands of years"⁶²⁵ In this passage, Namagoose reveals that the Cree culture was robust – one that could withstand change. The word *change* is emphasized through repetition, and the Cree culture could weather changes to land as experienced with the hydropower developments, and to changes in the contact societies. The Sámi also discovered their culture as an Indigenous one rooted in land. The Eeyouch and Sámi fought back by emulating the forms of governing structures of the majority society. Paradoxically, it was through these new governing structures that the material base of the culture was granted and cultural practices retained.

⁶²⁵ Bill Namagoose, "A message from the Editor," *Eeyou Eenou Nation*, August, 2002, 4.

Conclusion: “As long as the sun rises and the river runs.”⁶²⁶

The research question that initiated this study was if the legal situation of the Sámi and Eeyouch changed as a result of the hydropower project, particularly regarding the right to be consulted about territorial and water encroachments. The first challenge was to comprehend what the legal situation was before, but “before” is not a specific time-period. Going back to early contact made more sense in order to capture the different ways of organizing the societies and to look at the distinctive ways resources and social interaction were controlled.⁶²⁷ The question assumed that legislation regarding land ownership was important, and the challenge was to understand what property meant, and to suggest how land rights that were not private property based were translated into European based jurisprudence. This thesis is therefore situated in the intersection between the positivistic view on laws as grounded in social facts, and the natural law views on laws as in need of being aligned with or justified by Indigenous jurisprudence. Habermas’s theories deepened the understanding of this approach to the evidence.

Chapter One described how English law encroached on Eeyouch territory and Danish law was applied on the territory of Finnmark. However, distances from the power centres gave the populations on the periphery some autonomy. The Sámi did not purchase land after the law in 1775 enabled them to do so but they continued to use their own customary laws.⁶²⁸ Economic and ecologic influences that led to more specialization of livelihoods, such as reindeer husbandry and the pomor trade, quickened changes, as both the mountain Sámi and the coastal Sámi adapted to a new situation or seized opportunities. The sudden closure of the pomor trade in 1917 affected Sámi livelihoods much more than the law on private ownership did.⁶²⁹ The encroachment of laws became most noticeable when working alongside economic and ecologic changes.

⁶²⁶ Governor Morris (1880) quoted in Indian Chiefs of Alberta, *Citizens Plus*, 25. (Morris used these words to show that treaties were signed in good faith and would last forever).

⁶²⁷ In England, power and landownership was connected; in Eeyou Istchee, power was skill and knowledge based. Habermas would call it lifeworlds without “shared background assumptions” and histories. (Habermas, *Between Facts and Norms*, 25.)

⁶²⁸ In Norway, power was gained from trade more than landownership. In Canada property ownership and power seem to be connected. See for instance: Public Archives Canada, *County Maps: Land Ownership Maps of Canada in the 19th Century* [Ottawa], 1979. National Map Collection, Public Archives of Canada. North American legal theories on landownership describe how the value of landownership increases with the rise in population.

⁶²⁹ Private ownership affected the mountain Sámi, especially on the fringes of their territory.

The narrative on women's exclusion from land through marriage laws was one example of how an external legal framework in Canada increased disturbances in communities that were already under pressure economically and environmentally. The ban on Aboriginal ceremonies and outside control of who could be chiefs likewise broke a community away from its preexisting governance structures, its history and its land.⁶³⁰ In Sápmi, the state border closures cut reindeer herders' access to grazing areas, and these international laws imposed an added challenge for the Sámi who were not immune to the economic situation in Scandinavia. The pressure on land also increased in the nineteenth century as the population in Norway grew from 0.9 million in 1800 to 2.2 million in 1900.⁶³¹

The second chapter described confrontations: the Indigenous people stood up against the hydropower developments, as the damming of their land would threaten their livelihood. The Cree had a strong legal foundation to argue their case in court; however, the legal foundation was opposed by a long tradition of political maneuvering to avoid the acknowledgment of Indigenous land rights. The *Kanatewat* case was also undermined by a strong political will to develop in the territory, and the fact that construction did not stop during the court case is evidence of this. The Eeyouch and the Sámi showed that the hydropower developments that were backed by statements of policies (in the form of *Bill 50* and the *Royal Resolution of 1979*) were incompatible with their traditional way of life and would destroy their resource base.

Richard White wrote that nature can be known through work, and the Sámi and Eeyouch demonstrated their knowledge during and after the court proceedings.⁶³² The Sámi had knowledge about reindeer herding practices that the government did not understand. For instance, the impact that the developments would have on reindeer herding was calculated by adding the number of reindeer that used the land and dividing it by 12 (months). Thus, the impact seemed small to the NVE, but for the herders who

⁶³⁰ It is not a secret that the *Indian Act* was written with the political goal of taking land rights away from aboriginal people.

⁶³¹ Danielsen, Rolf. "15: The Consolidation of the New State." in *Norway: A History From the Vikings to Our Own Times*, trans. Michael Drake, (Oslo: Scandinavian University Press, 1995), 217; Hovland, "Recovery and Growth," in Drake, *Norway: A History*, 231, 218. Up until 1855, the population growth caused internal migration from the interior to the coast or to the far north. Between 1865 and World War 1, Norway experienced a great wave of emigration.

⁶³² Richard White, *The Organic Machine*, 4-7; Richard White, "Are You an Environmentalist or Do You Work for a Living?," 171.

used the land during the calving period when the reindeer are particularly vulnerable, the changes to the land was damaging to their industry. The Eeyouch maintained that their livelihood would be affected, since the animals, fish, and fowl would be reduced as a result of the La Grande hydropower project.⁶³³ Later, they also showed how forestry practices of logging companies (for instance clear-cutting) were not sustainable and negatively affected the wildlife population. In the court cases, the “scientific” knowledge was mostly collected by non-Indigenous experts, and local knowledge was not taken seriously until western science arrived at similar conclusions. In the context of hydropower developments, this is somewhat ironic, since traditional dam-building preceded scientific dam-building by more than four thousand years, and some of the “pre-scientific” dams had lasted more than a millennium.⁶³⁴ Clearly, Indigenous concerns for the environment were also founded by observations and work.

The dams were built, and the land flooded, and the rivers’ flow controlled. Thus as E.P. Thompson wrote for the English enclosure: “But it was too late to reverse a general process: no common was ever brought back.”⁶³⁵ The dams that closed off land to traditional users could be seen in the same light as “one of the social crime scenes in the global narrative of modernization.”⁶³⁶ However, there is also a different narrative that contests this refrain: that of resistance to barriers, and to a renewed focus on what was so important with the communal governance of the land. In communicating their resistance and challenge of the Euro American laws, the Eeyouch and the Sámi chose different strategies. The Eeyouch chose unanimity, to “speak with a single voice,” while the broad variation of Sámi views were mixed with the different non-Sámi opinions.⁶³⁷ This reflected the historical ways of “social interaction and decision-making” in Sápmi.⁶³⁸ The two different approaches may also be an expression of the power-relations and historical experiences with the dominant society, as the Eeyouch had seen the dividing powers of the *Indian*

⁶³³ *Kanatewat et al. supra note* at 488. (Dr. Spence estimated that the resources harvested by the inhabitants in Fort George (Chisasibi) amounted to \$560,000.00 based on store values for protein of equivalent quality. *Kanatewat et al. supra note* at 331).

⁶³⁴ Smith, *A History of Dams*, (Bungay, Suffolk: Richard Clay (The Chaucer Press), Ltd., 1971), 1. Examples of long lasting dams: Nero’s dam, 26-29 (collapsed in 1305); Cornalvo dam and Proserpina dam near Mérida, (built in the first two centuries and still in use), 43- 48.

⁶³⁵ Thompson, *The Making of the English Working Class*, 245.

⁶³⁶ McDonagh, Briony and Stephen Daniels. “Enclosure Stories,” 107.

⁶³⁷ Lars Carlsson and Fikret Berkes, “Co-management: Concepts and Methodological Implications,” *Journal of Environmental Management* 75 no. 1 (2005): 67, doi:10.1016/j.jenvman.2004.11.008. They did not write about the Sámi and Eeyou but of communities in general.

⁶³⁸ Carlsson and Berkes, “Co-management: Concepts,” 67.

Act. Unlike the *Indians* who had only gained the right to vote in 1960, the Sámi had been part of the democratic will formation since 1913 (longer for men). The Sámi's needs were better met by provoking public discussions and they used the public sphere to communicate the distress Sámi culture faced. For this fight, they did not have to be a "unitary community."⁶³⁹ The Eeyouch and the Sámi used communicative action to test and to produce legitimate law.⁶⁴⁰

The third chapter described how the confrontations led to laws that made consultations mandatory. The "electrification socialism" was questioned by local communities, and more local control of resources was demanded.⁶⁴¹ Consultations in a community to form co-management strategies on resource use are much more complicated than "everybody agreeing" on an issue or the external non-Indigenous government sharing some power. Therefore this is not a process between the state and a homogenous community.⁶⁴² In reality, it is an interaction between many parties: for instance, the Cree forestry board, CRA, forestry companies, shareholders, family hunting groups, and elders. With so many people and interests, consensus was a process that was *in the making*, rather than an end product. The agreements that were reached had to be continually validated through ongoing communication between the parties involved. The Eeyouch were reviewing the JBNQA and pointed out the lack of implementation and the narrow interpretation of the *Agreement* by the non-Indigenous government.⁶⁴³ They also showed how certain laws, such as *The Forest Act* (1997), that limited the timber licenses to companies that owned a mill, excluded the Eeyouch from being involved in forestry since none of the communities had a mill.⁶⁴⁴ In Norway, several government

⁶³⁹ Carlsson and Berkes, "Co-management: Concepts," 67.

⁶⁴⁰ Habermas. *Between Facts and Norms*, 148.

⁶⁴¹ Steve Buckler, "Theory, Ideology, Rhetoric: Ideas in Politics and the Case of 'Community' in Recent Political Discourse," *British Journal of Politics & International Relations* 9, no. 1 (2007): 40, doi: 10.1111/j.1467-856X.2007.00248.x.

⁶⁴² Carlsson and Berkes, "Co-management: Concepts," 65, 67. Carlsson and Berkes have identified a number of complexities "rarely accounted for in the conventional conceptualizations of co-management: (1) complexities of the State, (2) complexities of the community, (3) complexities of the dynamic and iterative nature of the system, (4) complexities of the conditions available to support the system, (5) complexities of co-management as a governance system, (6) complexities as a process of adaptive learning and problem solving, and finally (7) complexities of the ecosystem that provides the resources that are being managed. Regarding the second point, communities themselves may be complex systems consisting of different interests by gender, ethnicity and socioeconomic group."

⁶⁴³ The Department of Indian and Northern Affairs. *Negotiating a Way of Life: Initial Cree Experience with the Administrative Structure Arising from the James Bay Agreement*, Ignatius E. La Rusic, (research director). Montreal: ssDcc inc., 1979.

⁶⁴⁴ Bill Namagoose, "Forestry Part II: A Share in the Forest Resources," Eeyou Eenou Magazine, February 2002, 40.

reports regarding Sámi governance and ownership rights were produced between 1984 and 2005.⁶⁴⁵ The situation in Finnmark was the opposite to what it was in Canada, as the Indigenous people had to prove that they indeed had rights to land. Therefore, Finnmarksloven came after 25 years of research and consultations.⁶⁴⁶

Through consultation, different systems of land governance can be aligned. In Eeyouch Istchee, more control was asserted on the local level, from a local police force and school boards with curriculum decision-making powers to ucimaaws co-managing the land with logging companies. A regional governance body, the CRA, was established as the administrative arm of Cree government.⁶⁴⁷ CRA supports all the other departments administratively.⁶⁴⁸ Regional structures have been added to the traditional local repertoire of land governance to accommodate the governance structures in Québec, while Québec has accepted local co-management in industries such as the forestry. In Finnmark, the process to reach a consensus of resource co-management took longer, because Sámi land rights had to be re-established.⁶⁴⁹ Like Eeyouch Istchee, a regional governing body was established, when the Sámi Parliament was created. The local or municipal politics were not changed substantially, as Norwegian governing structures are “both centralized and decentralized.”⁶⁵⁰ The central Norwegian government formulates policies and funds programs, but it is in the local municipalities that most of “the practical activities” are carried out.⁶⁵¹ The planning of land use in the 435 municipalities happens through close communication with the central government. The *Finnmark Act* was a result of a long communication process that required willingness and openness on the part of the Norwegian and the Sámi to commit to cross-cultural dialogue.⁶⁵²

⁶⁴⁵ Reports written after the Alta controversy.

⁶⁴⁶ It was pointed out in Hans-Kristian Hernes and Nils Oskal, ed. *Finnmarksloven* that the consultations did not follow the *ideal* consultation process, but I have called it consultation from the lack of a better word.

⁶⁴⁷ “About the Cree Nation Government,” The Grand Council of the Crees (Eeyou Istchee). Last accessed 11/7/2014. <http://www.gcc.ca/cra/cranav.php>.

⁶⁴⁸ This includes support to all departments in terms of personnel services, and financial administration.

⁶⁴⁹ Oskal, “Political Inclusion of Saami as Indigenous Peoples of Norway,” 257. Up until around 1740 both individual Sámi and Siidas were seen as owners of the land by the authorities and the courts.

⁶⁵⁰ Jan Mønnesland and Jon Naustdalslid, “Planning and Regional Development in Norway,” *Built Environment* 26, no. 1, (2000): 61, Stable URL: <http://www.jstor.org/stable/23288975>

⁶⁵¹ Mønnesland and Naustdalslid, “Planning and Regional Development in Norway,” 61.

⁶⁵² The law has legal protection of Sámi rights to land and resources.

Cross-cultural dialogue is complex. According to Habermas, multicultural societies have “a pluralization of forms of life accompanied by an individualization of life histories, while the zones of overlapping lifeworlds and shared background assumptions shrink.”⁶⁵³ The individualization of life histories happens also between members of the same cultural community. The gendering of land management for Canada’s Indigenous people through unequal access to *Indian status* has created different life histories within Aboriginal communities. Distinct differences in the coastal- and mountain Sámi’s land interests have shown that assumptions cannot be made for all the Sámi. The government is a complex structure of agencies and officials that have interests that do not necessarily overlap. Communication then “depends on the use of language oriented to mutual understanding.”⁶⁵⁴ The problem is, as Habermas points out, on “how can disenchanted internally differentiated and pluralized lifeworlds be socially integrated.[?]”⁶⁵⁵ As history has shown, assimilation was not the route to go. In addition, land governance and the laws that regulate land governance always are in danger of being taken over by “self-interested actors” who interpret laws for their own benefit instead of seeking an understanding of the needs of all parties involved.⁶⁵⁶

In one sense, when writing about the democratization of laws, it is a question of big politics, and of large systems of governance. But when seeing what the effects laws have on local communities and local governance, one can question if they are benevolent or not in fulfilling the core needs of each community and the individuals who live in the community. For the individuals in these communities who align their goals and motives with the big politics, the system works perfectly fine; however, those who feel alienated by the same rules, regulations and laws, their core needs to belong in a community, to have a livelihood that feels meaningful, and to see a future that matches the past, a rigid and unchangeable system has the opposite effect.⁶⁵⁷ The dilemma between those who want development and those who do not want development is intensified if the local population is excluded from the decisions that affect them. Jacqmain et al. wrote that “[s]ustainable development require meaningful participation in the decision making

⁶⁵³ Habermas, *Between Facts and Norms*, 25.

⁶⁵⁴ Habermas, *Between Facts and Norms*, 18.

⁶⁵⁵ Habermas, *Between Facts and Norms*, 26. I only used the first part of Habermas’s question.

⁶⁵⁶ Habermas, *Between Facts and Norms*, 27.

⁶⁵⁷ Immigrant groups such as the sons of Norway in Canada is a good example of how connecting to the past is an important aspect of one’s identity. Most of the members have no political or linguistic ties to Norway, but they still celebrate their roots and use that to connect to the future.

process by Aboriginal people.”⁶⁵⁸ Legally, the Sámi and the Eeyouch have the rights to more than just “meaningful participation” in development; they do have the rights to preserve their land.⁶⁵⁹ These rights that should not be ignored or forgotten in future debates of grand developments, especially since the history of the developments has shown that it is the local inhabitants who live with the changes in the land, while the benefits were distributed elsewhere. Local decision-making of how the land and the water are used is essential in any law for people in Finnmark and Eeyou Istchee. The JBNQA and Finnmarksloven is an assurance that the local users of resources are involved and consulted before any developments that changes the land or water can be initiated. In addition, Sámi customs are secured through *Convention 169* art. 8 and they are truly local as the customs in one area may be different from another.⁶⁶⁰ Conflicts are solved through indirect channels: one person may be appointed as peacemaker, who visits the involved, one at the time, brings a gift and open up communication about the issue.⁶⁶¹ This process of solving conflicts is also suited for rural communities, where the people involved are often involved in the same network of friends and family.⁶⁶² In Eeyou Istchee the use of elders to solve conflicts and reach a consensus is described in the hunting law. The Sámi and Eeyou did resist more than a hydropower development; they also resisted the colonization of their lifeworld. What they gained through the resistance were the rights to revenue sharing of resources, political power, and recognition of their particular ways of organizing their communities.

⁶⁵⁸ Jacqmain, et.al., “Aboriginal Forestry,” 631. Jacqmain et al. see how Aboriginal knowledge promotes sustainable timber practices, Berkes, Ostrom and others connects control in decision-making on resources with a more sustainable resource use. However, the debate also includes Dwight Newman, “The Rule and Role of Law: the Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector,” *Aboriginal Canada and the Natural Resource Economy Series 4* (May 2014), who argues against UNDRIP’s suggestions of extending the technical legal application of the right to be consulted and to rather focus on a working relationship.

⁶⁵⁹ Jacqmain et.al., “Aboriginal forestry,” 631.

⁶⁶⁰ Susann Funderud Skogvann, *Samerett*. 2nd ed. (Oslo: Universitetsforlaget, 2009), 86.

⁶⁶¹ Skogvann, *Samerett*, 86-87.

⁶⁶² Skogvann, *Samerett*, 86.

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Appendix 1: Definitions:

Brukd rett/Usage rights: rights to use another's property, i.e. grazing rights, fishing rights, rights to use roads. This right can also be expropriated.⁶⁶³

Bygdelag: Village society/regional society.

Category 1A land: "Category 1A lands is held by the Crown for Québec, but in all other respects such land are subject to the jurisdiction of the federal government, which is constitutionally responsible for their constitution."⁶⁶⁴

Category 1B: "Category 1B lands are fully transferred to the Aboriginal community land holding corporation and are not subject to federal authority. *The Cree villages and the Naskapi Village Act* makes Category 1B land into village municipalities and established the Aboriginal municipal corporations whose make-up is identical to the landholding community corporations referred to above."⁶⁶⁵

Category I land: "Category I lands are Aboriginal lands held and controlled by the Aboriginal nation or nations participating in the public government. Category II lands are shared lands encompassing parts of the traditional Aboriginal territories over which the Aboriginal public government will exercise jurisdiction shared with other Canadian governments and possibly with other Aboriginal nation governments in accordance with negotiated arrangements. Category III lands are Crown lands and privately held lands."⁶⁶⁶

Co-management: In relation to natural resources, the term management can be understood as the right to regulate internal use patterns and transform the resource by making improvement. These activities can be performed by single actors or jointly by groups of individuals or as a result of cooperation among different groups.

Collaborative management, or co-management, has been defined as 'the sharing of power and responsibility between the government and local resource users' and 'the term given to governance systems that combine state control with local, decentralized decision making and accountability and which, ideally, combine the strengths and mitigate the weaknesses of each.'

The World Bank has defined co-management as 'the sharing of responsibilities, rights and duties between the primary stakeholders, in particular, local communities and the nation state; a decentralized approach to decision-making that involves the local users in the decision-making process as equals with the nation-state'

Conceptualizations of co-management in the literature have some common underpinnings.

- They explicitly associate the concept of co-management with natural resources management.
- They regard co-management as some kind of partnership between public and private actors.
- They stress that co-management is not a fixed state but a process that takes place along a continuum.⁶⁶⁷

Communicative Action: "the necessity for coordinated action generates in society a certain need for communication, which must be met if it is possible to coordinate actions effectively for the purpose of satisfying needs."⁶⁶⁸

⁶⁶³ NOU 1984:18, *Om Samenes Rettsstilling*, 120.

⁶⁶⁴ *Report of the Royal Commission on Aboriginal Peoples. Volume 2, part 2: Restructuring the Relationship*. [RCAP], Ottawa: Minister of Supply and Services, 1996, 721.

⁶⁶⁵ *Report of the Royal Commission on Aboriginal Peoples. Volume 2, part 2: Restructuring the Relationship*. [RCAP], Ottawa: Minister of Supply and Services, 1996, 721.

⁶⁶⁶ *Report of the Royal Commission on Aboriginal Peoples. Volume 2, part 2: Restructuring the Relationship*. [RCAP], Ottawa: Minister of Supply and Services, 1996, 266.

⁶⁶⁷ Carlsson and Berkes, "Co-management: Concepts," 67.

Consultation: “Consultation is a fundamental principle in the ILO Convention No. 169. What is important to remember is that consultation must be entered into:

a) In a spirit of good faith, with respect for each others’ interests, values and needs. The process of consultation must be specific to the circumstances and the special characteristics of the given group or community.

Thus, a meeting with village elders conducted in a language they are not familiar with, e.g. the national language, English, Spanish etc, and with no interpretation, would not be a true consultation.

b) With respect for the principle of representativity which is a vital component of consultation it could be difficult in many circumstances to determine who represents any given community. However, if an appropriate consultation is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention.

The Convention provides rules to follow for consultations:

Peoples Concerned:

Those who will be affected by a specific measure. For instance, when a highway which will pass through indigenous villages is being planned, then these same villages have the right to be consulted and given an opportunity to let the authorities know what they think of this scheme. They may have alternatives to suggest.

Appropriate Procedures:

The way in which the concerned people are consulted depends on the circumstances. For consultation to be ‘appropriate’ it must meet the requirements of each specific situation, and must be meaningful, sincere and transparent. For instance, in the case of the proposed highway, it is not sufficient to talk to a few village members only. A closed meeting with selected persons who do not represent the majority view is not “true” consultation.

Representative Institutions:

This can include traditional institutions, e.g. councils of elders, village councils, as well as contemporary structures such as indigenous and tribal peoples’ parliaments or locally-elected leaders who are recognized as true representatives by the community or people concerned. It will be different in every case.”⁶⁶⁹

Convention: International agreements that are legally binding for the signature states legally are called conventions, those that are only binding morally and ethically are called declaration. However, the division is not absolute in law, and grey zones exist.⁶⁷⁰

Declaration: 1. A formal statement, proclamation, or announcement. 2. International law: the part of a treaty containing the stipulations under which the parties agree to conduct their actions. 3. International law: A country’s unilateral pronouncement that affects the rights and duties of other countries.⁶⁷¹

Duodji: Sámi handicrafts. The creation of useful and beautiful clothing and tools, is influenced by the local needs.⁶⁷²

Eeyou Istchee: Eastern James Bay. It means “the Cree peoples land.”⁶⁷³

Eeyouch, Eeyou, Eenou and James Bay Cree: The term used for the inhabitants who benefit from the JBNQA. Eeyouch are used by authors such as Caroline Desbiens instead of Eastern James Bay Cree. Eeyou and Eenou are terms used by the CTA. The Eeyou nation and Eeyou people of Eeyou Istchee or an individual member thereof, also referred to as Eenou in the inland communities. Eeyou and

⁶⁶⁸ Habermas, *The Theory of Communicative Action: Volume One*, 274.

⁶⁶⁹ *ILO Convention on indigenous and tribal peoples, 1989 (No.169): A manual* Geneva, International Labour Office, 200316-17

⁶⁷⁰ NOU 1984:18, 249.

⁶⁷¹ Bryan A. Garner, editor in chief, *Black’s Law Dictionary* eight edition, St.Paul, Minnesota: Thompson West, 2004, 436, 437.

⁶⁷² NOU 1984:18, *Om Samenes Rettsstilling*, 117.

⁶⁷³ Desbiens, “Water all around, 263.

Eenou can be used to express both the singular and the plural as the context implies. (hunting law 4.3) Eeyou (singular) Eeyouch (plural) for Cree.

Eiendomsrett/property right: the right to dispose over property, either positively by farming, digging selling and pledging or negatively by denying others this right on the property. However, the property rights are highly regulated in Norway, and it can be expropriated for public or private purposes.⁶⁷⁴

Enfranchisement: “Enfranchisement was the most common of the legal processes by which native peoples lost their *Indian* status under the *Indian Act*. The term was used both for those who give up their status by choice, and for the much larger number of native women who lost status automatically upon marriage to non-native men. Only the former were entitled to take with them a share of band reserve lands and funds, but both groups lost their treaty and statutory rights as peoples, and their right to live in the reserve community.”⁶⁷⁵

Ethnic group: As a legal term it is found in UN convention 1966 artikkel 27. A group who conceive of themselves as one kind by virtue of their common ancestry (real or imagined) who are united by emotional bonds, a common culture, and by concern with preservation of their group.⁶⁷⁶

Finnmark: County in Norway

Indian title/Aboriginal title: Indigenous right to land or a territory. It stems from Indigenous peoples' longstanding use, and prior occupancy of the land or territory in question. In Canada, the legal system recognizes “Indian title” as a *sui generis* or as a “unique collective right to the use of, and jurisdiction over a group’s ancestral territory.”⁶⁷⁷

Indian: Legal title of a person who is registered as an Indian or is entitled to be registered as an Indian according to the *Indian Act*.

Indigenous: The word Indigenous has different meaning in Norwegian. The same word *innfødt* meant at first the people who were born in the territory of a state, or had been naturalized in the state. However, the word also had a different meaning, and more and more came to be a word describing colonized peoples in exotic corners of the earth (from a European perspective). The *innfødte* were not as technologically or educationally advanced as the colonizers. The Norwegian word *urfolk* is closer to aboriginal people. There was a confusion surrounding the term Indigenous when translated to Norwegian. Did it mean the first people or only people who had occupied a territory for a long time? Indigenous is a wider concept, and is often used on populations who are strongly linked culturally and economically to the local natural resources.⁶⁷⁸

Injunction: An injunction commands an act that the court regards as essential to justice, or it prohibits an act that is deemed to be contrary to good conscience. It is an extraordinary remedy, reserved for special circumstances in which the temporary preservation of the status quo is necessary¹ **Permanent injunction:** a final order of a court that a person or entity refrain from certain activities permanently or take certain

⁶⁷⁴ NOU 1984:18, *Om Samenes Rettsstilling*, 120.

⁶⁷⁵ <http://thecanadianencyclopedia.com/en/article/enfranchisement/>

⁶⁷⁶ Fransesco, Capotorti, *Study on the rights of persons belonging to ethnic, religious, and linguistic minorities*. Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Prosecution of Minorities. New York: United Nations, 1979. 34

⁶⁷⁷ Indigenous Foundations (University of British Columbia), ‘Aboriginal Title’, available at <http://indigenousfoundations.arts.ubc.ca/home/land-rights/aboriginal-title.html> (last visited 15 June 2013).

⁶⁷⁸ NOU 1984:18, *Om Samenes Rettsstilling*, 162.

actions (usually to correct a nuisance) until completed. **2) Interlocutory Injunction:** injunction issued during a trial to maintain the status quo or preserve the subject matter of the litigation until the trial is over.⁶⁷⁹

Lingua Franca: A language used for communication among people of different mother tongues.⁶⁸⁰ In the coast of Finnmark it was used as a trade language between Russian traders and Norwegian and Sámi fishermen.

Molte: Cloudberry

Natural Law: Standards of conduct derived from traditional moral principles and/or God's law and will. (This was first mentioned by Roman jurists in the first century A.D.) Natural law assumes that all people share an understanding of natural law premises.⁶⁸¹ Natural law is concerned with the justice aspects of law.

Positive Law: "Statutory man-made law, as compared to "natural law," which is purportedly based on universally accepted moral principles, "God's law," and/or derived from nature and reason. The term "positive law" was first used by Thomas Hobbes in *Leviathan* (1651)."⁶⁸² Positive law is concerned with the sources of law.

Proclamation: A formal public announcement made by the government.⁶⁸³

Property: "1. The right to possess, use, and enjoy a determinate thing (either a tract of land, or chattel); the right of ownership <the institution of private property is protected from undue governmental interference>."; "2. Any external thing over which the rights of possession, use and enjoyment are exercised."⁶⁸⁴

Regjering: Government

Sámi electoral register. § 2-6.

All persons who make a declaration to the effect that they consider themselves to be Sámi, and who either

- a. have Sámi as their domestic language, or
- b. have or have had a parent, grandparent or great-grandparent with Sámi as his or her domestic language, or
- c. are the child of a person who is or has been registered in the Sámi electoral register may demand to be included in a separate register of Sámi electors in their municipality of residence.⁶⁸⁵

Sámi: The term Sámi includes a feeling of being Sámi, language, musical traditions and stories, however, the term is flexible and in the determination of who is a Sámi and not, both a lineage of Sámi speaking parents, grandparents or great grandparents, and self-identification is used. It is different from the term

⁶⁷⁹ <http://legal-dictionary.thefreedictionary.com/interlocutory+injunction>

⁶⁸⁰ <http://dictionary.reference.com/browse/lingua+franca>.

⁶⁸¹ Natural law, <http://dictionary.law.com/Default.aspx?selected=1307>

⁶⁸² Positive Law, <http://dictionary.law.com/Default.aspx?selected=1552>

⁶⁸³ Bryan A. Garner, editor in chief, *Black's Law Dictionary* eight edition, St.Paul, Minnesota: Thompson West, 2004, 1243.

⁶⁸⁴ Bryan A. Garner, editor in chief, *Black's Law Dictionary* eight edition, St.Paul, Minnesota: Thompson West, 2004, 1253.

⁶⁸⁵ "Government.no Information from the Government and Ministries." Act of 12 June 1987 No. 56 concerning the Sameting (Sámi Parliament) and other Sámi legal matters (The Sámi Act). <http://www.regjeringen.no/en/doc/Laws/Acts/the-Sámi-act-.html?id=449701> Last visited, 26/5/2014.

Norwegian, which is a legal term that does not bring ethnicity into the equation.⁶⁸⁶ The Sámi are divided into coastal Sámi, also called sea Sámi, and mountain Sámi.

Sápmi: The region inhabited by the Sámi; it includes land in Norway, Sweden, Finland, and Russia.

Storting: Parliament or National Assembly in Norway

Sui generis: From Latin, “of its own kind,” Of its own kind or class; unique or peculiar.⁶⁸⁷

Tallyman: In the Eeyou language, the designation of the tallyman as ‘amiskuchimaaw’ literally translates as ‘Beaver Boss’ or ‘Beaver Manager’.⁶⁸⁸ Ucimaaw, is Adrian Tanners word for it.

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Umatrikulert: (Statens umatrikulerte grunn) Unregistered land.

Usufruct: noun, (from Latin) “A right to use and enjoy the fruits of another’s property for a period without damaging or diminishing it. In Roman law, the usufruct was considered a personal servitude, giving a real right. In modern civil law, the owner of the usufruct is similar to a life tenant, and the owner of the thing is the *naked owner*.” (Usufructuary: adjective).⁶⁹⁰

White Paper: The term originated in Britain where it is applied to government documents, reports, statements of policy of insufficient thickness to require the strong blue covers normally used. It is in 1939 that the term "white paper" was first applied to a government document in Canada, by the Minister of Finance, Charles A. Dunning. However, the term white paper is now more commonly applied to official documents presented by Ministers of the Crown which state and explain the government's policy on a certain issue. This is the definition that we have decided to retain for the purposes of this compilation, thus separating them clearly from the so-called "green-papers" which are issued by government to invite public comment and discussion on an issue prior to policy formulation.⁶⁹¹

⁶⁸⁶ NOU 1984:18. *Om Samenes Rettsstilling*.

⁶⁸⁷ Bryan A. Garner, editor in chief, *Black’s Law Dictionary* eight edition, St.Paul, Minnesota: Thompson West, 2004.

⁶⁸⁸ Desbiens, “Speaking the land,” n2, 361.

⁶⁸⁹ Carlsson and Berkes, , “Co-management: Concepts,” 67.

⁶⁹⁰ Bryan A. Garner, editor in chief, *Black’s Law Dictionary* eight edition, St.Paul, Minnesota: Thompson West, 2004, 1581.

⁶⁹⁰ NOU 1984:18, *Om Samenes Rettsstilling*, 120.

⁶⁹¹ <http://www.parl.gc.ca/parlinfo/pages/WhitePapers.aspx>.