



ON AMENDING THE 1916 MIGRATORY BIRDS CONVENTION

Indigenous Reflections and Priorities

PREFACE

It is a Saturday afternoon, and Philip Awashish and I are discussing the role of law in Canadian society and its relationship to Eeyou's activism and advocacy. The key, he explains, is to understand that the Eeyou do not expect Canadian laws to be able to represent what is important or inherently Eeyou. He tells me, "The right to hunt and fish is far more than the pursuit of fish and game [...] it involves related activities, which are associated with the cultural and spiritual core from an Eeyou perspective. Too often, we are limited to having our rights described by Canadian law, but Aboriginal rights need to be defined by taking into consideration Aboriginal perspectives. That is what we are trying to do in these negotiations; we are not just concerned with the actual pursuit of hunting geese, for example, but rather there are other related matters, including spiritual matters that are associated with the annual spring hunt and the first kill, as I outlined in the report. These are cultural and spiritual matters and no Canadian law can genuinely represent these." That is, the Eeyou are guided by "miiyoupimaatsiwin," or the interconnectedness and interdependence of life and the need for spiritual, psychological, societal, and physical balance. Cree's and First Nations' life-giving and world- and life-defining relations to lands and animals, the means by which their communities continue to exist and survive, extend from the lands they govern across the borders and boundaries of nation states far from their territorial homes. These relations continually implicate them in national and international relations and border problems, which are not widely recognized.

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In the essay below, Philip shares his experience in a momentous engagement, negotiating an amendment to an international treaty between the United States and Canada that involved the boundary breaches of migratory birds and had affected migratory birds-Indigenous Peoples relations for nearly a century. In it, he explains the perspective of an Indigenous negotiator whose aim was to ensure proper representation and the restitution of the inherent rights and claims of Indigenous Peoples in a settler colonial context. He indicates how it took repeated, diverse, and multi-decade Indigenous initiatives to reconcile the breaches created by the Migratory Birds Convention. Indigenous initiatives included treaty-making, negotiating a commitment by the Canadian Government to renegotiate the international treaty with the US, initiating specific constitutional changes, securing Indigenous representation on the Canadian negotiating team for Canada-US treaty negotiations, and providing effective inputs to necessary modifications in the modified international treaty and protocol. They negotiated inter-governmental jurisdictional conflicts, environmental and wildlife conservation groups' opposition, commercial interests, legal impediments, and legislative reluctance. Philip explains how Indigenous leadership resolved these boundary issues that affected Indigenous lives, communities, rights, and their relations with migratory birds and how they affirmed a future for their ways of life.

This essay draws from, updates, and revises the report Philip Awashish wrote in October 2000, entitled "Amending the 1916 Migratory Birds Convention," to inform the Cree (Eeyou Istchee) leadership of these achievements. He and two other Aboriginal intervenors had been appointed negotiators by the Canadian Government. This contribution is unique because it documents the process of these negotiations from an Indigenous perspective (for which we could find no other published source).¹ Philip Awashish is an Eeyou (James Bay Cree) elder, political leader, and negotiator. When in 1971 he read that the Quebec Government was planning to build a new hydro-

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1 Among the works we located on the negotiations process was a short overview by Wagner and Thompson (1993), found in a publication of the Canadian Arctic Resource Committee; a working paper by Gastle (2002) which described Indigenous peoples' participation and engagement in negotiating international affairs and which cites (and partly relies on) Philip's unpublished report on the negotiations; a dissertation by Julliet (2000) which carefully documents the negotiations process from a public policy perspective; and an article co-authored by Anjali Choksi and Cree legal counsel Peter Hutchins (Hutchins and Choksi 2002). Although each piece refers to or acknowledges the participation of Indigenous negotiations, none begins from Indigenous positionality nor primarily adopts the perspective of the Indigenous negotiators, as this article does.

electric project on Eeyou Istchee, in anticipation of their exclusion from the planning process, he called together the first-ever meeting of James Bay Cree leaders from across their territory, both to make everyone aware of these plans and begin to organize and mount an effective campaign to have a seat at the table. He would soon become one of the key negotiators, principally responsible for negotiating around key issues such as governance, environmental protection, hunting, fishing, trapping rights, and security for hunters and trappers. Philip was one of the ten Eeyou signatories of the 1975 James Bay and Northern Quebec Agreement (JBNQA), Signing for the Grand Council of the Crees (Eeyou Istchee), also signed by the Northern Quebec Inuit Association, the Government of Canada, the Government of Quebec, Hydro-Quebec (an integrated public electricity utility), the James Bay Energy Corporation and the James Bay Development Corporation. Among his leadership roles since that period, he served as the Executive Chief and Vice-Chairman, respectively, of the Grand Council of the Crees (Eeyou Istchee) and the Cree Regional Authority (now the Cree Nation Government) and as Chief and Councilor of the Cree Nation of Mistissini. He remains active as a Commissioner on the Cree-Naskapi Commission, to which he was appointed by the Government of Canada pursuant to the recommendations of the Cree Nation Government and the Naskapi Nation of Quebec. The Commission “is an independent, arms-length body responsible for investigating representations submitted to it concerning the implementation of” Cree government institutions and the obligations of other governments to Cree (Cree-Naskapi Commission). As Philip himself writes:

For Eeyou of Eeyou Istchee, the treaty process was the path chosen to commence the process of nation-building, secure recognition, protection, and continuity of Eeyou rights such as hunting and fishing, and self-governance, use and protection of Eeyou Istchee and redefine relationships with Canada and Quebec. Before the 1975 JBNQA was signed, ratified, and put into effect and force, for centuries, Canada and Quebec had engaged in a continuous and acrimonious exercise and process of the denial of the rights of Eeyou to their ancestral, historical, and traditional land—an area covering 410,000 square miles [that is, a land mass that is greater than the entire province of Ontario]... The history of Eeyou’s relations with other governments and nations can be summarized as a legacy of conflicts over land, natural resources, and the exercise of power. Prior to 1975, it is a legacy of the exclusion of Eeyou in the exercise of power, development of natural resources, and denial of Eeyou rights to their homeland- Eeyou Istchee (Awashish,

“Worldviews, Values and The James Bay and Northern Quebec Agreement,” March 31, 2022, unpublished paper).

While the process leading to an Indigenous-led modification of the Migratory Birds Convention had many unique features, the process and the partial but significant reconciliation it achieved have implications for Indigenous, Canadian, and international entities today. Indigenous Peoples, governments, and developers are each seeking to shape the expanding numbers of international development projects and infrastructure projects that serve international corporations and consumers from lands that Indigenous Peoples govern as foundations of their increasingly diverse futures.

THE SPRING GOOSE HUNT

Every ‘NISKIPISUM’ (“month of the Goose,” i.e., April) is a sacred and moving occasion for the Eeyouch/Eenouch when the light and warmth of the sun renews the face of Eeyou Istchee. It is the season for renewing life as Eeyou Istchee continues to nourish men and animals through the providence of the Creator when the ‘NESK’ (Canada goose) returns north to Eeyou Istchee of the Cree Nations.

In the Cree villages, there is much excitement in the air. With cheerful hearts and great anticipation, men and women prepare for the spring goose hunt. The children are excited, too, as they watch the preparations for this annual traditional activity. The young boys wonder if this will be the season they will kill their first goose.

When a young boy kills his first goose, there is much happiness and festivity in the bush camp, which brings together three to five families. The young boy is initiated as a young hunter into a life profoundly based on love and respect for the land and its wildlife.

For the feast in which all camp members will participate, the whole goose is cooked along with other geese. The head of the goose is decorated with beads and ribbon ornaments for the young hunter to keep for the rest of his life; it is a reminder of the “gift” from his first kill. Before the goose is eaten, a piece of goose is thrown into the fire by an elderly person to thank the southerly winds for bringing their “gift” and to honor the Creator so that the days of Eeyou may be long upon Eeyou Istchee.

In itself, the feast expresses the central role of sharing in Eeyou culture and society. As the geese have shared themselves by binding themselves to hunters, people must share the harvest with each other. In this way, the young hunter learns that the unique relationship,

not only between persons but also between men and animals, is one of reciprocity. As the young hunter practices the customs and rituals of respecting geese, he develops a relationship of love and respect for the land and animals, and thus, he unites the cultural and natural domains of humans and animals. This relationship between men and animals gives the Cree people a sense of belonging in nature and, just as importantly, a sense of their place in nature.

Subsistence and harvesting activities, along with their associated rituals and customs, provide the Eeyouch/Eenouch with a perception of themselves as a distinct continuing society and affirm their continuity with the past and their unity with the natural world. While hunting geese and other migratory birds is very important for subsistence, the harvesting and associated activities and ceremonies are essential for the cultural and spiritual well-being of Eeyouch/Eenouch of Eeyou Istchee.

In 1916, Great Britain (on behalf of Canada) and the United States of America (USA) signed the Migratory Birds Convention (MBC), which formed the international conservation agreement or treaty that provided the basis for managing and hunting birds migrating between Canada and the USA. Article II of the Convention provided for a close season for the hunting of migratory birds between March 10 and September 1 of each year. In 1917, the Government of Canada enacted the Migratory Birds Convention Act to give legislative effect to the MBC. Federal legislation established and enforced the close season, which meant that what was an important, if not essential, spring hunt of migratory birds to the Indigenous Peoples was considered illegal by the Government of Canada. Notwithstanding the close season, Eeyouch/Enouch and other First Nations Peoples harvested migratory birds, which led to many hunters getting charged simply for participating in the spring hunt of migratory birds—a right and tradition exercised by past and present generations of Eeyou/Eenou hunters and their families in the pursuit and conduct of their traditional way of life.

THE JAMES BAY AND NORTHERN QUEBEC AGREEMENT, 1975

The Eeyouch/Eenouch of Eeyou Istchee are beneficiaries of the James Bay and Northern Quebec Agreement (JBNQA), which is an out-of-court settlement as well as a treaty that was signed after a long and arduous battle to halt the first phase of the James Bay hydroelectric development project of Quebec within Eeyou Istchee in the early 1970s. Signed in 1975, the JBNQA is a comprehensive

and detailed Cree rights charter approved, given effect to, and declared valid by Acts of the Parliament of Canada and the National Assembly of Quebec.

Because hunting, fishing, and trapping are essential to the Cree traditional way of life, the protection of this way of life through the recognition of precise hunting, fishing, and trapping rights for Crees and the establishment of a new legal regime for the exercise of these rights within Cree traditional territories formed a fundamental purpose of the JBNQA and legislation under that Agreement. Furthermore, the environmental and social protection regime established by, and in accordance with, Section 22 of the JBNQA provides for the protection of the rights and guarantees of the Eeyouch/Eenouch of Eeyou Istchee.

During the negotiations that led to the signing of the JBNQA, the Eeyouch/Eenouch of Eeyou Istchee raised awareness of the close spring season on migratory birds. At the time, the Government of Canada took the position that it was bound to its international obligations under the 1916 Migratory Birds Convention and that Indigenous Peoples were subject to the laws and regulations on hunting migratory birds, including the Migratory Birds Convention Act and the Migratory Birds Regulations.

Following the coming into force of the JBNQA, further discussions between Canada and the Crees of Eeyou Istchee identified the provisions of the Migratory Birds Convention Act and its Regulations, which conflicted with the new Hunting, Fishing and Trapping Regime of the Agreement. The joint Indigenous-Federal-Provincial Hunting, Fishing and Trapping Coordinating Committee, established by the Agreement, also submitted a series of proposed amendments to the regulations to the Government of Canada. The result of Cree efforts, which were not entirely satisfactory, was the inclusion in the Federal Regulations of a non-derogation provision, which provided that nothing in the Regulations would be interpreted or applied in a manner inconsistent with the provisions of the JBNQA.

There were several objections to the Government's approach. For example, the Eeyouch/Eenouch of Eeyou Istchee objected that Article II of the 1916 Migratory Birds Convention provides for a close season on hunting migratory birds. They did not recognize the application of Article II of the Convention, as it prohibited an essential and traditional hunt. The Eeyouch/Eenouch of Eeyou Istchee, therefore, also did not recognize the application of the Migratory Birds Convention Act and the Federal Migratory Birds Regulations issued to implement the Act, as this statute and its regulations implemented the provi-

sions of the Convention. The position of the Eeyouch/Eenouch was stipulated in sub-section 24.14.6 of Section 24 of the JBNQA, which established that the Eeyouch/Eenouch had secured their Aboriginal rights to hunt migratory birds. Section 24 of the JBNQA provides for the right of every Native person to hunt, fish, and trap any species of wild fauna (including migratory birds) at all times of the year.

Therefore, under Section 24 of the JBNQA subsections 24.14.2 and 24.14.3, the Government of Canada had important undertakings and obligations to amend the Migratory Birds Convention Act and the Federal Migratory Birds Regulations in order to recognize the Eeyouch/Eenouch's right to harvest migratory birds to the extent possible under the Convention and, more importantly, to seek amendments to the 1916 Migratory Birds Convention or the application of the Convention in and to the Cree territories to eliminate all conflicts with the Hunting, Fishing and Trapping Regime established by and in accordance with Section 24 of the JBNQA.

1979 PROTOCOL AMENDING THE 1916 CONVENTION ON THE PROTECTION OF MIGRATORY BIRDS

On January 30, 1979, the Governments of Canada and the United States of America signed the Protocol Amending the Convention of August 16, 1916, for the Protection of Migratory Birds in Canada and the United States of America, acknowledging the right of each party to dispense with the close season provided in the Convention as it applied to Indigenous Peoples. The Protocol was not submitted to the United States Senate for ratification due to the influence of intense lobbying by interest groups. The Protocol, which did not come into force, reads in part as follows:

Notwithstanding any other provision of this Convention, the High Contracting Powers may, without prejudice to those rights accorded to Indians by sub-paragraph 1 of the first paragraph of this Article and to Eskimos and Indians by sub-paragraph 3 of the said first paragraph, authorize by statute, regulation, or decree the taking of migratory birds and the collection of their eggs by the indigenous inhabitants of the State of Alaska and the Indians and Inuit of Canada for their own nutritional and other essential needs (as determined by the competent authority of each High Contracting Power), during any period of the year in accordance with seasons established by the competent authority of each High Contracting Power respectively, so as to provide for the preservation and maintenance of stocks of migratory birds. (1)

Interest groups opposing the Protocol of 1979 felt that an Aboriginal hunt of migratory birds in Canada and a subsistence hunt in Alaska would pose a conservation threat, as its size would be unknown and the ability of governments to regulate the hunt was minimal.

Although the scale of the Alaskan hunt had mostly been documented, the Canadian aboriginal harvest remained a focus for concern within the United States hunting community. In Canada, harvest information is gathered and documented in areas of completed comprehensive land claims. Harvest documentation and regulation are generally part of pending claims agreements. Through claims agreements, “co-management” blends government jurisdiction and aboriginal practices into effective conservation regimes. At the time, Foreign Affairs and International Trade Canada and the United States State Department expressed ease with developing a common document between the Canadian Wildlife Service and the US Fish and Wildlife Service as a precursor to the formal negotiations respecting amendments to the 1916 Migratory Birds Convention. The successful negotiation of the proposed changes required the full support of the provinces and territories and Indigenous groups in Canada, as well as the concurrence of the US Fish and Wildlife Service and the US State Department. At the time, one question remained: Should Canada be unable to secure the agreement with the US, would unilateral domestic legislation be contemplated to accommodate aboriginal hunting of migratory birds within Canada? This was not an entirely meaningful option, given that it ignored the international nature of bird migration and nearly a century of cross-border cooperation with the US.

THE NORTH AMERICAN WATERFOWL MANAGEMENT PLAN, 1986

In May of 1986, the Governments of Canada and the United States of America signed the North American Waterfowl Management Plan, which put in place an ambitious 15-year program to achieve a net gain in wetlands and associated upland habitat for waterfowl across the continent. The management plan clearly acknowledged that the destruction and degradation of waterfowl habitat, *not* hunting, was the key threat to waterfowl species. In fact, the Waterfowl Management Plan estimated the total subsistence harvest of ducks and geese to be 5–7% of the total continental harvest, indicating that the aboriginal subsistence hunt would have only a minor impact on waterfowl populations. The Waterfowl Management Plan also clearly differentiated between “recreational hunting” and “subsistence hunting” both in its principles and in its recommendations. Fur-

thermore, as significant changes had occurred in the management of North American waterfowl since the time of the 1916 Migratory Birds Convention, the Waterfowl Management Plan referred to efforts to amend the Convention with respect to both the subsistence hunt and the appropriateness of the cooperative involvement of subsistence hunters in the process.

CONSTITUTION ACT 1982

Section 35 of the Constitution Act 1982 provides that “the existing aboriginal and treaty rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed,” thus giving constitutional recognition to Aboriginal and treaty rights and protecting them from legislative attack. Aboriginal rights are rights held by Aboriginal Peoples, not by virtue of Crown grant, legislation, or treaty, but by the fact that Aboriginal Peoples are independent, self-governing peoples in possession of lands now making up Canada. Section 35 of the Constitution Act 1982 explicitly includes rights acquired under modern land claims agreements in its protected treaty rights. The JBNQA, as a modern land claims agreement, acquired constitutional status and protection accordingly, and, amongst other rights, the right of the Eeyouch/Eenouch to hunt, fish, and trap under the JBNQA is “recognized and affirmed” by the supreme law of Canada. Furthermore, the Courts had also clearly identified the right to hunt and fish for food as a right included in Section 35 of the Constitution Act, 1982. In addition, the Courts held that Aboriginal and treaty rights overrode the Migratory Birds Convention Act and its regulations. Consequently, the prohibition of waterfowl hunting during the close season provided for by the Migratory Birds Convention Act under the 1916 Migratory Birds Convention clearly violated the Aboriginal and treaty rights of the Eeyouch/Eenouch of Eeyou Istchee, as well as other Aboriginal Peoples of Canada.

The entry into force of Section 35 of the Constitution Act 1982 prevented Canada from implementing any international treaty without considering the Aboriginal and treaty rights of the Aboriginal Peoples of Canada. This limit on Canada’s ability to implement the 1916 Migratory Birds Convention constituted a fundamental change in the circumstances, radically different from those prevailing when Canada first expressed its consent to be bound by the Convention. (Canada is also bound by treaty obligations to amend the Convention to eliminate any conflicts or incompatibilities with treaty rights).

PROCESS AND PROGRESS ON AMENDMENTS TO THE 1916 MIGRATORY BIRDS CONVENTION

Acknowledging the difficulties created by the 1916 Migratory Birds Convention (MBC) for Eeyou hunters, the Government of Canada agreed in the JBNQA to obtain a modification or amendment to the Convention.² In 1979, the Government of Canada and the United States of America had reached a tentative agreement on an amendment to the MBC that would have allowed regulated subsistence spring hunting of migratory birds by Alaskan residents, Indians, and Inuit in Canada, as mentioned above. However, this proposal, or the Protocol of 1979, failed to receive the political support required for ratification. The most commonly expressed objection to the Protocol as written was that it was too vague concerning the means to be used to implement its terms. In response to this problem, the Canadian Wildlife Service and the United States Fish and Wildlife Service jointly prepared a discussion paper regarding Protocol implementation and distributed it for discussion in 1985. The discussion paper was prepared without the direct participation of the representatives of the First Nations of Canada. Members of the wildlife management community gave the paper considerable attention, but for various reasons, it was never formally accepted or rejected.

In 1987, the International Association of Fish and Wildlife Agencies (IAFWA), an international association with membership from the Canadian and Provincial departments, the US government, State departments, and interested organizations in the conservation and management of wildlife species within North America, considered these issues. The IAFWA urged Canada and the United States of America to enter into negotiations that would provide for comprehensive solutions to all outstanding issues, including, for example, the delineation of peoples who would qualify as subsistence hunters, the geographic areas that would be open to subsistence hunting, and the mechanisms for regulation, enforcement, and monitoring.

In 1988, the Canadian federal and provincial wildlife ministers considered similar issues related to the Protocol without the direct participation of any First Nations or Aboriginal representatives from Canada. The ministers involved instructed their representatives to develop an MBC amendment for northern regions that would ensure the conservation of migratory birds, allow for regional flexibility

2 An identical commitment is found in the 1984 Inuvialuit Comprehensive Claims Agreement for the Western Arctic region and other modern land claims agreements (The Western Arctic Claim).

in their application, allow all residents to potentially benefit, maintain, and enhance current shared arrangements, allow the federal government to retain paramountcy concerning MBC matters, and that all of the amendments would bind both Canada and the United States.

In Canada, various legal issues affected the development of amendments that met the ministers' criteria and addressed the concerns of IAFWA. Evolving developments, however, opened the door to renewed efforts to resolve the MBC amendment issue.

The Canadian Wildlife Service and the United States Fish and Wildlife Service felt that some future conservation of the continental migratory bird resources required biologically-based and equitable harvest management in northern areas, as elsewhere. The conservation concerns raised by the IAFWA in 1987 and by the Canadian federal and provincial wildlife Ministers in 1988, in conjunction with the 1979 Protocol, would have to be addressed to ensure current and future sustainable conservation needs were met. Any changes to the existing Convention would have had to meet these needs in both countries and would have to be developed in close cooperation with provincial, territorial, and state wildlife agencies, native groups, and non-governmental organizations with significant interests in migratory birds conservation.

In the fall of 1990, the Government of Canada, in partnership with its provincial and territorial counterparts, intensified its efforts to amend the MBC. An extensive program of public consultation was undertaken as part of that effort. Consultations included bilateral discussions between the Canadian Wildlife Service (CWS) and Aboriginal, wildlife, naturalist, and environmental organizations across Canada. As part of and in response to the bilateral discussions, the Cree Regional Authority/Grand Council of the Crees (of Quebec) submitted a brief on migratory waterfowl to the Government of Canada. The brief stated the position of the Crees of Quebec concerning the process and amendments to the MBC. Following these discussions, CWS, in February 1992, prepared a paper, "Migratory Birds Convention Amendments: A Discussion Paper," which set out general scenarios for amending the MBC. Consultation workshops were the next step in the advice-seeking process. The Government of Canada, through the Canadian Wildlife Service, engaged the Canadian Arctic Resources Committee (CARC) to conduct the consultation workshops, which were held in the spring of 1992. The overall purpose of these workshops was to gather the perspectives of Aboriginal organizations, wildlife and habitat groups, and naturalist and environmental interests involved in the use and management of migratory game birds.

The Cree Regional Authority/Grand Council of the Crees (of Quebec) participated in one of the workshops.

There were four scenarios presented to stimulate discussion on possible amendments to the MBC or possible solutions to this long-standing issue: (1) pursue equitable northern access, (2) develop a modification of the 1979 Protocol, (3) develop cooperative wildlife management agreements, or (4) retain the status quo. The workshops stimulated people across Canada to express their views on regulatory measures and migratory game birds. In particular, they considered the strengths and limitations of the 1916 Migratory Birds Convention and suggested how it should be changed by process and content. The status quo was not presented as an acceptable alternative since the Convention conflicted with the Constitution Act, 1982, as well as court rulings respecting Aboriginal and treaty rights, along with the spirit and intent of the JBNQA, among other treaties. The intensive consultation process conducted by the Canadian Wildlife Service demonstrated general support for an amendment to the 1916 Migratory Birds Convention among provincial/territorial governments, Aboriginal groups, and non-governmental organizations. One provincial exception was Quebec, which disagreed with spring hunting by Aboriginal People outside of the comprehensive claims areas. The United States Fish and Wildlife Service also conducted a series of nationwide consultation meetings in 1992. The majority of opinions favored amending the Convention.

In September 1993, based on and in response to presentations made by Aboriginal groups and in the course of the Canadian Government's inter-departmental review process, the proposal to amend the MBC was revised by the CWS and resolved the MBC as follows:

- (1) Ensuring year-round access to hunting of migratory birds by Aboriginal People throughout Canada, subject to conservation;
- (2) Regulating the murre hunt in Newfoundland, Labrador, and adjacent waters;
- (3) Ensuring opportunities for some non-Aboriginal residents of the Northwest Territories and Labrador living a subsistence lifestyle to hunt migratory game birds, subject to approval by local management authorities; and
- (4) Granting authority to Canada to vary dates of the close season for qualified residents holding migratory bird permits in certain regions of the Northwest Territories and Labrador.

An Aboriginal Advisory Committee, chaired by James Bourque, Yellowknife, Northwest Territories, was established to help guide the CWS in discussions and negotiations respecting the proposed amendments to the MBC. The Cree Regional Authority/Grand Council of the Crees

(of Quebec) participated in the Committee on an informal basis. The revised proposal for amendments to the 1916 Migratory Birds Convention meant a new Protocol would be determined through negotiations between Canada and the United States of America.

In response to the revised proposal (of September 1993) respecting amendments to the 1916 Migratory Birds Convention, the Cree Regional Authority/Grand Council of the Crees (of Quebec) shared a number of principal interests and concerns, reiterating their positions concerning their right to representation in the determination and development of the “Canadian position” and in the negotiations with representatives of the Government of the United States. The CRA/GCC demanded that the proposed amendments affirm “year-round access to hunting of migratory birds by aboriginal people, subject to conservation,” thus eliminating one of the principal conflicts of the MBC with the Hunting, Fishing and Trapping Regime as established by and following Section 24 of the JBNQA; namely, that the right to harvest is recognized in conformation with Section 24.6 of Section 24 of the JBNQA.

Following CWS meetings with other organizations interested in the use and management of migratory birds, the Ministers of Environment and Foreign Affairs drafted and presented a memorandum to the Cabinet. The memorandum was accepted and ratified in early June 1994. Consequently, the Department of Environment and the Department of Foreign Affairs were mandated to negotiate amendments to the 1916 Migratory Birds Convention with the Government of the United States of America.

In early July 1994, officials from CWS and the US Fish and Wildlife Service met to discuss the logistics of the negotiations. The composition of the negotiations team was discussed with particular reference to representation by non-governmental members. The US team, which was limited to 10 people, would include a State representative from Alaska, a State representative from the lower 48 states, a representative from conservationist organizations, a representative from hunting organizations, one or two Native persons from Alaska, along with the State Department and Interior Department officials. Canada proposed to have three Aboriginal members (one representative from each Aboriginal Peoples—Indian, Inuit, and Metis), a provincial representative, two representatives from each of the Department of Environment and Department of Foreign Affairs, and representatives from the Department of Justice.

CWS and members of the Aboriginal Advisory Committee discussed the Aboriginal composition of the Canadian Negotiation

Team based on the recommendations of Aboriginal organizations and non-governmental organizations, such as the Hunting, Fishing and Trapping Coordinating Committee established by Section 24 of the JBNQA. By early October 1994, invitations were extended by the Director of CWS to three Aboriginal persons, James Bourque, Rosemarie Kuptana, and Philip Awashish, who formed part of the Canadian negotiations team or the Canadian delegation.

The Aboriginal representatives of the Canadian delegation took the following principal positions respecting the negotiation process and proposed amendments to the MBC of 1916:

- (1) the harvesting of migratory birds by Aboriginal peoples of Canada must be expressed in the context of "Aboriginal peoples of Canada having aboriginal and treaty rights";
- (2) the taking of migratory birds for food by qualified non-aboriginal residents in northern Canada must be subject to the provisions of treaties, land claim agreements, or co-management agreements with Aboriginal Peoples from Canada;
- (3) a general non-derogation provision must be included in the body of the Convention (as amended) to ensure that the provisions of the Convention shall not be construed so as to derogate from Aboriginal and treaty rights.

On April 10 and 11, 1995, the Canadian delegation met in Ottawa to negotiate a draft protocol with the proposed amendments to the 1916 Migratory Birds Convention. The protocol was a legal instrument that would provide for acceptable amendments to the 1916 Migratory Birds Convention. The meeting of the Canadian delegation, in which the three Aboriginal representatives participated, determined the Canadian position concerning the contents of the protocol. The Aboriginal representatives of the Canadian delegation were persistent in maintaining the following principal positions respecting Aboriginal and treaty rights of Aboriginal peoples and the MBC:

- (1) the harvesting of migratory birds by Aboriginal Peoples must be expressed within the context of Aboriginal and treaty rights and;
- (2) the Convention must not abrogate nor derogate from the Aboriginal and treaty rights of the Aboriginal Peoples of Canada.

In addition, the Aboriginal representatives insisted that the proposed taking of migratory birds by qualified non-Aboriginal residents of Northern Canada must be subject to the consent of Aboriginal Peoples by means of treaties, land claims agreements, self-government agreements, and other formal agreements with Aboriginal Peoples.

The Aboriginal representatives also raised other details, such as any commercial component of Aboriginal and treaty rights.

In general, the draft protocol as determined by the Canadian delegation on April 11, 1995 provided for a number of principal elements respecting Aboriginal Peoples of Canada including that Aboriginal Peoples of Canada having Aboriginal and treaty rights may harvest all species (notwithstanding classification of game, non-game, and insectivorous) of migratory birds, their eggs, and nests throughout the year; that the sale of down be permitted, but that migratory birds, eggs, and nests shall not be sold or offered for sale unless provided for in the relevant treaty, land claims agreement, self-government agreement or other agreements made with Aboriginal Peoples of Canada; that qualified non-Aboriginal residents in areas of northern Canada may take migratory game and non-game birds and their eggs for food only if Aboriginal Peoples so permit, in accordance with treaty, land claims agreement, or self-government or other agreements made with Aboriginal Peoples of Canada; and that decisions respecting the close season for sport hunting by qualified non-Aboriginal residents must be made following the provisions of treaties, land claims agreements, self-government or other agreements made with Aboriginal Peoples of Canada. These elements were made subject to existing Aboriginal and treaty rights of the Aboriginal Peoples of Canada under Section 35 of the Constitution Act, 1982, and the regulatory and conservation regimes defined in the relevant treaties, land claims agreements, self-government agreements, and other formal agreements with Aboriginal peoples of Canada. Furthermore, the preamble to the draft protocol clearly stated that “changes to the Convention are now required to establish conformity with the Aboriginal and treaty rights of the Aboriginal Peoples of Canada.”

The Aboriginal representatives and members of the Canadian delegation supported the draft protocol (of April 11, 1995) because it upheld and advanced Aboriginal and treaty rights of the Aboriginal Peoples of Canada, proposed the removal of existing barriers to the exercise of Aboriginal and treaty rights, provided for the consent of the Aboriginal peoples for the taking of migratory birds by qualified non-aboriginal residents of Northern Canada, and acknowledged that the Convention would need to be amended to conform with Aboriginal and treaty rights.

On April 11, 1995, the Government of Canada submitted the draft protocol to the Government of the United States of America for negotiations between the parties by their respective negotiation teams or delegations.

MIGRATORY BIRDS CONVENTION ACT, 1994

Bill C-23, An Act to implement a Convention for the protection of migratory birds in Canada and the United States or the Migratory Birds Convention Act 1994, received Royal Assent on June 23, 1994. When Bill C-23 was under consideration by Parliament, the Standing Committee on the Environment held hearings on the implications of the Bill. The Eeyouch/Eenouch of Eeyou Istchee and other First Nations made representations to the Standing Committee to express their concerns and positions. In appearing before the Standing Committee on May 26, 1994, the Grand Council of the Crees (Eeyou Istchee) testified that the Government of Canada and Parliament must adopt positive measures to ensure that all legislation respects Aboriginal and treaty rights of the Aboriginal Peoples of Canada and the responsibilities of the Government of Canada towards the Aboriginal Peoples. In response to Eeyou, as well as other interventions, Parliament enacted the Migratory Birds Convention Act, 1994, with the following non-derogation provision: "For greater certainty, nothing in this Act shall be construed as to abrogate or derogate from any existing aboriginal or treaty rights of the Aboriginal Peoples of Canada under section 35 of the Constitution Act, 1982."

PARKSVILLE PROTOCOL AMENDING THE 1916 MIGRATORY BIRDS CONVENTION

Through contemporary treaty instruments, such as the JBNQA, the Government of Canada had undertaken to seek amendments to the 1916 Migratory Birds Convention to align it with the rights recognized in treaties signed between Aboriginal Peoples—particularly those addressing the Convention's close season provisions, which were incompatible with their right to harvest migratory birds throughout the year. Furthermore, in 1982, an explicit recognition and affirmation of the Aboriginal and treaty rights of the Aboriginal Peoples of Canada was incorporated into the Constitution of Canada. Subsequently, the Courts in Canada have declared that the Aboriginal and treaty rights of the Aboriginal Peoples of Canada prevail over incompatible legislative provisions. As a result of these developments in law and undertakings in contemporary treaties, Canada undertook to renegotiate the 1916 Migratory Birds Convention with the United States. In recognition of the value of the migratory birds to Aboriginal Peoples and the importance of Aboriginal knowledge, institutions, and practices in the conservation and management of migratory birds, Canada ensured that there was Aboriginal representation

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on the Canadian delegation designated to negotiate amendments to the 1916 Migratory Birds Convention. It was agreed that Canada would embark on negotiations to amend the 1916 Migratory Birds Convention for the specific purpose of bringing the Convention in line with the Aboriginal and treaty rights of the Aboriginal Peoples of Canada. The “Canadian position” was determined through negotiations between Canadian and Aboriginal representatives of the Canadian delegation to achieve this purpose.

On April 27, 1995, after several days of complex negotiations, the *Protocol Between The Government Of Canada And The Government Of The United States Of America Amending The 1916 Convention Between The United Kingdom And The United States Of America For The Protection Of Migratory Birds In Canada And The United States* was agreed upon and initialed by the head representatives of the Canadian and American delegations in Parksville, British Columbia, Canada.

This article has focused attention on the negotiations that led to those provisions of the Parksville Protocol that affect Aboriginal Peoples in Canada and their treaty rights. It is important to return and note the original 1916 Migratory Birds Convention. Article II of the Protocol and Article II of the original Convention are the principal provisions that refer to “Indians and Eskimos” (in the original Convention) and “Aboriginal peoples of Canada” (in the Protocol).

Article II of the original 1916 Migratory Birds Convention provides for the following close seasons during which no hunting shall be done by Aboriginal and non-Aboriginal persons:

- (1) The close season on migratory game birds shall be between March 10 and September 1 of each year. However, ‘Indians’ may take at any time sooties for food but not for sale.
- (2) The close season on other migratory insectivorous and non-game birds shall continue throughout the year, except that ‘Eskimos and Indians’ may take at any season auks, auklets, guillemots, murrelets and puffins, and their eggs for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.

Consequently, the hunting or harvesting of migratory birds during the close season, particularly during the spring and summer, was considered illegal by the Government of Canada because of its international obligations under the 1916 Migratory Birds Convention and implemented by the Migratory Birds Convention Act. Furthermore, the original Convention did not refer to Aboriginal and treaty rights. However, Article II of the Protocol amending the 1916 Migratory Birds

Convention provided for the following main principles respecting Aboriginal Peoples and their Aboriginal and treaty rights in Canada:

- (1) Migratory birds and their eggs (regardless of classification as game, insectivorous and non-game birds) may be harvested throughout the year by Peoples of Canada having Aboriginal or treaty rights. (The close season provisions are subject to the Aboriginal and treaty rights of Aboriginal Peoples of Canada.)
- (2) Down and inedible by-products may be sold, but migratory birds and eggs shall be offered for barter, exchange or trade or sale only within or between Aboriginal communities as provided for, in the relevant treaties, land claims agreements, self-government agreements or co-management agreements made with Aboriginal Peoples of Canada. The commercial component of Aboriginal and treaty rights as it relates to migratory birds and eggs is further subject to the definition, nature, and scope of said rights as may be determined by the courts, negotiated treaties, or land claims agreements. (The original 1916 Convention does not permit the sale of migratory birds and eggs under any circumstances. The said Convention of 1916 does not even provide for the sale of down and inedible by-products within or between Aboriginal communities.)
- (3) Qualified non-Aboriginal residents may take migratory game and non-game birds and their eggs throughout the year for food in areas of Northern Canada where the relevant treaties, land claims agreements, self-government agreements, or co-management agreements made with Aboriginal Peoples of Canada recognize that the Aboriginal Peoples may so permit. (Without the said treaties or agreements, the taking of migratory game and non-game birds and their eggs by such qualified non-Aboriginal residents for food shall not be permitted.)
- (4) The dates of the fall season for the taking of migratory game birds by qualified residents of the Yukon and the Northwest Territories may be varied, by law or regulation, by the proper authorities (including Aboriginal authorities and institutions involved in regulatory and conservation regimes).

Furthermore, the principles of the Protocol to amend the 1916 Migratory Birds Convention were made subject to existing Aboriginal and treaty rights of the Aboriginal Peoples of Canada under Section 35 of the Constitution Act, 1982, and the regulatory and conservation regimes defined in the relevant treaties, land claims agreements, self-governments, and co-management agreements with Aboriginal Peoples of Canada.

Concerning the management of migratory birds, the Convention stated that “the means to pursue these [conservation] principles may include, but are not limited to:

Monitoring, regulation, enforcement, and compliance;
Cooperation and partnership;

Education and information;
Incentives for effective stewardship;
Protection of incubating birds;
Designation of harvest areas;
Management of migratory birds on a population basis;
Use of Aboriginal and Indigenous knowledge, institutions, and practices; and
Development, sharing, and use of best scientific information. (MBC, Article II)

These elements constitute explicit recognition in an international treaty (the MBC as amended by the Protocol) of the importance of Aboriginal and Indigenous knowledge of the species, Aboriginal and Indigenous institutions including Aboriginal governments, and, of course, Aboriginal and Indigenous practices, which might include Eeyou/Eenou stewardship and management practices as well as the use of resources for personal and community purposes.

Another important addition to the Convention was the language concerning environmental protection, the prevention of damage to birds and their environments, including damage resulting from pollution, and the protection of habitat necessary for the conservation of migratory birds. This language is significant for Aboriginal Peoples as it identifies the real threat to migratory birds—environmental degradation and habitat loss—rather than the alleged threat of overharvesting.

In September 1995, the Parksville Protocol was amended to incorporate changes requested by the United States to provisions relating to the harvesting of migratory birds and their eggs by the Indigenous inhabitants of the State of Alaska. The Grand Council of the Crees (of Quebec)/Cree Regional Authority and the Cree Trappers Association supported the Parksville Protocol and requested the signature to and ratification of the Protocol by the Government of Canada. The Federal Cabinet approved the Protocol in September 1995, and the Governor-in-Council authorized the Minister of the Environment and Deputy Prime Minister of Canada, the Honourable Sheila Copps, to sign the Protocol amending the 1916 Migratory Birds Convention in October 1995.

On December 14, 1995, the Protocol between the Government of Canada and the Government of the United States of America amending the 1916 Migratory Birds Convention was signed by all parties in Washington, DC. Upon ratification of the Protocol by the Governments of Canada and the United States of America, the Protocol ensured substantial conformity of the 1916 Migratory Birds Conven-

tion with the Aboriginal and treaty rights of the Aboriginal Peoples of Canada. According to the Canadian Government (“Acts and Regulations: Protected Areas”), “The Protocol improves the Convention by enhancing conservation efforts to provide for and protect the habitat necessary for migratory birds, and includes an updated list of migratory birds under the Convention’s Article I. The Protocol further recognizes and endorses Aboriginal Peoples’ traditional harvesting rights and clarifies and expands some of Environment and Climate Change Canada’s obligations in relation to migratory birds (Article II to V of the Convention).”

As far as the Government of Canada was concerned, the ratification by Canada was completed once the Federal Cabinet had approved the Protocol and the Governor-in-Council had authorized a Minister of the State to sign the Protocol. The Secretary of the Interior for the United States, Bruce Babbitt, signed the Protocol on behalf of the United States of America. In October 1997, the United States Senate unanimously agreed to provide “advise and consent” to the President to ratify the Protocol. The exchange of the instruments of ratification took place in Ottawa on October 7, 1999.

The Protocol entered into force on the date the Parties exchanged instruments of ratification. Therefore, as of October 7, 1999, the Protocol entered into force. It remains in force for the duration of the Convention and is considered an integral part of the Convention, particularly for the purposes of its interpretation. In this regard, the Protocol does not replace but updates and amends the 1916 Migratory Birds Convention. Once the Protocol was enacted between Canada and the United States, Canada was obliged to give effect to its international obligation by amending its domestic legislation. Accordingly, on May 18, 2000, Minister of the Environment, the Honourable David Anderson, tabled in the House of Commons a Government Order amending the schedule to the Migratory Birds Convention Act, 1994, to incorporate the Parksville Protocol, which amended the 1916 Migratory Birds Convention.

CANADIAN DELEGATION INTERPRETATION DOCUMENT

During the negotiations leading to the Parksville Protocol, in late April 1995, the representatives of the Government of Canada undertook, in response to the concerns of the Aboriginal representatives of the Canadian delegation, to provide a document which set forth a common understanding of the purpose and intent of the amendments to the 1916 Migratory Birds Convention negotiated and set out

in the Parksville Protocol. This undertaking by the Canadian Government representatives was intended to confirm for the Aboriginal representatives, in writing, that the language of the Convention and, in one particular example, the language relating to the commercial use of birds and eggs would not be invoked by Canada in future treaty negotiations with Aboriginal Peoples as a reason for not negotiating broader commercial use provisions. The purpose of negotiating the Protocol for the Government of Canada was to permit Aboriginal and treaty rights to evolve in accordance with the understanding of these rights in Canadian domestic law. That is, the Aboriginal Representatives of the Canadian delegation wanted to ensure that there was official documentation relating to the stated intention of the parties and their perception and understanding of the language negotiated and agreed to in the Parksville Protocol. It was only appropriate then for the members of the Canadian delegation, including the Aboriginal representatives who negotiated the Parksville Protocol, to outline their common understanding of the purpose and intent of the amendments to the 1916 Migratory Birds Convention and set out in the Parksville Protocol as an aide to its interpretation. This common understanding of the parties was set out in the “Canadian Delegation Interpretation Document.”

CONCLUSIONS

The Parksville Protocol made a historically significant contribution to the recognition of Aboriginal and treaty rights of the Aboriginal Peoples of Canada and the preservation of migratory birds and their sustainable use in North America. The Parksville Protocol did not replace the 1916 Migratory Birds Convention but amended and updated it. The Protocol removed inconsistencies between the 1916 Migratory Birds Convention and the Aboriginal and treaty rights recognized and affirmed under Section 35 of the Constitution Act, 1982. It also fulfilled the commitment made by the Government of Canada in constitutionally protected, comprehensive claims agreements, including the James Bay and Northern Quebec Agreement of 1975, to negotiate an amendment to the Convention to eliminate, to the extent possible, all conflicts with the harvesting regimes established by treaties or claims agreements and to eliminate to the extent possible any conflict with the right of Eeyouch/Eenouch as well as other Aboriginal Peoples to harvest at all times of the year all species of wild fauna.

In particular, the Protocol served to update and amend the 1916 Migratory Birds Convention in recognizing and endorsing the tradi-

tional harvesting rights of Aboriginal Peoples of Canada. Consequently, Eeyouch/Eenouch of Eeyou Istchee, as well as other Aboriginal Peoples, may now conduct their activities and their traditional way of life associated with harvesting migratory birds in a manner consistent with their Aboriginal and treaty rights. The Protocol reaffirmed that the priority rests with the conservation and preservation of migratory birds. While recognizing existing management regimes, the Protocol enabled the development of new partnerships between the Government of Canada and Aboriginal Peoples in the management and conservation of migratory birds.

In conclusion, with the proper implementation of the Convention as amended, barriers to Aboriginal Peoples' traditions, which had existed for nearly 84 years, were successfully removed, and the right to exercise inherent Aboriginal and treaty rights was secured. It was one more in a series of important and ongoing actions that the Eeyouch/Eenouch of Eeyou Istchee and other First Nations of Canada have taken in their struggle for their Aboriginal and treaty rights. Guided by Eeyou's law and principles, that struggle will continue. Life, after all, is a matter of faith.

Abstract: This article is the result of a collaboration between Philip Awashish, Eeyou leader, and anthropologist Jasmin Habib. It provides an account of the process by which the people of Eeyou Istchee, also known as the James Bay Cree, sought and, in the end, succeeded in obtaining an amendment to the Convention for the Protection of Migratory Birds in the United States and Canada (1916). The James Bay and Northern Quebec Agreement signed in 1975 expressly permitted the goose hunt at all seasons and therefore conflicted with the 1916 Convention and the Act and regulations that enforced it. A protocol drawn up by Canadian and American negotiators in 1979, allowing exceptions to the closed season for Indigenous populations, was rebuffed by conservationists. However, the 1982 Canadian Constitution Act affirmed the primacy of treaty obligations of the Governments of Canada and Quebec and Indigenous peoples, and the courts ruled that it, therefore, permitted the harvesting of migratory birds. Eeyou's attitudes respecting the economic and spiritual importance of the hunt are explored in the article. The article describes how this conflict of law was successfully resolved with a new protocol in 1995.

Keywords: Convention for the Protection of Migratory Birds in the United States and Canada, Cree Nation of Eeyou Istchee, Goose Hunt, James Bay Cree, James Bay and Northern Quebec Agreement

Bios:

Philip Awashish was one of the principal negotiators and the signatory for the Cree Nation of Eeyou Istchee in the negotiations leading to the signing of the James Bay and Northern Quebec Agreement in 1975. He was an elected official and an executive of the Grand Council of the Crees/Cree Regional Authority between 1976 and 1989. He has served as Commissioner of the Cree-Naskapi Commission since 1998. He is widely called upon as a speaker and adviser, the author of several articles, reports, and expert opinions in legal cases. He is currently preparing a Cree history of how the Cree engaged in nation-building throughout the last half-century of court cases against resource developments that ignored their self-governance and rights, the negotiation and implementation of the first modern treaty in Canada (the James Bay and Northern Quebec Agreement, JBNQA), and subsequent agreements. He is an elder and teacher, guided by and renewing “miiyopimaatsiwin,” or the interconnectedness and interdependence of life, foundational to Cree’s ways of actively living and doing things.

Jasmin Habib is the Chair of the Political Science Department at the University of Waterloo, former Director of the PhD Global Governance at the Balsillie School of International Affairs (2019–2022), and founding Director of the Global Engagement Seminar Program (2016–2019). She holds a Ph.D. in Anthropology (McMaster University) and an M.A. in International Peace Studies (University of Notre Dame). Among her publications are *Israel, Diaspora and the Routes of National Belonging* and *America Observed: On an Anthropology of the United States* (co-edited with Virginia Dominguez). Her research and publications focus on the politics of empire and the practices of decolonization with a primary interest in the experiences of war-affected refugees now living in Israel, Palestine, Canada, and the United States; Indigenous practices and relations of autonomy in North America; and the architecture of consent for contemporary state violence. Her work is primarily ethnographic and collaborative. In 2022, she was honored to receive the Weaver-Tremblay Award, which is presented annually to an anthropologist who has made extraordinary contributions to Canadian applied anthropology.

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