

CHAPTER 3: MANOMIN/WILD RICE: USE AND POLICY

Wild rice legislation and policy is an extension of the larger context of Aboriginal resource policy described in the previous chapter. This chapter will look specifically at wild rice as a resource, and provide a more focused contextual history for the Mud Lake dispute. Not all Aboriginal people are familiar with wild rice. Nor has it been relevant to the history of all Aboriginal nations. However, for those who have, *Manomin* (wild rice) is a critical component of their history, culture, and identity. It is bound up with a whole way of being. This chapter will explore the plant in historical context, Aboriginal peoples and their cultural relationship with *Manomin*, and the development of the *Wild Rice Harvesting Act (WRHA)*. This chapter will also explore the legal basis of Aboriginal water and water resource rights, and provide an example through the Treaty 3 headland-to-headland and wild rice debates. In this way, the context of State-Aboriginal relations over *Manomin*/wild rice prior to the Mud Lake conflict will be contextualized.

What is Wild Rice?

Wild rice has been known to Aboriginal peoples as *Manomin – gift of the Creator*. While there are a number of variants of wild rice, the scientific term for the Mud Lake variety is *Zizania aquatica*. It is a self-seeding, annual aquatic plant unique to North America. It grows in flowing water, predominantly in sandy soils, at the banks of rivers, and sometimes at the openings of lakes where there is moving water to transport nutrients (Dore 1969; Kuhnlein and Turner 1991). The plant is sensitive to water depth, especially during the critical floating leaf stage, and so will only grow where water levels are within a suitable range of depth (Thurston 1992). At optimum sites, it forms dense, continuous beds. The seeds do not ripen all at once

but over a period of days. As it ripens it ‘shatters’ - falls from the plant - and drops to the water bottom where it re-seeds for the coming years (Dore 1969; Kuhnlein and Turner 1991). Not all of the seeds germinate in the same year, providing some regenerative potential in years of ecological instability. The plant has a long, narrow shape that is heaviest at one end. This facilitates its rapid movement to the river bottom where it penetrates the muddy soil. The end has barbs that assist the seed to hold on to the river soils, and prevent its being washed away (Thurston 1992).

Despite its popular name, wild rice is not actually a ‘rice’. In reality, it is a tall, annual grass providing a grain, or seed which provides a source of protein, fat, carbohydrates, vitamins, and minerals (Kuhnlein and Turner 1991). Its ecological habitat extends from Manitoba to New Brunswick, and has been harvested by Aboriginal communities in eastern North America since prehistoric times (Moodie 1991; Kuhnlein and Turner 1991; Ratkoff-Rojnoff 1980). Archaeological evidence establishes the use of this plant by Aboriginal people as long as 2500 years ago (Ratkoff-Rojnoff 1980). Vennum notes that early explorers referred to wild rice by a variety of names including *avoine sauvage* (wild oats), *water oats*, *water rice*, *riz Canadien*, and *riz sauvage* (wild rice) (1988). It is this latter name that came to be widely used¹. *Manomin* has been recognized as an important food for many nations including Cree, Ojibwa, Assinboin, Potawatomi, Monomini, Ottawa, Huron, Iroquois

¹ It should be noted here that there is a tension inherent in the naming process that makes writing about *Manomin*/wild rice a difficult challenge. The name *Manomin* does not refer to the plant merely as a natural resource, but as a gift of *Manitou* – a gift of the Creator - for the well being of the people. In contrast, the popular term ‘wild rice’ connotes a natural resource – a much more restricted concept. Because this term is pervasive in the terminology of the government, it has come to be used, to a large degree by Aboriginal peoples as well – at least when in conversation with government representatives. Thus the challenge exists to find a suitable way of expressing the meaning of this plant suitable to the context of the discussion. Where ‘wild rice’ has been used in a quote I have left it as spoken. However, I feel obliged to remind the reader of the different meanings inherent to the different speakers. Thus, I have made the effort to use *Manomin* where appropriate, and ‘wild rice’ only when the discussion refers explicitly to the plant as a natural resource.

and Malecite (Kuhnlein and Turner 1991). Its importance was even greater as a trade good (Peers 1996; Moodie 1991; Kuhnlein and Turner 1991; Ratkoff-Rojnoff 1980). Historically, it has been traded as far as British Columbia (Kuhnlein and Turner 1991).

It has also been recognized that Aboriginal groups have engaged in the management of *Manomin*, as well as the propagation and extension of the geographic range of the plant (Peers 1996; Moodie 1991; Ratkoff-Rojnoff 1980). Aboriginal peoples were known to re-seed thinning locations in existing stands, to manage their use based on production levels, and to propagate new stands where conditions allowed. A study by Moodie explores the history of Aboriginal management of *Manomin*. He refers to this process as incipient agriculture (Moodie 1991). Pollen sampling corroborates a movement of *Manomin* over a period of years. It was found to be present at Rice Lake, Ontario around 4,000 years B.P., and at Rice Lake, Minnesota from about 2000 B.P. (Ratkoff-Rojnoff 1980 citing McAndrews 1970). Moodie argues that the existing range of *Manomin* is due to this process of intentional propagation, thus challenging the notion that *Manomin* is an uncultivated plant, and that Aboriginal people are merely opportunistic users of this resource (Moodie 1991).

Aboriginal culture and *Manomin*

Manomin is easily stored, thus presenting itself as an invaluable commodity for trade, and a critical food in times of scarcity. In the historical record, Jesuits and explorers are often found crediting *Manomin* with ‘staving off starvation’ (Avery and Pawlick 1979; Jenness 1977). Moodie quotes an ‘Indian’ agent in 1900 writing “they depend upon [*Manomin*] for winter use and also as a means of obtaining such articles as they need...” (1991, quoting Jenks). Vennum (1988) and Peers (1996) both note

that *Manomin* played a key role in an overall subsistence strategy. Clearly then, *Manomin* had a significant role for Aboriginal communities, both as a product of use, and as a commodity of trade. A 1979 submission by the Grassy Narrows community states that,

the harvesting of wild rice is today, and has historically been one of the major, if not the major ingredient, in the culture of the Ojibwa of North-western Ontario, and the Islington Band in particular. A survey of income sources of 'Indian' people in the Treaty 3 area, covering the years 1973 and 1974 indicated that wild rice was the largest contributor of income (Grassy Narrows Mediation Meetings and Presentations 1979).

Thus, *Manomin* continues to have a significant economic role in contemporary Aboriginal communities.

Far more than this, *Manomin* has a role in maintaining a link to the history of the people. Contemporary Aboriginal peoples tell stories of the role of *Manomin* in their communities for generations (Darwell 1998; Cizek 1993; Richardson 1993; Vennum 1988; DIAND 1980; Ratkoff-Rojnoff 1980; Avery and Pawlick 1979). Children harvest in lakes seeded by their grandparents and great grandparents; they learn how to harvest and process *Manomin* from their elders; and they continue to share in the communal practice of protecting, nurturing and harvesting the plant. In fact, the contemporary practice of harvesting mirrors that described in the historical record (Peers 1996; Moodie 1991; Ratkoff-Rojnoff 1980). This illustrates the idea that the harvesting of *Manomin* goes beyond use as a 'resource' or 'commodity'. Rather, it is a ritualized activity learned, taught, and practiced in culturally specified ways.

Academic research notwithstanding, to call *Manomin* a natural resource, or a subsistence food, is a sterile and shallow interpretation of this plant's role in community life. Rather, to the communities for which *Manomin* is a historical resource, *Manomin* is an annual ritual - part of the participatory life of being and

thinking of oneself as 'Indian', or as 'community' (Richardson 1993; Thurston 1992; DIAND 1980; Ratkoff-Rojnoff 1980; Avery and Pawlick 1979). For instance, Richardson quotes Joe Pitchenesse of the Wabigoon Lake reserve who states, "people develop a sense of self-worth through the ritual and community involvement during the *Manomin* harvest" (1993:188). Ratkoff-Rojnoff states that *Manomin* is considered to be "a sacred food, to have a unique spiritual significance in that it is... a gift of the Great Spirit to ensure their survival and well being" (1980:79). And Avery and Pawlick state that *Manomin* "is a sacred plant, as central to the ancient Ojibwa religion as bread and wine to Christians... but it is a staple, too, a food that can be stored for years" (1979:33). In fact, *Manomin* nurturing and harvesting are seen as part of the social, spiritual, and cultural cohesion of communities. As Thurston states, "for traditional harvesters, ricing is a kind of spiritual holiday, a time for families and friends to come together (1992:27).

In Aboriginal communities, *Manomin* is subject to a system of Aboriginal management. This process includes a 'rice boss' or 'rice steward' who monitors the crop and decides when, or if, it is ready to harvest. The steward also decides who should be invited to participate in the harvest so that all community needs are met. The quality of certain beds is considered and, if poor, is left to rest in order to replenish. Thought is also given to other users of *Manomin* such as animals and birds (Richardson 1993). It is an implicit understanding that a portion of the seed will be allowed to fall into the water, or be sowed on the water, for fish and other users, as well as for the regeneration of the plant for the future (Moodie 1991). In this way, there is an implicit recognition of themselves - the Aboriginal users - as members of an ecological community, which includes the *Manomin* itself, and other animal users.

It also implies respect for *Manomin* and its contribution to the well being of the whole ecological environment.

It is important to note that the spiritual and communal importance of *Manomin* is, in part, the reason for its abundance and geographic range. The propagation of *Manomin* has been seen as a natural extension of use, part of the duty of the community to ensure its presence and abundance for future generations. This process includes reseeding older beds that are beginning to be depleted, but also seeding new sites wherever possible. Seed must be sowed in shallow muddy water and is sometimes wrapped, a few seeds at a time, in mud before depositing in the water (Jeness 1977). As Avery and Pawlick quote, “it is related in our birchbark scrolls of our religion that wherever our people travelled, they sowed wild rice” (1979:35). Thus, the presence of *Manomin* over a large range is due to the deliberate propagation of the grain. This is significant in the debate over Aboriginal rights to *Manomin*. As Joe Pitchenesse of the Wabigoon Lake reserve states, “[To allow] individual licensing of lakes with no regard to... the centuries of Aboriginal seeding, harvesting and caring for *Manomin* stands, would not only be a mistake, but an out-and out crime” (Richardson 1993:190).

This cultural and spiritual meaning has a huge significance for identity, self-worth, community relations, ritual, and spiritual relationships to the environment and cultural tradition (Richardson 1993). This spiritual importance is the key to harvesting through the traditional method in contrast with the use of mechanical harvesters (Richardson 1993). The environmental impact of commercial harvesting is hotly debated between traditional users, and advocates of commercial harvesting machines (Thurston 1992). Avery and Pawlick discuss the environmental impacts of commercial harvester use. They argue that it not only reduces the use potential of

Manomin by taking too much, uprooting plants, and leaving not enough seed for regeneration and use by other creatures. However, the critical point they make is that it also harms the continuity of the traditional method, and its cultural and spiritual benefits to the community. It is this loss of cultural and spiritual continuity that is impacted so significantly by commercial operations. Avery and Pawlick state “mechanical harvesting will lead to one operator making the total income of a whole community, translating a few weeks work for a hundred people into a few days work by one” (1979:42). They quote Ojibwa speakers who say, “what we are fighting is not only the loss of income but the soul-destroying effects of unemployment” (Avery and Pawlick 1979:42).

The history of this crop as a staple and trade good, and its importance in community life, is just as valid today as it was two hundred years ago. As Ratkoff-Rojnoff state “today, as [in] the past, it [*Manomin*] is the symbol of their survival and well-being. It is also their last natural resource. And they are determined to pass on this right which is theirs according to tradition, along with their beliefs, to their children” (1980:78). For years, traditional practice and spiritual expression went underground because of oppression, scorn, and contempt. This has lead to misunderstanding and disrespect on both sides, but especially among decision makers (Ratkoff-Rojnoff, 1980).

The 1970s saw a movement to open up tracts set aside for Aboriginal people to non-aboriginal commercial operations. Aboriginal people view this as an attack on their culture and rights. Avery and Pawlick state “people see their exclusive right to harvest wild rice on ‘Indian’ lands under attack by government and businesses eager to exploit what they now recognize as a crop with great commercial possibilities” (1979:35). Aboriginal peoples, like the Ojibwa of Treaty 3, view the loss of their

exclusive right to *Manomin* as a loss of tradition - a right founded in religion - part of their heritage (DIAND 1980). It is an annual ritual - significant in a manner far above the provision of a dietary staple. (DIAND 1980).

This challenge to Aboriginal claims of ownership to *Manomin* is exacerbated by loss of crops and stands due to competing interests such as hydroelectric development. One such loss is cited in a paper titled Claim for damages of wild rice by the Trent Canal, (Musgrave, unknown date). Musgrave noted that the building of the Trent Canal, and subsequent water diversions, effectively destroyed the *Manomin* in the Peterborough region. He also noted that this loss severely impacted the local Ojibwa communities who maintained a culture heavily influenced by *Manomin*.

This fact, in combination with the loss of economic opportunity from other resources (fish, game, timber), and the ongoing struggle to prevent commercial users from gaining full and unrestricted access to *Manomin* - a plant which in many ways is seen as a way of life - has left many Aboriginal communities feeling that this is the last stand - the last resource - their last great hope (Richardson 1993; DIAND 1980; Ratkoff-Rojnoff, 1980; Avery and Pawlick 1979). As Chief Kelley of the Lake of the Woods region states, "*Manomin* belongs to the Anishinahbaig...[it] is our tradition, our right. It is non-negotiable" (Avery and Pawlick 1979:36).

For those nations and communities who are people of *Manomin*, rice remains the last best hope for a Native controlled industry - or the last stand against the commodification of a way of life - the last frontier to be defended against exploitation from the outside. *Manomin* was given along with rules of governance that guaranteed appropriate use of the resource (sharing and continuation of all). It is a part of the people's history, and a symbol for the definition of identity. It is not conceivable that it would not also be a part of their future. As Marcus Darwell states, the continuing

practice of harvesting *Manomin* is a “conscious exhibition of cultural continuity and a way of ensuring that Aboriginal ideas are remembered and passed on through generations” (Darwell 1998).

Wild Rice policy and the *Wild Rice Harvesting Act*

The history of non-aboriginal involvement in the wild rice industry began with increasing attention to the resource in the 1930s. At this time, businessmen were purchasing processed rice from Aboriginal communities for sale to interested buyers (Avery and Pawlick 1979). This involvement gradually increased over time. Non-aboriginal businessmen involved themselves with the development of mechanical roasters and wind machines for mechanical processing, and airboats for harvesting (Avery and Pawlick 1979). This development prompted the involvement of the Department of Lands and Forests (later MNR) with the development of a wild rice management program in 1954 (RCAP 1995), and eventually leading to the development of the *Wild Rice Harvesting Act, 1960 (WRHA)*.

The *WRHA* was initially promoted as a means of developing a more co-ordinated approach to rice harvesting. At the second reading for the bill which proposed the Act, a Mr. Chapple, the MLA from Fort Williams, expressed grave concerns regarding the licensing of *Manomin*. He stated that it was his belief that it should be reserved for the exclusive use of Aboriginal people, and that they should be allowed to sell this, and other resources, for their own needs. He also expressed concern regarding the authority inherent in the establishment of a licensing system. He stated, “once we license a thing we control it” (JLAO 1960). He was deeply concerned that such provisions were really about opening up the industry to non-aboriginal users. The response by Mr. Spooner, then Minister of Lands and Forests,

assured Mr. Chapple that their only interest was to avoid waste through control features that could 'manage' use in a more productive fashion, and to avoid conflict where more than one group was interested in harvesting at a particular site (JLAO, 1960).

Non-Aboriginal people and Aboriginal people from outside of the Treaty 3 area (the largest wild rice producing area in Ontario) had been coming to the area to harvest without consultation with the local Aboriginal peoples (MNR 1979). In the minds of Aboriginal people, wild rice policy began as a means to protect their interests against encroachments (Notske 1994). As Avery and Pawlick state, "Ojibwa leaders attending the meetings which led to the drafting of the Act had understood that the legislation would refer directly to 'Indian' pickers'. It did not" (Avery and Pawlick 1979:37-8).

The *WRHA* was passed in 1960 (S.O. 1960 c131 (545), s.3 (1)). It gave authority to the then Department of Lands and Forests to manage wild rice harvesting, providing for the issuance of harvesting licenses, enforcement and penalties, registration of harvesting areas, and consideration of royalties. The following year, the Act was revised to provide for the establishment of 10 block areas in the Kenora and Dryden areas for the sole use of the local Aboriginal people (RSO 1960, s.4, c. 431 (1467) (Figure 3: Registered Wild Rice Harvesting Areas in North-western Region). Aboriginal peoples interpreted the 10 block areas as recognition of their harvesting rights (Notske 1994; Vennum 1988). Each area was registered to a specific band, and excluded other users, Aboriginal and non-aboriginal alike (MNR 1979). A final revision in 1971 provided for hearings under the Act before issuing or canceling a license (S.O. 1971 c.50 s.88).

Outside of the block areas, licenses to harvest and seed new lakes were issued to Ontario citizens. However, the bulk of ricing areas were located within these reserved block areas. By the mid-1970s a business lobby began to argue that the block areas should not be restricted. They argued that many areas within the blocks were being under-utilized, and that this unnecessarily restricted the development of a lucrative business (Notske 1994; Vennum 1988).

In 1977, a Ministry of Natural Resource proposal called for the elimination of the block areas. They recommended instead that the areas commonly harvested by Status 'Indians' continue to be reserved for their exclusive use, but that the remainder of these areas be opened up to licensing by other users (MNR 1979). Treaty 3 Aboriginal people were stunned at this change. The proposed new act would have completely undermined the ricing rights achieved through the 1959 *WRHA* (Vennum 1988). They had assumed that the *WRHA* provided for recognition of their special interests in *Manomin*. They assumed that it recognized their ownership of *Manomin*. However, the act did not say, in any manner, that the areas 'belonged' to the Aboriginal people. Rather, as with other resources, the Province considered wild rice to be a Provincial resource to be managed for the benefit of all of the people of Ontario.

Many non-aboriginal people joined the significant Aboriginal protests over the ramifications of this proposal. These debates came at a time when a *Royal Commission on the Northern Environment (RCNE, or the Hartt Commission)*, was underway. This commission sought to address the special needs of the areas in Ontario's north by holding hearings into the needs of local communities, and then making recommendations for action. Aboriginal people brought their concerns regarding the proposed changes to the special hearings that were underway in their

areas. Many Aboriginal communities made emphatic pleas to the chair of the commission, Justice Hartt, to protect their rights to *Manomin* as their sole remaining resource. They feared that they would not be able to compete with the technology that other users had, and that they would lose out on establishing a viable economic base for their communities (RCNE 1979).

An interim report of the RCNE in 1978 recommended a five-year moratorium on licenses to non-aboriginals for wild rice harvesting in order to grant the Aboriginal people a buffer in order to develop their own Native wild rice industry (RCNE 1978). It recommended a tripartite working group on wild rice that would include Status 'Indians', the Federal government, and the Provincial government, and proposed that the Ontario Métis and Non-Status Indian Association (OMNSIA), and the Ontario Wild Rice Producers Association (OWRPA) be included in discussions because of their common interests in access to the stands.

The OWRPA protested the RCNE report on the grounds that it discriminated against certain individuals based on race (OWRPA 1978). Furthermore, an internal MNR document argued that Status 'Indians' had had preferential treatment with the 10 block areas since the WRHA was implemented. They argued that the concerns expressed to the Hartt commission were exaggerated, and considering the nature of the hearings, had not been opened to proper verification (MNR 1978b). They proposed that under a five-year interim policy, Status 'Indians' could have the first pick of areas, to guarantee their special interests in harvest sites, while still providing for other users to access under or un-utilized sites within the block areas. They proposed that after the five-year period the harvest totals could be assessed, and policy could be adjusted based on the collected information (MNR 1978b).

In spite of these concerns, on May 18, 1978, Premier Davis made a statement to legislature proposing a five-year moratorium on licenses to non-aboriginals for wild rice harvesting. This special provision declared that:

- only 'Indian' bands would be licensed to harvest wild rice in the Kenora and Dryden districts.
- outside of these areas all current licenses to other users would be reissued.
- Ontario would extend its efforts to assist Indians to develop appropriate technology and to increase utilization of the available crop
- no additional licenses would be granted to non-Indians for a period of five years
- and that the Tripartite working group on wild rice should include representation of the OWRPA and the OMNSIA

(RCNE, 1979:104)

While efforts were made to include the OMNSIA in this process, these efforts were unsuccessful. Ontario's position on Métis and 'non-status Indian' peoples was that they were not 'Indians' under the *Indian Act*, and therefore held rights no different from other citizens of Ontario. Thus, Ontario continued to refer to the OMNSIA and OWRPA in a single breath as 'citizens of Ontario'. Status 'Indians' were so adamant that non-aboriginal people be prevented from harvesting *Manomin* that non-status and Métis peoples were unable to establish an effective voice on wild rice matters. OMNSIA proposed that they should be considered as descendants of the first citizens of Ontario, and that they should receive special consideration in the process (OMNSIA 1979; NCC 1979). However, an MNR response to the OMNSIA on hunting and fishing rights clearly expressed their position; "without overall agreement that Métis and 'non-status *Indians*' should have special status in relation to the rest of the citizens of Ontario, no action can be taken to provide special rights on the basis of a specific racial background" (MNR 1978a).

The MNR intention to develop an 'effective', 'commercial' industry led to significant pressure on Aboriginal communities to use commercial harvesting methods. They argued that Aboriginal wild rice use was 'ineffective' and 'wasteful'

(MNR 1979). MNR encouraged the use of mechanical harvesters to increase harvest quotas by Aboriginal communities citing statistics suggesting that there was a large deficit between available and actual harvest (MNR 1977). Grand Council Treaty 3 responded by illustrating the faulty nature of these statistics (1981b). MNR also promised to implement programs of support, providing training and technical advice, demonstrations of mechanical harvesting methods, and loan assistance for communities to acquire mechanical harvesting equipment (MNR 1979; MNR 1980d). The Ojibwa argued that this 'assistance' was not effective (Grand Council Treaty 3 1980). They also argued that subsidies were readily provided for non-aboriginal development and research, but not to Treaty 3 people under the guise that funding was for all citizens of Ontario and could not be provided on racial grounds (MNR 1977). Furthermore, they argued that they could not participate equally in the Tripartite process because they were only provided with funds for traveling expenses, and not for research in order to support their claims (Grand Council Treaty 3 1980). They also argued that the MNR approach to push mechanical harvesting methods did not assist with high unemployment because it took work away from the many traditional harvesters in the community.

Manomin was also threatened by competing interests such as domestic and sanitary purposes, navigation, fishing, power, irrigation, and reclamation (Vennum 1988). In 1973, the water control board for the Lake of the Woods district flooded the wild rice fields destroying that year's crop. In 1977, there was a bumper crop. In 1978 and 1979, the first two years of the five-year moratorium, the board kept water levels two feet higher, resulting in a total crop failure (Vennum 1988). The failure, however, was blamed on Aboriginal users, and was used to fuel the push to open up the reserved tracts for commercial development (Vennum 1988).

The Aboriginal response challenged these faulty impressions, and engaged in significant discussions surrounding water levels, and water control structures to protect wild rice crops, and also to have an Ojibwa representative on the Lake of the Woods water control board to bring Ojibwa concerns to the table. In addition, pressure to adopt commercial practices was met with considerable resistance by Aboriginal users. For many harvesters, commercial harvesting contravened the spiritual and cultural teachings associated with the rice harvest. However, in order to defend themselves against pressures to open up the areas to other users, some Aboriginal people did take up mechanical harvesting, especially in Manitoba. As Notske states “today, *Manomin* is still important, although its social and cultural significance has been modified by new economic factors and Indian ricing activities are being affected by external regulatory forces” (1994:25). Clearly, Aboriginal cultural practices do not exist in a vacuum, and are subject to change in response to political and social pressures. While wild rice production has become a business enterprise for some, and some Aboriginal wild rice producers market traditionally harvested and processed wild rice, there continue to be individuals who harvest *Manomin* exclusively for personal and community use in the traditionally prescribed manner. Despite these changes, contemporary practice continues to rest on a heritage of cultural teaching and use, and is still considered of critical importance to these communities.

Wild Rice conflicts and the legal basis of Aboriginal Rights to Water Resources

Aboriginal water rights research is a small, but growing area of inquiry (Notske 1994; Bartlett 1986; Bartlett 1988). The basis of Aboriginal rights to both land and water hinge on a number of precedents. These are recognized as Aboriginal title,

treaty rights, and riparian rights (Bartlett 1988; Notske 1994; Vennum 1988; Morgan and Thompson 1992). Rights to water resources are even less well defined. Rights to river resources, such as wild rice, draw on British Common Law as well as evolving understandings of treaty, and Aboriginal rights. However, legislative changes have influenced these rights in particular contexts. Thus the theory of water rights and the practice of actual rights do not always align. The Treaty 3 Headlands dispute will be used as an example to illustrate how these concepts are applied in conflicts over wild rice resources.

Aboriginal title - sometimes referred to as 'inherent right' or 'Aboriginal right' - derives from the original occupation of the land prior to contact (Isaac 1995, Bartlett 1988). The inalienability of Aboriginal title has continued to be debated into the 1990s. However, in 1973, Calder recognized that Aboriginal title derived from the historic occupation and possession of traditional lands, and is not dependent on legislative enactments, like the Royal Proclamation, or upon treaties, or orders in council (Isaac 1995). Calder also noted that the use of water was integral to that of historic occupation. Thus water rights were an implicit aspect of Aboriginal title (Bartlett 1988).

This concept was applied in the case *Kanatewat vs. James Bay Development Corporation* (1973, 41 D.L.R. (3d) 1, [1975] C.A. 166, rev'g [1974] R.P. 38 (Que.S.C.)) where an injunction was given to the ongoing development of a hydroelectric dam based on Aboriginal water rights (Bartlett 1988). While this decision was overturned based on more complex circumstances of the particular situation, it was not based on whether Aboriginal title to water had existed. Rather, it was based on whether title had been extinguished by legislation (Bartlett 1988).

A second point of contention for Aboriginal water rights, as of 1908 (*Winters vs United States*, 207 U.S. 564 (1908), 52 L.Ed. 340), guaranteed only those patterns of use which were prevalent at the time of signing (Bartlett 1988). *Calder (v. Attorney General of British Columbia)*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145) recognized that “a right to water is ... an integral part of Aboriginal title. It includes, and does not distinguish between, land and water. Both were central to traditional Aboriginal life” (Bartlett 1988:7). However, once again, water rights could be limited to historic and traditional uses. This framework for understanding Aboriginal rights to water and water resources continued throughout the case study period. As late as 1985 in *Attorney General for Ontario v. Bear Island Foundation* ([1985] 1 C.N.L.R. 1 (Ont. S.C.) at 38) the courts rejected that rights could extend to contemporary uses stating “the essence of Aboriginal rights is the right of Indians to continue to live on their lands as their forefathers lived...” (Bartlett 1988:7-9).

The issue of modern uses to water and water resources can, however, be considered through the context of treaty rights (Notske 1994; Bartlett 1988). Treaty rights advance those of Aboriginal title. Treaties promised the continuity of access to harvesting patterns ‘as by the past’. However, as stated earlier, they also sought to induce Aboriginal people to take up settled lifestyles, and to encourage farming, and other European based lifestyles. The implication of this is not only the continuity of traditional uses, but also the development of non-traditional uses. For example, a Department of Indian Affairs decision in 1920 suggested that the role of the crown in treaties was to encourage industrial and pastoral pursuits, and cultivation, and thus an “implied undertaking by the Crown to conserve for the use of Indians, the right to take for domestic, agricultural purposes all such water as may be necessary, both now and in the future development of the reserve” (Bartlett 1991:51 quoting Williams). As

Bartlett states, without water rights the object could not be fulfilled, and the land would be without value. Thus, where treaty rights are involved, there is some latitude for entertaining uses beyond those of historic occupation.

Riparian rights once again overlay Aboriginal title (Notske 1994; Bartlett 1988). They are rights possessed by *all parties* that own lands adjacent to waterways. However, the 1911 *Bed of Navigable Waters Act* (S.O. 1911, c. 6) enacted by the Province of Ontario caused limitations on this right. It reserved tidal and navigable waters to the Province in order to preserve Provincial interests in such things as hydroelectric, and other potential resources (Bartlett 1988). It stated,

Where land bordering on a navigable body of water or stream has been heretofore, or shall hereafter, be granted by the Crown, it shall be presumed, in the absence of an express grant of it, that the bed of such body of water or stream was not intended to pass to the grantee of the land, and the grant shall be construed accordingly and not in accordance with the rules of the English Common Law (Bartlett 1988:105)

This Act separated Ontario water rights to navigable waters from the common law. However, it was not applicable to Indian reserve lands because the Provincial Crown had not granted them. Yet only reserved lands were free from this encumbrance. In the headland-to-headland dispute, the largest issue at stake was whether the reserve boundaries ran along the shore, or whether they were inclusive of the lands from the two projecting headlands. If the water formed part of the reserve, then the Province had no authority to govern its use, except for the limiting provisions included in the Canada-Ontario agreement discussed in chapter 2 (especially stipulations regarding hydro-electric potential). However, if the reserve boundaries ran along the shoreline, and since water rights were not specifically mentioned in the treaty document, then the *Navigable Waters Act* would apply, and the Province had the authority to govern their use. This debate was itself tied up with debates regarding treaty promises to

resource harvesting, especially to fish and *Manomin*. This will be discussed in greater detail below.

Treaty 3 Wild Rice Dispute

The 1977 proposed changes to the *WRHA* represented a significant challenge to Treaty 3 Ojibwa peoples' interests in *Manomin*. While Aboriginal, treaty, and riparian rights should have supported Ojibwa resource interests like *Manomin*, they failed to do so. There were several reasons for this. First, there was ambiguity about the reserve boundaries, and thus whether treaty and riparian rights applied (McNab 1983; Bartlett 1988; Avery and Pawlick 1979). Secondly, the official treaty document did not support Ojibwa claims that *Manomin* was a treaty guarantee (Ratkoff-Rojnoff 1980a and b; Bartlett 1988; Vennum 1988; Notske 1994; Avery and Pawlick 1979). In combination with the history of devaluation of Aboriginal interests relative to Provincial interests, and the attitude of the Province regarding economic development, these factors led the MNR to disregard Aboriginal interests in wild rice, and to move towards the development of what it saw as a potentially lucrative business.

Treaty 3 was signed in 1873 with the provision that the signatories would choose land most suitable to them. Following the 1889 *St. Catharine's Milling* decision, and the subsequent Canada-Ontario agreements on Indian Lands, the Province assumed authority and ownership over surrendered lands, and applied stipulations regarding the selection, location, and extent of reserves (Bartlett 1988; McNab 1983). Several reserve locations were established and surveyed in association with Treaty 3. These reserves were chosen at sites with access to water and water resources (McNab 1983). Grand Council Treaty 3 in their statement on the

Headlands dispute reflects this point clearly. They state, “our people chose marshy areas, land embracing water which would ensure the continuation of our way of life through hunting, fishing, trapping and harvesting” (Grand Council Treaty 3 1979:2).

The Ojibwa expected that these water resources would still be available as in the past. In fact, all parties to the treaty understood that water resources were of utmost importance and significance to the Ojibwa signatories, and would have been considered to be an explicit part of the agreement (Ratkoff-Rojnoff 1988a).

Commissioner Dawson himself made statement to this effect in an 1885 letter. He stated,

In those days it was never contemplated that there would be such a run on their fisheries by the whiteman as has since occurred. Otherwise the clause in favour of Indians would have been made stronger (in Ratkoff-Rojnoff 1980a:20)

And again in 1888 stated,

In the case of the Lake of the Woods where there is an unusually large Indian population, the government of Ontario should, I think, be asked to reserve the whole lake for the use of the Indians (in Ratkoff-Rojnoff 1980a:19)

Clearly, it was the intention of the negotiators for the Crown to protect Ojibwa interests in water resources regardless of the explicit wording of the treaty document.

Despite these statements, there was little done to effectively protect Ojibwa interests in water resources in the area. In the period following the signing of Treaty 3, Americans fishing in the Lake of the Woods area caused a significant depletion of fish stocks. This was also an issue for wild rice crops. Concurrently, a number of years of high water levels due to an 1888 dam constructed in the Kenora area, caused very poor rice yields (Ratkoff-Rojnoff 1980a; McNab 1983). These two factors led to a food supply crisis for the Treaty 3 Ojibwa (McNab 1983; Bartlett 1988; Ratkoff-Rojnoff March 1980a).

The Headland principle first appeared in the 1891 *Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands* (S.O. 1891, c. 3), and later confirmed in an 1894 Canada-Ontario agreement. It stated that the lands under the waters wholly or partly encompassed by the reserve, including islands, would be considered to form part of the reserve rather than that presented in the original survey along the shoreline. This provision was presumably a superficial fix, intended to retain some of the fish and rice harvesting areas for Ojibwa use (McNab 1983). From this point forward, reserve boundaries that had been considered to run along the shoreline were now considered to extend from the two headland extensions. It removed this portion of the lake from public access and reserved it for the use of reserve residents exclusively.

However, the inclusion of these lands under water considerably increased the reserve acreage. The Province of Ontario had already registered complaints that the actual reserve allotment significantly exceeded that provided for in the treaty document (McNab 1983). In fact, shortly after the treaty was signed, an article in the *Manitoban*, a weekly Winnipeg newspaper, stated that the Ojibwa had come to town angry about the size of the allotments and demanding the abrogation, and readjustment of the treaty (Ratkoff-Rojnoff 1980a). Presumably, the extent of the allotments had not been made clear at the time of signing. The surveyor general was sent to look in to the matter. As a result, reserve lands were based on areas chosen by the Ojibwa representatives rather than on the maximum entitlement dictated by the terms of the treaty (McNab 1983).

This fact caused some distress to the Province. The Province felt that the locations of reserves were 'injuriously located' relative to the 'opening of contiguous territory' but agreed to approve the reserves so long the Province received suitable

compensation (McNab 1983). The matter was settled in a series of meetings between Ontario Ministry of Lands, Forests, and Mines, and the Superintendent General of Indian Affairs, and their deputies Aubrey White and Duncan Campbell Scott respectively. At this time the Province pressed its concern regarding the location and extent of the reserves. In 1914, after much debate, Scott recommended to the Minister that the reserves be confirmed as in the original survey, the Province being compensated for lands in excess of the treaty allowance based on the reserve acreage alone (McNab 1983). While the matter was still under consideration by the Federal government, the Province rapidly passed the 1915 *Act to confirm the title of the Government of Canada to certain lands and Indian lands* which stated that

The land covered with water lying between the projecting Headlands of any lake or sheets of water not wholly surrounded by an Indian Reserve or Reserves and islands wholly within such Headlands shall not be deemed to form part of such Reserve, but shall continue to be the property of the Province, and the Bed of Navigable Waters Act shall apply (McNab 1983:153).

The government of Canada did not concur with this decision despite the involvement of the Deputy Superintendent General of Indian Affairs, and they did not enact similar legislation confirming its validity. Thus, the 1915 Ontario Act stands in violation of the 1894 agreement (Bartlett 1988; McNab 1983).

At the time of the Ardoch, Ontario Mud Lake conflict, the Treaty 3 reserve boundaries were still not settled. Treaty and riparian rights had been ineffective in protecting Aboriginal water resource interests. The failure to agree on the boundary question left no clarity over Aboriginal resource access and control. While the Province made verbal commitments to address the issue, their true intentions were aptly illustrated in a Treaty 3 document detailing the ongoing promises, delays, and inaction of the Provincial government from July 1978 to June 1981 (Grand Council

Treaty 3 1981a). The Ontario government took the position that it had no legal obligation to the Treaty 3 people relative to any claim. However, they proposed that Ontario extend some efforts to assist in meeting the needs of Treaty 3 Indian peoples to overcome social and economic difficulties irrespective of any claim (MNR 1980c). In this way, the Provincial government sidestepped the boundary question, and continued to exert its authority over all of the resources of Ontario, and over Ojibwa people as citizens of Ontario.

A further question adding to the question of Ojibwa water rights in the Treaty 3 area was the lack of clarity around treaty promises to *Manomin*. The official version of the treaty made no reference to *Manomin*/wild rice and did not guarantee rice-harvesting rights, much less, exclusive right to Ojibwa harvesters (Vennum 1988; Notske 1994; Ratkoff-Rojnoff 1980a; Avery and Pawlick 1979; etc...). However, the Treaty 3 people claim that *Manomin* was discussed, and was set aside for Ojibwa use (Ratkoff-Rojnoff 1980a; Avery and Pawlick 1979). In support of this statement, they hold a document that they claim was produced during the negotiations, and signed by two of the Métis interpreters working for the Ojibwa. This document, often referred to as the Nolin notes (PAC RG10, 1918, 279OD), was considered important at the time of signing, and was included in the official dispatch to Ottawa along with the treaty document (Ratkoff-Rojnoff 1980a). In fact, Ratkoff-Rojnoff surmises that because of the difficulty of translating technical and legal terminology into the Ojibwa language, this document is very likely the version of the treaty that Ojibwa signatories agreed to, as it is written in a form consistent with treaty documents (1980a). She also notes that there is a good deal of consistency between the official document, and the various versions produced by other parties during negotiations, including the Nolin notes. This lends credence to the validity of the Nolin document

(Ratkoff-Rojnoff 1980a). This document explicitly states that, “the Indians will be free as by the past for their hunting and rice harvest” (Notske 1994:18; Ratkoff-Rojnoff 1980a:21; Avery and Pawlick 1979:37). Considering the centrality of *Manomin* to the Ojibwa generally, and this region specifically, it is unlikely that it would not have been a priority in the guarantees sought by the Treaty 3 signatories. However, the Province has consistently refused to acknowledge Aboriginal rights to wild rice. Once again, treaty and riparian rights were unable to protect Ojibwa interests to significant water resources in the Treaty 3 area.

The very fact that boundaries and resource rights were debated has much to do with the devaluation of Aboriginal resource interests relative to Provincial, and other, interests. In general, history illustrates inadequate attention to the protection of Aboriginal resource interests (fish and wildlife from non-aboriginal harvesting; *Manomin* from flooding and harvesting) (Ratkoff-Rojnoff 1980a; Richardson 1993). Thus, while the treaty was for the purpose of encouraging the evolution of a settled and self-sufficient agricultural community, the lack of adequate lands and protection of resource interests led to starvation, and significant levels of government dependency (Ratkoff-Rojnoff March 1980).

During the 1950s and 1960s some of the boundary disagreements were settled. It was at this time that the *WRHA* debates took place. The *WRHA* was enacted in 1960, and in 1961 the ten large harvesting areas were set aside as a special provision for Ojibwa reserve communities. As stated earlier, the 10 block areas established in 1960 were designed to protect the interests of Ojibwa communities in the Treaty 3 region from people coming from Manitoba and the USA to harvest wild rice (MNR 1979). In the 1970s, the Treaty 3 Grand Council became increasingly proactive in seeking the resolution of their claims to water and water resources confirmed through

the headland-to-headland principle (Bartlett 1988). This was the state of affairs when, in 1977, the MNR developed their proposal to revise the *WRHA* in the interest of developing a wild rice industry in the region.

Throughout the 1979-82 study period MNR files held a great deal of information on the Treaty 3 situation. The movement by Treaty 3 Ojibwa to protect their interests in the *Manomin* was adamantly opposed by MNR at this time. MNR planners stuck to a strict reading of the official treaty document. They insisted that there was no provision in the treaty to set aside *Manomin* exclusively for the Ojibwa, nor was there a guarantee of access (MNR 1979). Furthermore, they stated that Aboriginal access had been maintained exclusively through the good will of the state, which had chosen to support that access because of its importance to the Ojibwa people. MNR aggressively contested the Aboriginal perspective that the block areas had recognized their Aboriginal rights to the rice. They stated their intention to continue to reserve smaller, commonly harvested areas within the original block areas for Ojibwa peoples strictly as a courtesy. MNR was firm in its insistence that the block areas be opened up for commercial development (MNR 1979).

In response to Ojibwa protests, the RCNE report recommended that the 10 block areas remain intact, and that a five-year moratorium be established, principally to allow Ojibwa harvesters the time to develop an Aboriginal led wild rice industry. Despite occasional moves to challenge this resolution, there has been no change. The ten block areas continued to be reserved for Ojibwa reserve communities into the 1990s.

As with other resources, the relationship between Aboriginal people and *Manomin* has been significantly influenced by evolving legislation, treaties, and court decisions. These developments have gradually eroded Aboriginal authority and

access to *Manomin* through the application of rules and regulations, by defining geographic zones of access and participation, by establishing provisions allowing protected access to only certain Aboriginal people, by imposing non-aboriginal attitudes to resource use, and by pushing for the economic development of wild rice as a commodity resource. These actions on the part of the Province to regulate wild rice as a natural resource have appeared as if to be an assault on Aboriginal cultural practice.

Aboriginal people, most notably the Ojibwa of Treaty 3, have resisted the constraints placed on them by the Provincial government. They have struggled to maintain their own cultural uses of *Manomin*, and to protect it from external exploitation. While there have been impacts on Aboriginal community practice, they have sought to maintain a healthy relationship with *Manomin*, one that recognizes the role it plays in their lives, traditions, and identities. Thus, while the history of wild rice policy has circumscribed Aboriginal access to *Manomin*, and has replaced Aboriginal control of the resource with Provincial authority and control, Aboriginal people have continued to express their own values relative to the resource, and have sought to make some space in which to maintain their harvesting traditions.