

# **A NEUTRAL FRAMEWORK FOR MODELLING AND ANALYSING ABORIGINAL LAND TENURE SYSTEMS**

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MODELLING AND ANALYSING ABORIGINAL  
LAND TENURE SYSTEMS**

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## PREFACE

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## **Dedication**

Ki vei Ro Litiana Mataitini, na tubuqu lomani: Vinaka vakalevu na nomuni loloma,  
Bubu. Au nuitaka ni daru na sota tale mai lomalagi.

Ki vei Ruci kei Finau, na noqu i tubutubu lomani: Vinaka vakalevu na vei tuberi.

Ki vei Asipeli, na luvequ tagane lomani: Vinaka vakalevu na vei vosoti.

## **Abstract**

Land tenure and land administration are culture-laden areas, as can be seen in Canada, where Aboriginal land tenure and land administration systems are challenging the conventional theory of property rights and western models of land administration. There is a need to better understand land tenure if land administration, which is concerned with implementing land tenure policies, is to be re-designed and improved upon.

This thesis is concerned with developing a framework to guide the analysis, modelling, design and implementation of land tenure reforms for Aboriginal communities. A problem highlighted by the cross-cultural land tenure literature is the inherently biased emphasis of current land administrations towards eurocentric concepts of land and land tenure. The primary objective of this research is to help alleviate this inequitable eurocentric bias by developing an ethnocentrically equitable or neutral analytical framework for analysing and designing proposed reforms of Aboriginal land tenure and land administration systems. The major conclusion of this research is that the research objective can be achieved by developing a neutral framework that incorporates the cultural worldviews, concepts, values and aspirations of the community, and rigorously analyses, models and compares the land tenure systems of the Aboriginal group.

The neutral framework is developed by integrating concepts and approaches from anthropology, geomatics engineering and soft systems engineering. The neutral framework entails first using the comparative design criteria of worldviews, values, concepts, goals and institutions of members of a community. This allows the Aboriginal land tenure systems to be described and analysed from the cultural perspective of the

subject Aboriginal group. Conceptual logical models are then developed from the issues identified in the initial cultural analysis, to enable comparisons to be made between each developed conceptual model and its relevant existing land tenure system or subsystem. The comparisons are then evaluated to identify reforms to be made to the existing land tenure systems that are systemically desirable and culturally feasible for the subject community.

The neutral framework is tested by applying it to the Mi'kmaq of mainland Nova Scotia, an Aboriginal community in eastern Canada. Comparisons are also made with the Nisga'a and the Lheidli T'enneh communities in western Canada.

## Acknowledgements

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... *MALO* ...



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## Chapter 1: Introduction

### 1.1 Background

Land tenure may be defined very broadly as being the set of relationships concerning the acquisition, use and transfer of land and the distribution of its product [McLaughlin, 1973; Barnes, 1985; Crocombe, 1974; Opadeyi, 1995]. Land tenure systems encompass the entire spectrum of tenures or relationships and thus set the framework for developing and implementing land policy and land-related objectives [Mulolwa, 2002 and GTZ, 1998]. West [2000] noted that land tenure systems exercise considerable, even dominant, control over the interests to be enjoyed in land, over the ways in which labour and capital are applied to land, and over the distribution of the rewards of land use. Land tenure systems are therefore important because they determine the ways in which relationships are acted out, and thus the way in which interests in land – i.e., rights, responsibilities, privileges and possibilities - may be acquired, used, distributed and transferred.

Land tenure exists in an enormous range of forms all over the world. In America for instance, under Anglo-American law, at least 50 forms of rights over land exist, and a similar number has been reported to exist in continental Europe [Doebele, 1983]. Plural tenures exist in many African, Asian and Pacific Island countries, due among other causes, to the co-existence of various tribal or Aboriginal<sup>1</sup> tenure systems with centralized government-administered tenure systems. British colonies, for instance, are

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<sup>1</sup> Aboriginal tenure systems refer in this thesis to the land tenure systems of the Aboriginal peoples of the jurisdiction being studied. It should be noted that the use of the term 'Aboriginal' in Canada is enshrined in Canada's constitution; however in certain jurisdictions such as in Australia, it is a derogatory term and is thus substituted in the literature with one or more of other terms such as 'native', 'indigenous', 'customary', 'traditional' and 'tribal'. The term 'aboriginal' is therefore used interchangeably with these other terms in this thesis, in accordance with the term used by the author(s) being cited.



well known for the introduction of dual tenure systems by their British administrators, who introduced private and publicly owned lands for newly settled areas, and communally owned lands for areas inhabited or resettled by Aboriginal peoples (e.g., Canada, New Zealand, Fiji, Kenya, Botswana). In Islamic countries in the Middle East and Africa, land tenure is based on the Ottoman Land Law of 1858, which defined 4 categories of land ownership: *mulk* (private), *miri* (state), *musha* (tribal and collective), and *wagf* (charitable and religious) [Doebele, 1983]. It is clear then, from the enormous variety of tenure systems and concepts around the world, that land tenure is rooted in national and ethnic cultures [Doebele, 1983] and in history.

The importance of land tenure may be seen in the extent to which it can inhibit access to land – an issue that has long affected the Aboriginal peoples of many countries, including Canada's Aboriginal peoples. Access to land has been a major focus of international attention in recent years, especially within the United Nations agencies and international funding bodies [Dale & McLaughlin, 1999]. For instance, international conventions such as the Sustainable Development (Agenda 21) Conference in Rio de Janeiro [UNCED, 1992], the Habitat II Conference in Istanbul [UNCHS, 1996], and the World Food Summit in Rome [FAO, 1996] have reiterated the need to incorporate land tenure issues, such as access to land, into development programs. Such international conventions have noted that discrimination in inhibiting access to land exists against three broad groupings of people: women, indigenous or Aboriginal peoples, and minority groups of settlers. Research over the last decade has recognised that while there are no simple solutions to the problems emanating from such discriminating inhibitions, a step towards a solution

lies in establishing the facts concerning such issues and raising awareness of the sensitivity of the issues<sup>2</sup>.

Land administration deals with implementing policies relating to the management of land tenure. Land administration systems encompass the various regulatory mechanisms (e.g., land registration, surveying, mapping, valuation, planning) required to implement land tenure policies. Since the role of land administration systems is to implement land tenure policies by regulating land tenure systems, it follows that land tenure needs to be understood if land administration is to be improved and made more effective and efficient. The need to improve the efficiency and effectiveness of land administration systems to better implement land policies and thus better manage land tenure systems and their associated resources, has meant that land administration reform programs are a common trend for both developed and developing countries. For developing countries, successful reforms have been rare and thus the effectiveness of land administration systems in these countries remains unsatisfactory [Mulolwa, 2002]. Land administration reforms are also being implemented in developed countries, with contemporary advances in technology and as the needs of societies evolve from the mere fulfilment of market demands to embrace issues such as human rights, gender, democracy and sustainable development [Mulolwa, 2002].

A critical problem that has long plagued land and natural resource administrators is that of finding effective and equitable means of incorporating the land/resource claims and

---

<sup>2</sup> See Rose, 1996; Nichols et al., 1999; Komjathy & Nichols, 2001; and Rakai & Nichols, 2001 for examples of issues concerning women and Aboriginal peoples.

ambitions of Aboriginal peoples. The need to resolve this problem is becoming increasingly important for three reasons. Firstly, it has often been the case that areas set aside by governments for conservation and/or sustainable development initiatives are those very areas that are being claimed by Aboriginal peoples. Secondly, the advancement and maturity of modern democratic government no longer permits ignoring the property rights of Aboriginal peoples. Thirdly, the tools for including Aboriginal peoples in participatory democratic institutions are currently poorly developed and need to be improved [Barnes, 2002].

Historical evidence demonstrates that the nature of the problem of finding effective and equitable means of incorporating the land/resource claims and ambitions of Aboriginal peoples is one that will not go away. It has been assumed by governments, land managers and land administrators over the last four centuries, that once indigenous peoples saw the reputed benefits of Western land tenure institutions, they would rapidly adopt its principles and practices. This however has not happened. In fact, the resistance to viewing land and landed resources as commodities by indigenous peoples everywhere is stronger today than ever before [Barnes, 2002].

This research therefore attempts to address a serious problem for which an acceptable institutional solution must be found. Aboriginal land tenure and land administration is a culture laden area, as can be seen in Canada and internationally, where Aboriginal land tenure and administration systems are challenging the conventional theory of property rights and western models of land administration [Riddell, 2002]. Developing a culturally-sensitive or neutral analytical land tenure framework will not only assist Aboriginal peoples in land administration, land management and governance, but will

also offer new culturally-sensitised ways of looking at the human-environment relationship and the search for more sustainable solutions. Such culturally-sensitised ways of viewing land tenure systems will help to facilitate the establishment of land administration systems that are more responsive to the cultural needs, values and aspirations of the community.

This thesis involves an analytical study of Aboriginal land tenure systems in Canada's maritime provinces of Nova Scotia on the east coast, and British Columbia on the west coast. The motivation for this study arose out of research on land tenure that was conducted for the Confederacy of Mainland Mi'kmaq (CMM), a tribal council in mainland Nova Scotia<sup>3</sup>. The underlying research question posed by the CMM was, in the event of the Mi'kmaw<sup>4</sup> aboriginal title being legally recognized by the provincial and federal governments, thus providing them with access to lands/resources and the opportunity for self-government and management of their lands, *what tenure options*<sup>5</sup>

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<sup>3</sup> There are two tribal councils in Nova Scotia – the Union of Nova Scotia Indians (UNSI) and the Confederacy of Mainland Mi'kmaq (CMM). The UNSI was established in 1969 and administers the reserves in Cape Breton Island, and some of the (generally larger) reserves on the mainland portion of Nova Scotia. The CMM was established in 1986 and administers 6 reserves, all of which are on the mainland portion of Nova Scotia. Figure 4.5 in Chapter 4 depicts the reserves that comprise the CMM. Since the crux of this research was commissioned by the CMM, final research findings are directed specifically for the mainland portion of Nova Scotia.

<sup>4</sup> The Mi'kmaw Resource Guide (1994), 2<sup>nd</sup> edition, provides the following explanation for when the terms Mi'kmaq or Mi'kmaw should be used: "The word Micmac is nothing more than a corruption in spelling and pronunciation of the plural form of the Mi'kmaq as is represented by the Francis/Smith orthography. It is and has been demeaning to the Mi'kmaw people in that they would be called anything but what they are, namely Mi'kmaq or The Family. The definite article "the" suggests that *'Mi'kmaq'* is the undedicated form indicated by the initial letter "m". When declined in the singular it reduces to the following forms: *nikmaq* – my family; *kikmaq* – your family; *wikma* – his/her family. The variant form Mi'kmaw plays two grammatical roles: 1) it is the singular of Mi'kmaq and 2) it is an adjective in circumstances where it precedes a noun (e.g. Mi'kmaw people, Mi'kmaw treaties, Mi'kmaw person, etc.)."

<sup>5</sup> In this thesis the term 'tenure options' is intended to refer to what 'models' of land tenure systems are available for the bands to choose from.

*would be available for their bands to choose from?* The above question was even more significant, given the federal government's current policy of devolving responsibility for management of reserve lands to First Nations.

The above question stimulated the goal of this research, which was to identify and/or design land tenure models appropriate to the needs of the Aboriginal community studied. To this end the thesis first develops a conceptual analytical framework for analysing, modelling and comparing Aboriginal land tenure systems from the Aboriginal community's perspective. It then uses the findings from the modelling and analyses to identify and/or design land tenure reform options for the Mi'kmaq of mainland Nova Scotia. The major conclusion of this research is that the research goal can be achieved by developing a framework that incorporates the cultural worldviews and aspirations of the community; and rigorously analyses, models and compares the land tenure systems of the Aboriginal group.

## ***1.2 The Research Problems***

As noted in the previous section, the main problem that this research is concerned with is the identification, design and development of alternative land tenure models for an Aboriginal community. It uses the Mi'kmaq of mainland Nova Scotia as a case study, in order to provide the community with land tenure options that they can choose from to meet their needs. The problem of identifying, designing or developing alternative land tenure models includes clarifying:

- what land tenure models are available,
- why they are appropriate, and
- the strengths and limitations of each model

This research is also concerned with a problem that continues to affect existing land tenure models and land administration systems – that of tenure eurocentricity. Tenure eurocentricity refers to the eurocentric bias that has tended to dominate many land tenure models, due chiefly to the extension of European concepts and customs through European colonialism. During European colonialism, the different cultural values, belief systems, lifestyles, and economic and political objectives of the colonising society led to local perception and concepts of land tenure issues being misunderstood, underplayed, misrepresented or simply ignored by the colonising institutions [Bohannan, 1960; Doebele, 1983; Benda-Beckmann, 1995; Fingleton, 1998; Benda-Beckmann & Benda-Beckmann, 1999]. Tenure eurocentrism has long affected the management and administration of land tenure systems in Canada's Indian or First Nation reserves, as well as the resolution of Aboriginal rights in Canada [Sutton, 1997]. In Canada and various other countries, including Australia and New Zealand, Aboriginal peoples are being granted the opportunity to control the management of their land tenure systems. Many of them are doing this by attempting to incorporate their concepts of land into their land tenure systems and resulting land administration systems. This raises the need to develop an ethnocentrically neutral land tenure framework that attempts to incorporate both Aboriginal and Eurocentric concepts of land tenure.

Other problems addressed in this research include those of the duality of tenure systems, legal pluralism, tenure pluralism and continuum of tenure. While these problems are important for a holistic understanding of a land tenure system, they were deemed to be of secondary importance to the problem of tenure eurocentricity and hence will not be addressed in great depth in this research. They are nevertheless discussed here to provide

a comprehensive picture of the problems affecting comparative cross-cultural land tenure research.

The **duality of tenure systems** revolves around the dual nature of land being both a public good and a private good at any one time. Land is a public good in that because it is permanent and not limited to one specific generation, it is available for the benefit of the public at large, now and in the future. Each generation therefore has a moral duty to use it with a view to those who follow [Doebele, 1983]. On the other hand, land is also a private good in that each person has an innate territorial need for his/her own private territory; a need which has been manifested into ownership of land and a house. While privately held lands have the advantage of ensuring the most efficient and optimum use of land, their main disadvantage lies in the difficulty of lower income groups to access such lands [Payne, 2000]. Publicly held lands are therefore aimed at resolving this inequity by promoting the ability of all sections of society to obtain access to land [Payne, 2000].

Benda-Beckmann [1995] argued that legal and economics scholars have tended firstly, to deal mainly with private property law and secondly, to do so in a synchronic dimension<sup>6</sup>. This ignores the political nature of (public) property rights and the processes of inheritance [Benda-Beckmann, 1995]. Benda-Beckmann [1995: 309] further argued that their use of individualist assumptions has prevented them from analysing the

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<sup>6</sup> synchronic dimension refers to law that applies over one lifetime or generation only; unlike diachronic dimension, where law would span two or more lifetimes or generations - thus inheritance plays a big role in acquisition of tenure interests.

“interrelations between individual interactions and social change, in particular to plural legal property systems”. It is clear then that the issues that stem from the dual nature of land may be resolved by identifying tenure arrangements that can reconcile the contradictions between the public and private natures of land [Doebele, 1983]

**Legal pluralism** is the term that was introduced by legal anthropologists such as Pospisil [1971], Moore [1978] and Griffiths [1986], to refer to the simultaneous existence of multiple legal systems pertaining to tenurial rights in social organizations. Wiber [1993:2] defined it as “a situation where more than one body of law is found to co-exist, each competing for the loyalty of a group of people”. The co-existence of private individual rights with communal rights was clearly documented by Pospisil [1971] and Crocombe [1971] in their research in the South Pacific region. Pospisil [1971] first stimulated the social science approach to legal pluralism with his concept of ‘legal levels’ – a concept that he developed when he observed the existence of different levels of rights while conducting comparative cross-cultural studies in the Kapauku highlands of Papua New Guinea. Pospisil [1971] thus proposed that a state of *legal pluralism*, encompassing both communal and individual tenure systems, existed in both tribal and western societies. Pospisil’s view has been supported by the subsequent research findings of other researchers, including Grossi [1981], Bacon et al. [1982], Wiber [1993], Benda-Beckmann [1995], Delville [1999] and Barry [1999].

Consequently a legacy of complex plural constructions of tenure interests (i.e., rights, responsibilities, restrictions and possibilities) now exists in many jurisdictions, and particularly in former European colonies – what may be described as being a state of tenure pluralism. **Tenure pluralism** refers to the simultaneous existence of plural tenure



systems as a result of the existence of legal pluralism, and of different cultural and political systems at any given time. These plural tenure interests may include for instance:

- the colonially introduced tenure interests (e.g., interests held by Band Councils in Canada's Indian or First Nation reserves);
- the colonially recognized traditional interests that resembled European concepts of private law ownership (e.g., socio-political responsibilities and rights of traditional chiefs);
- the traditional interests of the colonised peoples that may not be legally recognized by the colonial or current administration (e.g., traditional gathering, hunting, fishing rights, restrictions and responsibilities).

These plural interests continue to influence people's dealings with land, regardless of whether or not they have been officially recognized by state law. It is therefore important that any framework used to comprehensively compare and analyse Aboriginal tenure systems must recognize and incorporate the existence of tenure pluralism in its jurisdiction.

The fifth problem addressed in this research is that of the **continuum of tenure systems**. This refers to the existence of land tenure systems not as distinct, clearly defined rigid categories, but along a continuum of various categories at different stages of sophistication (Benda-Beckmann & Benda-Beckmann [1999] and Payne [2000]). Land tenure systems can therefore be arranged along a continuum stretching, for instance, from a traditional tenure system to a modern tenure system [Crocombe, 1971]; [Barnes, 1985]; [Payne, 2000]. The continuum of co-existing plural tenure systems exists for many reasons, of which a major one is colonialism [Benda-Beckmann & Benda-Beckmann,

1999]. However colonialism has tended to favour the land tenure concepts and perceptions of the colonizers, at the expense of the concepts and perceptions of those colonized [Benda-Beckmann, 1999]. Thus for many colonized Aboriginal peoples, such as the Indians or First Nations of Canada, this has meant that eurocentric concepts of tenure<sup>7</sup> based on simplistic models that distinguished between distinct disparate classes of communal and individual tenures, have been used to guide the establishment and management of land tenure systems in their jurisdictions. To be effective then, a comparative analytical framework must incorporate the reality of plural tenure systems co-existing along a continuum, in accordance with their prevailing legal, socio-political, economic, technological and ecological conditions.

In summary then, any land tenure model selected for the Mikmaq will need to identify tenure arrangements that are able to resolve the four problems discussed here as follows:

- minimize ethnocentric biases that may exist, particularly eurocentric biases that currently dominate tenure models – by developing a land tenure framework that incorporates the worldviews and aspirations of the subject community;
- reconcile the contradictions inherent in the public and private natures of land – by attempting to balance the need for equitable and efficient land tenure systems;
- recognize and incorporate the existence of plural tenure systems – by attempting to develop land tenure systems that are sensitive to the important needs of all communities

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<sup>7</sup> European tenure systems tend to be based on individual or privately held rights to land being treated as a commodity that can be freely traded in an open market. Aboriginal tenure systems on the other hand tend to be based on land not being perceived as a tradeable commodity, but as an important part of an individual or community's identity and life, with much emotional, spiritual and cultural attachments associated with them.

- reconcile the existence of a continuum of plural tenures in its jurisdiction – by attempting to develop a land tenure framework that can identify and balance the needs of holders within various tenure systems at varying levels of sophistication

These problems reflect the complexities of understanding land tenure systems – complexities which resurface in different forms, over changing conditions and over time, and which by their dynamic nature, require a multidisciplinary and holistic approach to resolve them.

The literature shows that while valuable lessons may be learnt from the experiences of other jurisdictions, it is rarely possible to satisfactorily import such land tenure systems, because of the inherent cultural, historical, political, economical, technological, ecological, geographical differences between all jurisdictions. It is therefore left to each jurisdiction to develop its own home-grown land tenure system and corresponding land management system, to meet its local needs. This thesis is thus ultimately concerned with developing a home-grown land tenure system for the Mi'kmaq of mainland Nova Scotia.

### ***1.3 Thesis Questions***

The following questions are to be addressed in this thesis:

- 1 What analytical frameworks exist for studying Aboriginal land tenure systems?
- 2 How can we identify or design a land tenure system that meets the needs and aspirations of an Aboriginal group, such as the Mi'kmaq of mainland Nova Scotia?
- 3 What can be learnt from the experiences of other First Nation communities with the initiation, development and implementation of reforms to their land tenure systems?

Given the complexities associated with the inherently dynamic nature of land tenure systems and the resulting multidisciplinary approach needed to deal with them, a systems approach will be used to address the research questions above. Based on systems theory, in which a system is viewed as a complex of organized interacting components, the systems approach allows an object of interest – in our case, land tenure – to be studied and analysed as a system [Zevenbergen, 2002]. The systems approach has been successfully used in the surveying/geomatics engineering discipline [e.g., by McLaughlin, 1971; Dale 1979; Barnes, 1988; Nichols, 1993; Barry 1999; Zevenbergen, 2002] to analyse and model cadastral systems. Its strength lies in its treatment of all components as being an essential part of a total system – an approach that is useful for applications that require a holistic and multidisciplinary approach for resolving problems.

This research thus uses the systems approach to develop a conceptual analytical framework to describe, analyse, model, compare and evaluate Aboriginal land tenure systems from an ethnocentrically equitable or neutral perspective – a perspective that is based on the perspective of the subject Aboriginal group, and not on the imported eurocentric perspective that has historically dominated the land tenure systems of colonised Aboriginal peoples.

#### ***1.4 Thesis Objectives & Assumptions***

The following objectives were used to find answers to the problem questions identified in the preceding section:

1. to develop comparators (comparative criteria) for describing and comparing the land tenure systems of different Aboriginal groups from a neutral or ethnocentrically equitable perspective

2. to design and develop a conceptual analytical framework for analysing, modelling, comparing and evaluating the land tenure systems of different Aboriginal groups from a neutral or ethnocentrically equitable perspective
3. to use the comparators and conceptual analytical framework to analyse, model, compare and evaluate the land tenure systems of Aboriginal peoples in Canada's provinces of Nova Scotia and British Columbia

### ***Assumptions***

Two assumptions have been made in this research. First and foremost, this research assumes that it is possible to describe, analyse, model and compare Aboriginal land tenure systems from an ethnocentrically equitable or neutral perspective. Secondly, it is assumed that despite the existence of different land tenure systems it is possible to have one standard framework to compare land tenure systems of different cultures.

### ***1.5 Contributions of this Research***

Denman & Prodano [1972] pointed out over three decades ago, that there was a need to understand and resolve land tenure problems before developing any systematic land use or resource use policies, this need continues to persist today. This thesis develops a conceptual analytical land tenure framework that is intended to assist policy makers, land administrators and stakeholders to better understand the underlying worldviews, perceptions, values, goals and aspirations of each other concerning their land tenure systems. The analytical land tenure framework will therefore contribute towards a better understanding of cross-cultural Aboriginal land tenure systems and their problems, and thus facilitate the determination and development of more effective and appropriate land tenure policies and land administration systems.

The development of the analytical framework is based on using a soft systems approach, whereby all components are treated as an essential part of the total system. The framework is used to first describe and analyse Aboriginal land tenure systems from the cultural perspective of the subject Aboriginal group. Issues or problems identified in the initial cultural analysis are then used to develop conceptual models, which are then used to enable comparisons to be made between the functions or operations of each developed conceptual model and its relevant existing land tenure system (or subsystem). The comparisons are then evaluated to identify desirable and feasible reforms that are required to be made to the existing land tenure system of the subject community.

Such a framework will be useful for evaluating existing Aboriginal land tenure systems and for assisting in the appropriate improvement or reform of those tenure systems. The framework will also be useful for evaluating land tenure models for a jurisdiction.

Land tenure is multidisciplinary area. In drawing from the disciplines of anthropology, law, soft systems engineering and geomatics engineering to develop the underlying concepts and analytical framework for this dissertation, this research demonstrates the multidisciplinary nature of land tenure, and the contribution that geomatics engineering can provide towards furthering knowledge and skills in this area.

## ***1.6 Scope of Thesis***

This thesis is limited to a study of Aboriginal land tenure systems in selected parts of eastern and western Canada. This study has most of its emphasis in the province of Nova Scotia, where some field visitations and testing of the framework was carried out, in the summer and fall of 2001, and in the spring and summer of 2002. Two Aboriginal

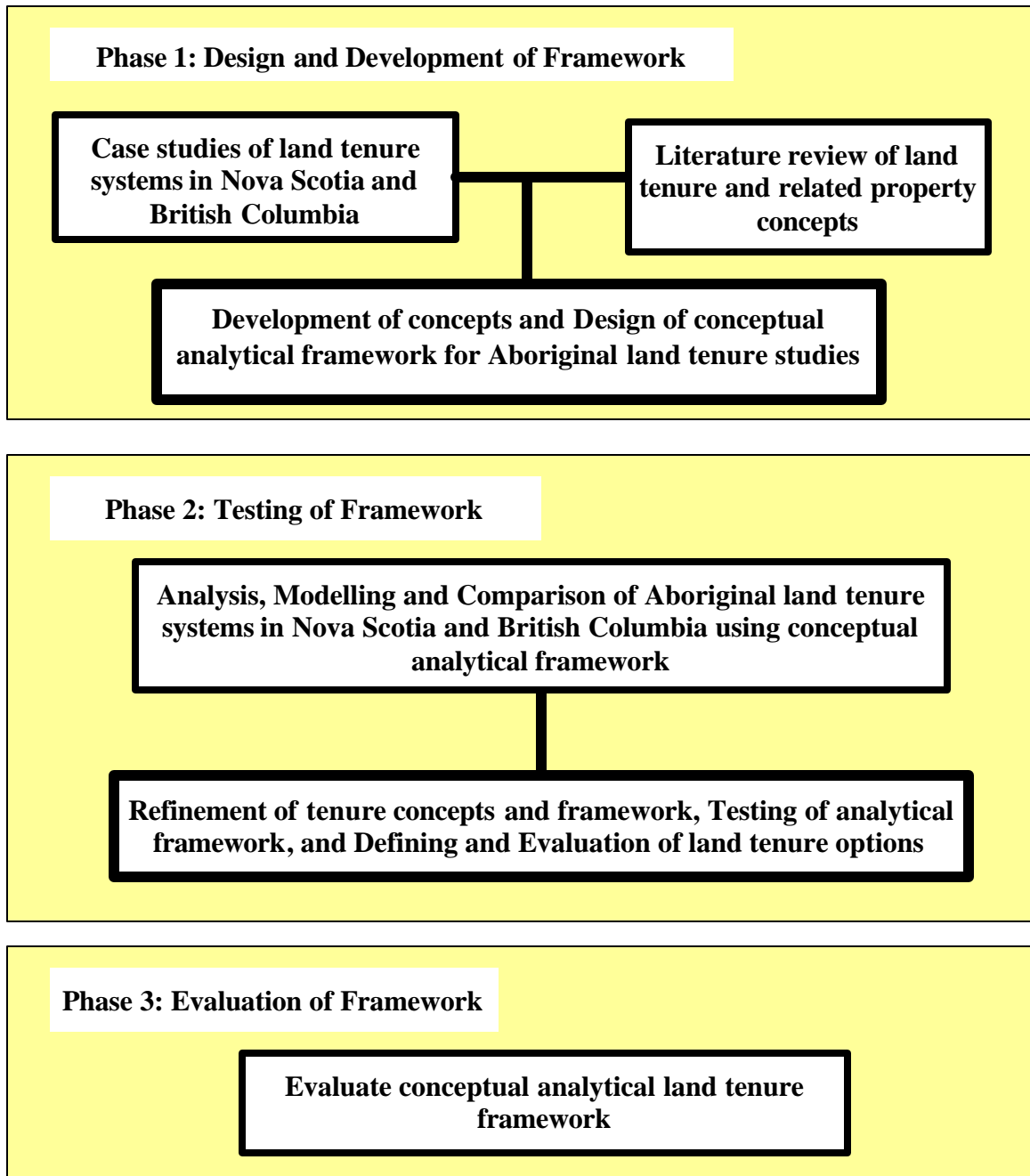
communities in the province of British Columbia, the Nisga'a Nation and the Lheidli T'enneh Nation, are also used to test the validity of the comparative analytical framework in a national context.

### ***1.7 Thesis Methodology***

The study commenced in 2000, in conjunction with research to be conducted for the Confederacy of Mainland Mi'kmaq (CMM), a tribal council in the province of Nova Scotia. The research, which was conducted from 2001 to 2003, involved synthesising, analysing, modelling and comparing traditional and contemporary Mi'kmaw land tenure arrangements, reviewing land tenure reform initiatives of selected Aboriginal communities in British Columbia, and evaluating various land tenure models that were relevant to the identified needs of the Mi'kmaq of mainland Nova Scotia. Figure 1.1 on the next page illustrates the research methods that were used to meet the thesis objectives stated in section 1.4.

**Phase 1** involved conducting a literature review of land tenure and property-related concepts, and this included examples of Aboriginal land tenure systems in Canada. This led to the formulation of land tenure concepts and the design and development of a suitable conceptual analytical framework for analyzing, modelling, comparing and evaluating Aboriginal land tenure systems.

**Phase 2** involved the testing and further development of the framework. It included a limited number of field visitations in Nova Scotia, and further research to refine and use the framework to analyse, model, compare and evaluate selected aboriginal land tenure systems in the provinces of Nova Scotia and British Columbia in Canada.



**Figure 1.1 : The Research Method**

This enabled the validity of the concepts and framework developed in Phase 1 to be tested and refined. It also enabled land tenure options to be defined and evaluated. Due to temporal, logistical and financial constraints of the research, the framework was not rigorously tested by detailed field visits to each community studied. The conceptual



framework was instead tested and refined by applying it to information obtained from case studies conducted by other researchers, of the communities studied.

**Phase 3** involved evaluating the conceptual land tenure framework.

## ***1.8 Data Collection***

The major sources of data or information have been obtained from the ethnographic writings of social science scholars such as historians, anthropologists, archaeologists and geographers. The data was collected as follows:

1. extensive reading of literature obtained from relevant institutions in Canada, and around the world was carried out. Much of the literature on the Mi'kmaq was obtained from the library of the Confederacy of Mainland Mi'kmaq (CMM) in Nova Scotia. The internet was also used to supplement existing literature in journals and books, particularly for literature on First Nations in British Columbia.
2. the office of the CMM was visited at various times during the summer and fall of 2001, and in the spring and summer of 2002. The visits included formal meetings, informal interviews and informal discussions with officers of the CMM.

## ***1.9 Organization of Thesis***

Figure 1.2 provides an overview of this thesis, which is organized into 6 chapters. Chapter 1, this chapter, discusses the research problems, and concludes with an overview of the thesis.

Chapter 2 provides an introduction to the concepts of land tenure, and sets the context of land tenure in terms of land administration and land management

Chapter 3 reviews approaches that have been taken over the years towards conducting cross-cultural land tenure research and Aboriginal land tenure research in particular; and

designs and develops a conceptual analytical framework for describing and analysing land tenure systems, and for identifying, modelling, comparing and evaluating options for land tenure reform.

Chapter 4 uses the conceptual analytical framework to describe, analyse, model, compare and evaluate the land tenure systems of the Mi'kmaq in Indian reserves in mainland Nova Scotia.

Chapter 5 uses the neutral analytical framework to describe, analyse, compare and evaluate the land tenure systems and tenure reform initiatives in two Aboriginal communities in British Columbia, the Lheidli T'enneh Nation and the Nisga'a Nation.

Chapter 6 evaluates the neutral analytical framework developed in Chapter 3 and used in Chapters 4 and 5. It then summarizes the conclusions that can be drawn from this research, and offers some recommendations for further research in the area.

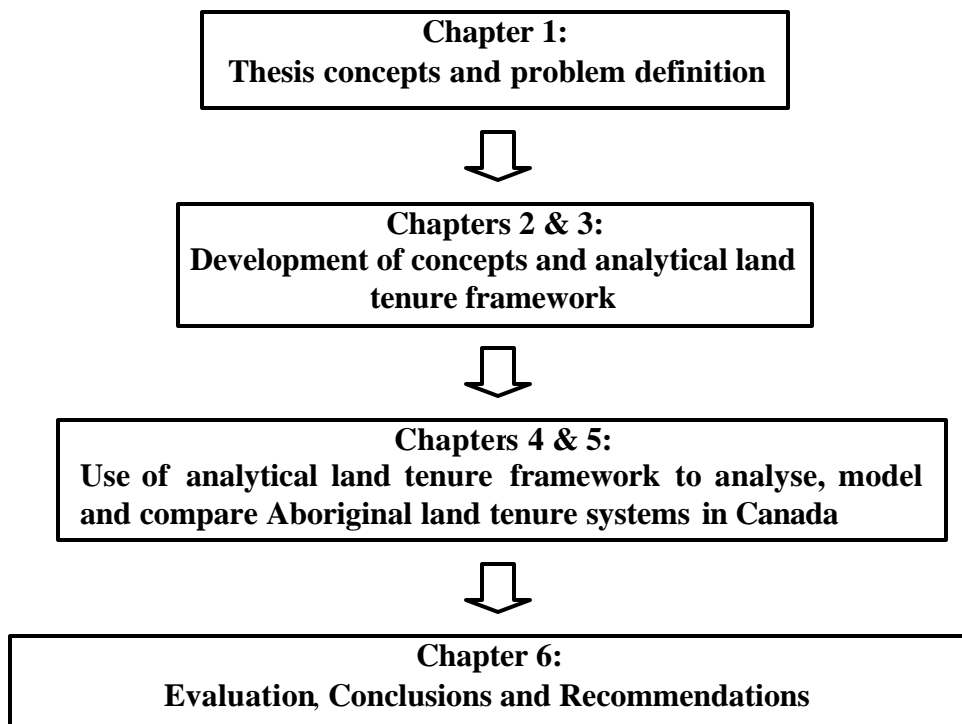


Figure 1.2 : Thesis Overview

## **Chapter 2: Land Tenure and its Significance for Land Management and Land Administration**

### ***2.1 Introduction***

The objective of this chapter is to review concepts of land, land tenure, land administration and land management, and to understand the significance of land tenure for land management and land administration. Chapter 2 begins with a review of basic concepts and definitions for land and land tenure. This is followed by a review of basic definitions of land administration and land management in order to illustrate the linkages between land tenure on the one hand, and land administration and land management on the other hand. An overview of existing land tenure models is then provided, to set the context for Chapter 3.

### ***2.2 Land Tenure – Basic Concepts and Definition***

As noted in Chapter 1, land tenure may be broadly defined as being the set of relationships concerning the acquisition, use and transfer of land and the distribution of its product [McLaughlin, 1973; Barnes, 1985; Crocombe, 1974; Opadeyi, 1995]. However Nichols [1993] pointed out that in common law jurisdictions<sup>8</sup>, the term ‘land tenure’ has tended to be defined very narrowly as the system of *estates in land* that was derived from the English feudal system – such as freehold estates and leasehold estates. It is clear then that some ambiguity surrounds the term land tenure, which has been

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<sup>8</sup> common law jurisdictions are those former and current countries of the British Commonwealth, that, as a result of British colonization, have legal systems based on English jurisprudence. English jurisprudence incorporates laws based on long-standing, common principles of law as espoused in court decisions; as well as statutory law. Canada, New Zealand, Australia, Fiji, Kenya, India are examples of some common law jurisdictions.

defined over time and in different jurisdictions, from varying disciplinary perspectives, including legal, economical, sociological, anthropological, political and surveying/geomatics engineering perspectives.

Before proceeding with a definition of land tenure, it is pertinent to look first at the meaning of the words 'land' and 'tenure' themselves. A principle of anthropology is that in order to be able to understand human behaviour, it is necessary to understand how the behavers themselves interpret behaviour [Bohannon, 1960]. Thus in order to understand the relationships that a group of people have with land, it is important to look at what the group means by 'land', and at the cultural concepts that they use to express those meanings. Bohannon [1960:100] surmised that "Only by asking 'What is Land?' can a reasonable cross-cultural comparison of land practices be begun".

### **2.2.1 Land**

The term 'land' has many meanings, which vary with the worldviews, philosophies, values, goals, concepts, and use that each person, discipline, profession or society has of, for, or does with, land. For instance, economists may see land as a resource to be exploited or conserved in order to achieve sustainable economic development. Lawyers however may see land as a "volume of space stretching notionally from the centre of the earth to the infinite in the sky, and associated with it are a variety of rights which determine what may be done with it" [Dale & McLaughlin, 1988:3]. To many other people, land may simply be the space for human activity as reflected in the many different forms of land use [Dale & McLaughlin, 1988]. Alternatively, many Aboriginal or indigenous peoples see land as being one with them (or vice-versa) – as their metaphoric mother, from whom all human, animal, plant and spiritual life forms spring.

In his analysis and critique of concepts used in land tenure studies, and their applicability to cross-cultural studies, Bohannan [1960] found that much of the concepts and thinking about land had been and remained largely ethnocentric. [Bohannan, 1960] opined that the Western<sup>9</sup> or occidental ethnographic concept of land stems from the practice by Westerners, of dividing the earth's surface using an imaginary grid that can itself be manipulated and redefined. The grid is then plotted on paper or on a sphere and then the task of correlating the grid to the physical features of land and sea commences. Systems of measurement have been perfected by surveyors for positioning all features on the earth's surface, for symbolizing the information acquired, and for transferring it to the gridded map. Land is therefore "a measurable entity divisible into thing-like 'parcels' by means of mathematical and technical processes of surveying and cartography" [Bohannan, 1960: 102]. This complex notion of 'land', with its accompanying technology, is an absolute essential to the Western or occidental system of land tenure [Bohannan 1960].

One economic perspective of land is provided by Barlowe [1978], who defined land as being:

*any portion of the earth over which rights of ownership, stewardship, or use may be exercised, including the earth's surface, water covered lands, water and mineral resources, as well as features and resources attached to the earth whether they be natural or artificial.*

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<sup>9</sup> 'Western' is used here to refer to those jurisdictions which are associated with the Western world, as a result of being colonized by western Europe. Current dominant concepts of land and tenures in such jurisdictions generally emerged as a result of western European colonization – thus introduced tenure systems have tended to be individually -oriented and geared towards the land market and capitalism.

As mentioned earlier 'land' is perceived differently by most indigenous or Aboriginal peoples. For instance, the Aboriginal people of North America believe that their territories are original grants from the Creator [Little Bear, n.d.]. Aboriginal peoples tend to view land as the source of their identity, and thus land is important socially, spiritually, emotionally, physically, economically and legally to them. Although land may be transferred within each society or group, it is generally inalienable to non-group members. However land has been known to have been transferred to non-group members in some areas of the world, such as in parts of Papua New Guinea, Fiji, and other parts of the South Pacific region [Pospisil, 1971 and Ward, 1997]. Kawharu [1977:vii], in his book on Maori land tenure, wrote:

*From the day he first set foot in New Zealand, perhaps a thousand years ago, land has given the Maori a sense of identity and of purpose.*

To the Aboriginal peoples of Australia, the term 'land', which they refer to as 'country', encompasses the land, sea, sky, subsurface areas and all living and non-living things on them. The anthropologist Rose [1996:8] describes their views of land as follows:

*country is multi-dimensional ~ it consists of people, animals, plants, Dreamings [sic.]; underground, earth, soils, minerals and waters, surface water, and air. There is sea country and land country; in some areas people talk about sky country. Country has origins and a future; it exists both in and through time.*

It can be seen from the preceding section, that land means different things to different people, and is greatly influenced by a people's culture. For the purposes of this thesis, land is defined largely from a surveying/geomatics engineering perspective to be:

*the multi-dimensional space for human activity which has associated with it, a variety of rights, responsibilities, restrictions and possibilities, that determine what may or may not be done with it, as reflected in the many different forms of land use*

**Definition of Land**

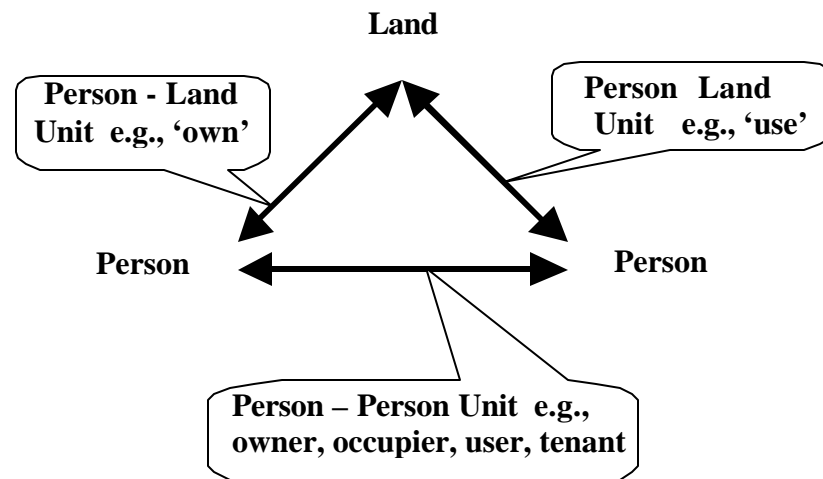
### 2.2.2 Tenure

‘Tenure’ is even more ambiguous than ‘land’. As a concept, the term tenure is derived from the Latin word *tenere*, meaning “to hold” or “to possess”. The term is therefore based on the assumption that ‘land’ (divisible into parcels, as discussed earlier) can be held [Bohannan, 1960]. This implies that a ‘relationship’ exists between a person (who may be an individual or group of persons) and a ‘parcel’ of land. Such a relationship may be referred to as a “**person-land**” unit [Bohannan, 1960]. In practice such ‘person-land’ units of relationship are prevalent in western tenure systems, where they are described using occidental property concepts such as ‘own’, ‘rent’, ‘sell’ [Bohannan, 1960].

However, since a parcel of land cannot in its entirety, be held physically, the term ‘land tenure’ has evolved as a legal term to mean the *right* that one has to *hold* land rather than the simple fact of holding land itself [Bruce, 1998; McLaughlin, 1973; Macpherson, 1978]. As Bruce [1998:1] aptly observed: “*One may have tenure but may not have taken possession*”. Bohannan [1960] also observed that the concept of ‘rights’ is used when social relationships are the main consideration.

On the other hand, scholars have also pointed out that the term ‘tenure’ refers to the *rights* utilized against other *persons* [e.g., McLaughlin, 1973; Barnes, 1985; Opadeyi, 1995]. Therefore a “**person-person**” unit must also be considered as another unit of social relationship [Bohannan, 1960]. Figure 2.1 on the next page has been developed by the author to illustrate the two main units of social relationship implied by the term ‘tenure’.

Confusion also exists over the conceptual meaning of the term ‘rights’, because as Bohannan [1960:103] argued, while ‘rights’ are attributes of persons against other persons, ‘rights in land’ also exist as attributes of a piece of land. Thus while Western tenure systems are dominated by person-land relationships (i.e., rights in land), Aboriginal tenure systems are dominated by strong person-person relationships (i.e., rights against others) [Bohannan, 1960]. This means that for Aboriginal tenure systems, gaining access to land depends on membership in a community (i.e., on person-person relationships), as opposed to occidental (Western) tenure systems, where access to land depends on one’s ability to pay for it, and not on one’s membership in a community. In fact, access to land determines one’s membership in an occidental community.



**Figure 2.1 : Units of Social Relationship implied in term ‘Tenure’**

It should be noted that ‘tenure’ has also been used to refer to the *interests* (or bundle of rights, responsibilities, restrictions, possibilities) held by people in land. Stoljar [1984:31-31] defined the term ‘interest’ as being “simply something one wants or describes, or something one should want or desire.” In differentiating between a right



and an interest, he suggested that a right is a type of interest and that it contains a benefit for the right holder, however “not every interest gives rise to a right, interest being the wider notion of the two [Stoljar, 1984:31].”

In addition, others have defined ‘tenure’ as being rights and obligations [e.g., McLaughlin, 1973]; or rights, responsibilities and restraints [e.g., McLaughlin, 1976, and Nichols, 1993]; or rights, duties and privileges [e.g., Crocombe, 1974]; or the rights, duties, privileges and possibilities [Benda-Beckmann, 1999] that people hold in connection with land.

### **2.2.3 Use of Native Terms**

‘Land tenure’ is a legal term that originated from English feudalism, after the Normans conquered England and replaced all previous land rights with grants from the new monarchy [Bruce, 1998]. Each grant had obligations attached to it, such as providing military services to the English monarch as and when required and giving alms to the church. ‘Land tenure’ is thus a western European (or occidental) term and concept that as mentioned earlier, is derived from the Latin word *tenere* meaning ‘to hold’ or ‘to possess’. It is therefore a term that is linguistically foreign to non-west European societies, which therefore raises inherent problems of interpretation and understanding, when trying to apply the concept into a non-European aboriginal society.

Little Bear [n.d.] has pointed out that land tenure and property concepts of a particular society are best understood by an appreciation of the society’s worldview and philosophy, since the roots of those concepts arise from and are ramifications of the society’s worldview and philosophy. Benedict [1959] also emphasized the variability of

all cultures in her book, *Patterns of Culture*, and pointed out that each unique way of life needed to be understood “in its own terms, free from the biases of a Western viewpoint”.

Bohannan [1969] similarly pointed out that in looking at the set of relationships that make up land tenure, it is important to consider people’s geographical concepts and perceptions of their territory, their concepts for describing and dealing with their relationships with land, and the social systems in which they interact spatially with each other. Bohannan [1969] argued that in an unbiased scientific study of cross-cultural land tenure systems, it was important to avoid fitting foreign concepts of land tenure into a local area<sup>10</sup>, and thereby not imposing a Eurocentric view of land tenure into the study. It was recommended that this could be done by clarifying assumptions being made by a researcher, and by diligently incorporating the local people’s own views, perceptions and concepts of land tenure into the study of their land tenure system [Bohannan, 1969].

#### **2.2.4 Other Tenure-Related Concepts**

Associated with the term land tenure are other terms such as ‘individual tenure’, ‘communal tenure’, ‘property rights’ and ‘ownership’. It is therefore instructive to look at these terms and their connection with the term ‘land tenure’.

##### *Individual Tenure, Communal Tenure and Customary Tenure:*

The terms ‘Individual tenure’ and ‘Communal tenure’ are misleading, being based on the false assumption that all rights to land are held in the case of individual tenure, by individuals and in the case of communal tenure, by the community [Crocombe, 1974;

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<sup>10</sup> Bohannan described this practice of fitting foreign concepts of land tenure into a local area as “back translation”.

Tiffany, 1976]. As Crocombe [1974: 9] succinctly pointed out, the terms “obscure the fact that in all tenure systems there are multiple rights to all land”. For instance, it is common in the South Pacific to find examples of where in a single territory, some rights are held by individuals through inheritance and some because of their particular status in the community such as chiefs or church leaders. Some rights are also held by specific groups (such as lineages, village councils, committees), and others by the community and/or nation as a whole.

While the terms ‘individual tenure’ and ‘communal tenure’ may be useful in distinguishing between the rights of the individual or group, the terms are nevertheless confusing because they have been used indiscriminately, to imprecisely describe and group together diverse forms of tenure systems [Crocombe, 1974]. For instance, “communal tenure” has been used to describe classic communistic, cooperative, and a wide variety of Aboriginal or customary tenure systems [Crocombe, 1974]. Crocombe [1974:9] argued that such catchwords “oversimplify a complex situation”, and should be avoided and replaced with descriptions, for each specific society, of the actual rights, duties and privileges held by individuals, families, groups and communities in each society.

Others have also referred to Marx, Engels and Maine for their advocacy for the theory of ‘primitive communism’ [e.g., McLaughlin, 1976; Benda-Beckmann, 1995], and to the French historian Coulanges for his arguments for ‘individual tenure’ [McLaughlin, 1976]. McLaughlin [1976] and Jaffe [personal communication, 2001] have opined that the controversy was steeped in political overtones and is now considered to be sterile. Consequently, the terms ‘individual tenure’ and ‘communal tenure’ will continue to be

used in this dissertation to simply distinguish between the rights held by an individual and by a group of people.

The term 'Communal tenure' has also been used interchangeably with the terms 'Traditional tenure', 'Indigenous' tenure, 'Aboriginal' tenure or 'Customary tenure,' to refer to the tenure system held under the customary or tribal laws and traditions of an Aboriginal group. Simpson [1976] opined that customary land tenures evolve naturally towards individual land tenures, a view espoused earlier by Marx, Engels and Maine's advocacy for the theory of 'primitive communism', and actively promulgated by colonial authorities in their newly settled colonies [Benda-Beckmann & Benda-Beckmann, 1999]. However, while Simpson's assertion may be true of some urban areas and urban or semi-urban areas that have rapidly growing areas under informal settlements, empirical research confirming such a view for non-urban areas does not exist. In fact Bruce & Migot-Adholla's [1994] research in sub-Saharan Africa has shown that individualisation reforms have sometimes resulted in a reversion back to customary land tenures.

### *Common Property*

The term 'commons' is another term that originates from English feudalism, that refers to the area on which all landholders of a locality have a right to activities such as grazing stock or gather wood [Bruce, 1998]. Historically, this is not a form of ownership but a pattern of legally guaranteed use, whereby all members are free to use the land simultaneously [Bruce, 1998:2].

In his article 'The tragedy of the commons', Hardin [1968] argued that a commons would inevitably be overused and degraded, since each user has the incentive to use as much of

the resource as possible. Bruce [1998] noted that others however argued that a commons did not involve unregulated use, since rights to use them were limited to community members only. Furthermore, many commons have rules limiting use, such as limiting the seasons for grazing, hunting or fishing; limiting types of livestock, etc. This led to the distinction between ‘open access lands’ which refers to unregulated use of a common property resource; and ‘common property’ which refers to a situation where there are controls over the use of the resource [Bruce, 1998].

‘Communal lands’ refers to lands over which a large amount of community control exists for its land use [Bruce, 1998]. Thus while the community is regarded as owning the land, it allocates use rights (or usufructuary rights) to the land to its members for cultivation. This implies a long-term right for an individual or household to use land and may include inheritance rights, but not necessarily a right to sell the land. A community may in fact retain the right to reallocate land holdings among its members. A communal land tenure system usually includes both use rights allocated to households or individuals, as well as common property in other resources [Bruce, 1998:2].

Bruce [1998] has also pointed out that the terms ‘common property’ and ‘open access’ are used in combination with other terms: e.g., a resource may be described as a ‘common property resource’ or an ‘open access resource’, depending on whether its use is controlled or not. The term ‘common pool resource’ may also be used interchangeably with the term ‘common property resource’, where its use is controlled by the community at large.

Economists have often held that where well-defined individually held property rights to resources are absent, and resource rights are instead held in common by many individuals, over consumption of the resources will occur [Ostrom, 1990]. They surmise that the resources will be exploitable only when privatization or enforcement by external forces is introduced into the area. In her pioneering book, *Governing the Commons*, Ostrom [1990] has forcefully argued that other solutions exist, and that stable institutions of self-government can be created if certain problems of supply, credibility, and monitoring are solved. Ostrom uses institutional analysis to examine different ways - both successful and unsuccessful - of governing the commons. Using case studies in Japan, Switzerland, Philippines, Canada and Turkey, Ostrom demonstrated that, contrary to Hardin's "tragedy of the commons" propositions, common-pool problems can sometimes be solved by voluntary organizations rather than by a coercive state [Ostrom, 1990]. Among the cases considered are communal tenure in meadows and forest, irrigation communities and other water rights, and fisheries.

### *Property*

'Property' is both a concept and an institution, and the conceptual meaning of property changes over time, in relation to the changing purposes that property as an institution, is expected to serve in a society [Macpherson, 1978]. As an institution, property is "a man-made institution that creates and maintains certain relations between people" [Macpherson, 1978:1].

As a concept, much ambiguity also surrounds the term 'property'. Thus as noted earlier, while in common everyday usage property is viewed as "things", it is seen in law and in property-related literature as not things but *rights*, rights in or to things [Macpherson,

1978:1]. Most modern writers have also treated property as being synonymous with *private* property, an *exclusive* individual right – my right to exclude you from some use or benefit of something. However such ambiguous misuses of the concept of property arose due to historic circumstances [Macpherson, 1978]. Macpherson [1978:2] argued that the first use (of viewing property as ‘things’) was “merely a popular misuse” of the term and was due to a limited understanding of what property is. The second use (of treating property as a private, exclusive individual right) however was a serious misuse of the term, caused by a genuine misconception, that affects the whole theoretical handling of the concept of property by many modern writers [Macpherson, 1978]. It must therefore be emphasized that property means *rights*, not things; and that the concept of property *cannot* logically be confined to private property [Macpherson, 1978:2].

Property can be defined as a right or enforceable claim to some use or benefit of something, whether it is a right to a share in some common resource or an individual right in some particular thing [Macpherson, 1978:3]. An analogy may be made between the case of a person’s private property, where property refers to the person’s right to exclude others from something; and the case of common property, where property is the right of each individual not to be excluded from something [Macpherson, 1978:4]. As an enforceable claim, property is a political relation between persons, since there must be some body to enforce it [Macpherson, 1978].

The literature shows that there has been a tendency for scholars in the legal, economic and legal anthropology disciplines to use the term ‘property’ when talking about rights in land, including particularly ownership rights in land, rather than the term ‘land tenure’. These disciplines have inherently assumed rights in land to include the responsibility and

restrictions that accompany each right. However, given the fact that many Aboriginal groups emphasize responsibilities and restrictions rather than rights in land, the term 'land tenure' is more appropriate than the term 'property' for them. The distinction between the two terms is that, as pointed out by Nichols [1993], property with its emphasis on 'rights', is a subset of land tenure, which is a much broader term, with its broader emphasis on 'rights', 'restrictions' and 'responsibilities'. Land tenure for instance, allows for the definition and recording of multiple rights, restrictions, responsibilities and possibilities- features that historically have tended to be largely excluded by property-based land registration systems, with their strong emphasis on recording of *rights* in land [Nichols, 1993]. In this thesis 'property' is viewed as a subset of 'land tenure', and therefore any references to 'property' are deemed henceforth to apply to 'land tenure' as well, unless specifically stated otherwise.

### *Ownership*

In English jurisprudence, the 'ownership' of property rights in land does not focus on the land itself, but on the *right* to possess the land [McLaughlin, 1973; Macpherson, 1978; Bruce, 1998]. Thus, one does not own the physical land itself, but rather one owns certain property rights over it [McLaughlin, 1973]. There are many types of legal rights that may be held, and these have often been described metaphorically as a 'bundle of rights'. Such rights include rights to use land (for planting, gathering, hunting, trapping, logging, fishing, mining, building, etcetera); rights to pass over the land; rights to benefit from and distribute the products of the land; rights to transfer one's rights to others; and so on.



However as Crocombe [1974: 8] has argued, the term ‘ownership’ may also be misleading, because although it implies the “absolute possession of all rights or almost all rights by a single party”, there is in fact “no land tenure system in existence wherein all rights to any parcel of land are held by a single party.” Like Pospisil [1971], Crocombe also recognized the existence of plural laws and tenures, in noting that since rights in land are held at so many levels and are so widely distributed, particularly in tribal societies, use of the word “*ownership*” tends to oversimplify a complex reality and prevents understanding of the true nature of the relationship involved [Crocombe, 1974: 9]. Crocombe [1974] therefore recommended avoiding the use of the term “*ownership*” altogether when examining land tenure systems, and looking instead at the various types of rights and duties that are recognized, and the groups or parties that hold them. The term ‘ownership’ will thus be used sparingly in this dissertation to refer to ‘rights of ownership’ when used.

### 2.2.5 Land Tenure

As noted earlier, land tenure may be broadly defined as being the set of relationships concerning the acquisition, use and transfer of land and the distribution of its product [McLaughlin, 1973; Barnes, 1985; Crocombe, 1974; Opadeyi, 1995]. In order to emphasise the fact that tenure relationships involve both people and land, land tenure is defined in this dissertation as being:

*the relationships that people have with land and with each other, concerning the acquisition, use, transfer and distribution of land and its products.*

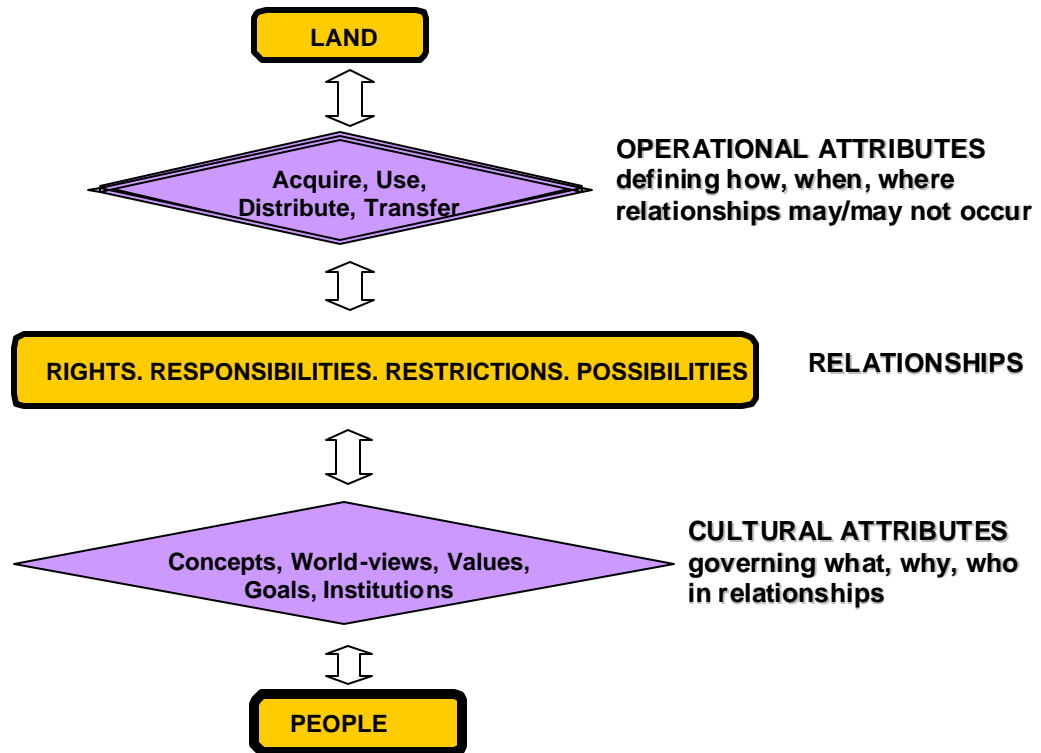
**Definition of Land Tenure**

Such relationships are expressed in more detail as the *rights, responsibilities, restrictions and possibilities* (also referred to collectively as the *interests*) that define what people

may or may not do with land. The relationships are inherently governed by the people's *concepts* of land, by their *world-views, values and goals*, and by their *institutions* (i.e. the established customs, practices and laws of a society or group). Figure 2.2 has been developed by the author to depict a conceptual framework for this definition, showing the primary attributes of land tenure and the linkages between people and land.

As depicted in Figure 2.2, land tenure refers to the relationships that link people to land and to each other. The linkages may occur in different ways, and these have tended to be expressed as attributes of rights, responsibilities, restrictions and possibilities. For instance, the right of 'ownership' provides the right holder with an enforceable right to use and benefit from the land. However the 'owner' or right-holder's use of land is restricted by the rules, regulations and laws that are in place – e.g., planning regulations in urban areas, traditional or customary rules in Aboriginal jurisdictions.

Associated with these rights and restrictions are the responsibilities that the right-holder has to meet fiscal or social obligations, such as paying property tax in an urban area, or sharing the benefits or resources gained in a rural Aboriginal community (e.g., a Mi'kmaw reserve) in Nova Scotia. In addition, associated with these rights, restrictions and responsibilities, are other possibilities that may exist, such as aboriginal rights, as a result of reforms in the values, policies, laws, leadership and political aspirations of the government and people. The evolution of aboriginal rights and aboriginal title in Canada, Australia and New Zealand demonstrate how 'possible attributes' of land tenure may develop and be accepted over time in a jurisdiction.



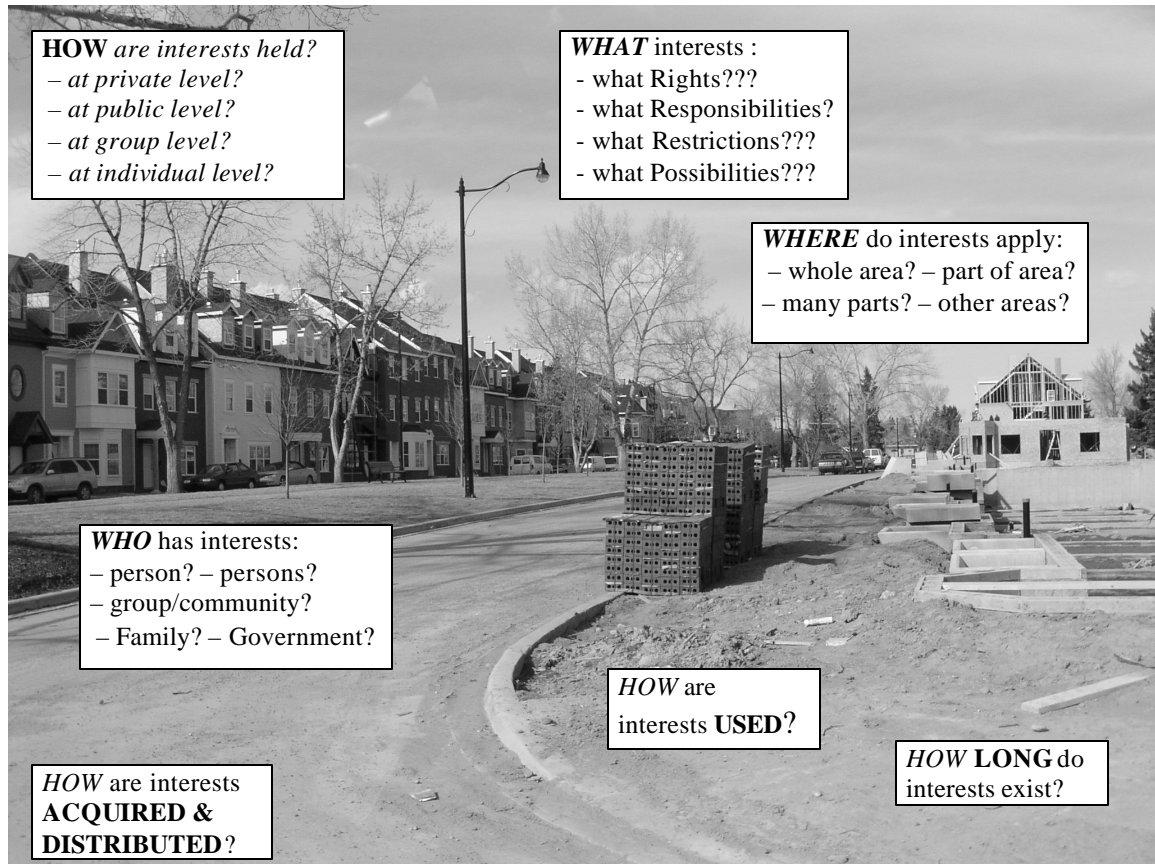
**Figure 2.2 : Conceptual Framework for defining Land Tenure**

The rights, responsibilities, restrictions and possibilities are defined by two principal classes of land tenure attributes – Cultural and Operational Attributes. *Cultural Land Tenure Attributes* refers to the class of attributes that govern and define the relationships – i.e., they structure the relationships in a society. These cultural or structural attributes include people’s concepts of land, their worldviews, and their values and goals. They also include the people’s institutions<sup>11</sup>, which help to both form, perpetuate and regulate their concepts, worldviews, values and goals. These cultural attributes tend to vary over time and space in accordance with customs, the physical environment, prevailing

<sup>11</sup> institutions have been defined as the humanly devised constraints that shape human interactions [Sevatdal, 1999] or as the ‘rules of the game in a society’ [North, 1990].

technologies, resources, time and ethological factors. Thus the cultural attributes (and resulting rights, responsibilities, restrictions and possibilities) of nomadic cultures in the Sahara desert will differ from those of farming cultures in the prairies of North America, and from the densely populated urban cultures of Asia.

The second principal class of attributes, *Operational Land Tenure Attributes*, is the class that defines what functions may and/or may not be done with the land. These operational or functional attributes include the processes of acquiring, using, transferring and distributing interests (rights, responsibilities, restrictions and possibilities) in land. For instance, one may acquire the right of 'ownership' over a residential parcel of land in an urban settlement, through inheritance, or through sale in a land market. Associated with the right of ownership will be a responsibility to pay taxes as required, and to use and enjoy the land without jeopardising the rights of neighbours to also use and enjoy their land. The right to use the acquired residential land will generally include building a dwelling structure and other suitable structures (e.g., fences, footpaths, garage) as required. Use rights (e.g., to construct and live in the building) will however be restricted by zoning regulations, and associated with the rights and restrictions will be responsibilities to keep the structure in reasonably good condition; and possibilities that the rights, restrictions and responsibilities may change in the future with changing values, goals and aspirations of the society. The right-holder or 'owner' in practice has the right to transfer his/her rights and to distribute any benefits accruing from his/her ownership right as desired. Figure 2.3 was prepared by the author to illustrate some of the common questions that arise in common-law jurisdictions, when attempting to describe or define these cultural and operational land tenure attributes.



**Figure 2.3 : Typical Questions associated with describing Land Tenure Attributes**

To date, cross-cultural land tenure studies have tended to focus more on operational land tenure attributes, with less emphasis being placed on conceptual cultural land tenure attributes. While numerous studies have been conducted on the institutional aspects of cultural attributes, minimal attention has been placed on studying those aspects of cultural attributes that relate to a people's concepts, worldviews, values and goals. In addition, although economists have studied land values, these have tended to be done from a land market-oriented perspective that has tended to ignore the values of the people in the territory or community. The literature suggests that unless a community's concepts, values, worldviews, and goals of the community are considered, land

administration systems established to manage land tenure systems will continue to be ineffective and inefficient.

## ***2.3 Relating Land Tenure to Land Administration and Land Management***

### **2.3.1 Land Administration**

As noted in Chapter 1, land administration deals with implementing policies concerning the management of land tenure. Nichols [1993:41] has noted that land administration is one of the primary land management processes and therefore derives its objectives “within the context of the broader land management objectives”. Nichols [1993: 10] has therefore defined ‘land administration’ as being a mechanism to manage the land tenure system, including managing arrangements for monitoring and enforcing many of the laws and regulations affecting tenure. Land Administration includes the processes of land registration, land conveyancing, surveying & mapping of land parcels, land valuation & taxation, dispute resolution, regulation of land tenure, and the creation & allocation of interests in land [Nichols, 1993].

Land Administration has also been described as being: “the operational component of land tenure; land administration provides the mechanisms for allocating and enforcing rights and restrictions concerning land” [McLaughlin and Nichols, 1989:79]. This definition reflects the historic emphasis of land administration on the operational or functional attributes of land tenure and its neglect of the cultural or structural attributes of land tenure.

Land Administration is therefore defined in this dissertation as follows:

*Land Administration is a mechanism for implementing policies concerning the management of land tenure in a community. This includes operational arrangements for acquiring, using, transferring and distributing interests in land. Such operational attributes are defined, monitored and enforced by the cultural attributes of the community, which include their worldviews, values, concepts of land, goals, and institutions.*

**Definition of Land Administration**

The advent of computers has led to land information systems (LIS) becoming an indispensable tool for documenting information on land tenure, and consequently for land administration and land management.

### **2.3.2 Land Information Systems**

A Land Information System (LIS) may be defined as being a “combination of human and technical resources, together with a set of organizing procedures, that produces information in support of some managerial requirement” [Dale & McLaughlin, 1988: p.8]. A land information system supports land administration and land management by recording, storing and providing land tenure information relating to the land, its related resources, the users, and land use activities of the users, including improvements made to the land. As noted earlier, Nichols [1993] reasoned that the emphasis of land tenure on the rights, responsibilities and restraints relating to the use and benefit of land, enables a broader perspective of what can be recorded about land. For instance, it allows for the definition and recording of multiple rights - features that historically have tended to be largely excluded by property-based land registration systems [Nichols, 1993]. In addition, the fundamental fact that land tenure systems are dynamic allows for the recognition and recording of new changing relationships to the land - such as customary

rights, restrictions and responsibilities, evolving water and oceanic rights, women's access to land [Nichols, 1993].

Nichols [1993] has also pointed out that generally land administrations, with their emphasis on managing property [and not land tenure] information do not adequately address the responsibilities attached to land. In addition, Kaufmann [1999] recorded that public restrictions attached to land have not been adequately addressed by current land administrations. Kaufmann [1999] has envisioned in a study commissioned by the International Federation of Surveyors, that, given continuing technological and land administration reforms, public restrictions would be addressed by land administration systems by 2015.

### **2.3.3 Land Management**

Land Management has been defined by O’Riordan as being:

*the process of decision making whereby resources are allocated over space and time according to the aspirations and desires of man within the framework of his technological inventiveness, his political and social institutions, and his legal and administrative arrangements.* (quoted in [Nichols, 1993: p.11])

Dale and McLaughlin [1988] provide a more expansive (and non-gendered) definition when they define land management as being the process of both decision-making and implementing the decisions made about land. The contribution of land management to sustainable development was recognized by the International Federation of Surveyors (FIG) [FIG, 1995:1] in its definition of land management as being “the process of managing the use and development of land resources in a sustainable way”. The United Nations Economic Commission for Europe [UN-ECE, 1996: 5] has noted that land management “covers all activities concerned with the management of land as a resource



both from an environmental and from an economic perspective.” Land Management includes the following [UN-ECE, 1996]:

- property conveyancing, property assessment and valuation,
- the development and management of utilities and services,
- the management of land resources such as forestry, soils or agriculture,
- the formation and implementation of land-use policies and environmental impact assessment, and
- the monitoring of all activities on land that affect the best use of that land

Land management thus includes land administration, and like land administration, relies considerably on relevant and up-to-date land tenure information, and thus on land or geographic information systems, for its success.

Land is a scarce resource, particularly in densely populated settlements, and therefore has been and continues to be, a source of conflict that has sometimes led to war and the unnecessary loss of human lives. Land administration systems have, as a result, been developed over the centuries to help minimise land disputes, provide more security in tenure, facilitate economic development of land resources and support governance through taxation. In times of colonial expansion, land administration systems have been established to regulate and control land tenure systems in order to facilitate settlement in newly settled colonies, such as those in North America and the South Pacific. Today land administration systems continue to implement policies related to the management and control of land tenure systems in order to among others, minimize land disputes, facilitate orderly settlement of newly subdivided areas and regulate the sustainable use of land and its resources.

### **2.3.4 Issues underlying the Management and Administration of Land Tenure Systems**

#### **Customary rights and Land sales**

Free sale of land by Aboriginal peoples to non-Aboriginal outsiders is neither likely nor desirable, in order to protect outright land losses [Crocombe, 1971]. However, outright prohibition on rural Aboriginal land sales has the disadvantage of restricting the adjustment that people would ordinarily make to land. Thus as Crocombe [1971:389] recommended, land transfer systems need to be multiple and flexible and adjusted periodically to changing needs.

Simpson [1976] shared Crocombe's view of undesirable free land sales by Aboriginal peoples living under customary land tenures when individual title is being introduced for the first time for them. He observed that "Too often has it been shown that there is no more certain way of depriving a peasant of his land than to give him a secure title and make it as readily negotiable as a bank-note." [Simpson, 1976:236]. Simpson therefore strongly advocated controlling land dealings for such circumstances, noting:

*There can really be no doubt, therefore, that it is essential to make provision for control when land dealing begins to develop in areas of customary tenure, and especially of course if land registration (which alone makes control possible) is introduced to facilitate that dealing. [Simpson, 1976:236].*

#### **Land Registration and Dispute Resolution Issues**

A major difference between (unregistered) customary rights and registered land rights is that while customary rights are "conditioned by the ever-changing state of social relations", registered land rights "depend on specific contractual arrangements" [Crocombe, 1971:388]. Crocombe further makes the distinction that:

*In a subsistence economy with shifting agriculture, customary tenures can adjust more effectively to demographic and economic realities. In urban or industrial areas, however, registered tenures are essential.* [Crocombe, 1971: 388-389]

Issues concerning how indigenous peoples' rights are to be **recorded** and how competing land use **disputes are to be resolved**, continue to affect land claims in Australia, Canada and many other countries around the world. In Australia, the legal recognition of Aboriginal land tenure and the promulgation of laws providing for the recognition and protection of areas of particular significance to indigenous Australians have had the benefit of trying to promote equity for Australia's indigenous peoples. However as the lawyer Neate [1999] pointed out, they have also generated the need to **precisely describe** the *location* and *extent* (i.e., the boundaries) of indigenous interests in land. This requirement incorrectly assumes [Neate, 1999]:

- that indigenous and non-indigenous Australians have similar concepts and perceptions of what a boundary is;
- that the boundaries of native title estates can be delineated precisely; and
- that indigenous people's lands specifically exclude others from using the same land and hence do not overlap with each other

Various other researches have shown that the above assumptions do not apply to many indigenous peoples all over the world [Peterson, 1976, Berndt, 1976, Rose, 1976]. Neate notes that questions about whether clear boundaries exist have generated lively debate, some of the questions being (1999:157):

- a. whether the traditional land tenure system of the group includes the notion of precise boundaries which are able to be plotted on a map or by any other physical description;
- b. what a group's traditional notion of boundaries means;

- c. how one can describe the extent of traditional country when the land of one group overlaps with the land of neighbouring groups

Neate recommends that in responding to the newly generated need for precisely described boundaries of indigenous interests (i.e. Native Title lands), there is a need for surveyors and professionals involved with precise land descriptions, to understand that (Neate, 1999:184):

*The rights and interests of indigenous people in their traditional country will not necessarily accord with conventional legal notions of property; in some areas two or more groups of people may have mutually recognized traditional rights and interests; in some areas the boundaries of traditional estates may be clearly defined by reference to natural features, but elsewhere the boundaries are imprecise, permeable and periodically negotiable.*

It may not be possible to plot such traditional estates using conventional cartographic means, or to record them using typical cadastral standards. Rather than attempting to record traditional estates using cadastral boundaries, it may be better to note, by references to areas mapped for other purposes, which group has (either alone or with others) which traditional rights and interests [Neate, 1999].

## **2.4 Existing Land Tenure Models**

### **2.4.1 Basic Model of Land Tenure Systems**

The most simplistic land tenure model is one that classifies land tenure systems into three broad categories, based on systems of property ownership [Demsetz, 1967]:

- communally-owned tenures,
- private individually-owned tenures and
- state or publicly-owned tenures

However the three broad categories understate the complexity of actual *de facto* tenure systems, as all three categories may co-exist at any one time – as noted earlier, the

literature shows that communal tenures have long existed together with individual and public tenures in both western and non-western countries [Benda-Beckmann, 1999 and Posposil, 1971]. Furthermore, the practice of equating communal tenures with Aboriginal groups and individual tenures with western tenures is a gross oversimplification of western and non-western tenures, since all tenure systems have both types of rights [Crocombe, 1974; Wiber, 1993 and Grossi, 1981]. For instance, Benda-Beckmann [1995] found that private individual and communal property or tenure rights existed together in the local African and Asian societies of the 19<sup>th</sup> and 20<sup>th</sup> centuries. Similarly, Bacon et al. [1982] reported that individual tenures do exist among indigenous groups in their studies in South Africa. Barry [1999] also observed the simultaneous existence of both types of rights in his doctoral study of cadastral systems in South Africa during periods of uncertainty.

The three broad categories also do not allow for illegally owned tenures, such as lands informally settled by ‘squatters’, and furthermore, do not distinguish between lands used by land owners themselves and those used by lessees. Thus while the model is useful for a simplistic, very general distinction between the three categories, they are not useful for a realistic depiction of land tenure systems operating at any one time.

#### **2.4.2 Extended Model of Land Tenure Systems**

Another model suggested by Payne [2000], effectively extends the three general categories above into the following five categories, to denote the most common types of tenures (based on property ownership systems) in developing countries:

- customary tenure
- private tenure
- public tenure

**Box 2.1 : Characteristics of each type of tenure category (from Payne [2000])***Customary tenure*

This is found in most parts of Africa, the Middle East, Melanesia and (once upon a time) North America. It evolved from largely agricultural societies in which there was little competition for land, and therefore land had no economic value in itself, but where survival was often precarious and depended upon careful use of the land to ensure an ecological balance. In customary systems, land is regarded as sacred, and man's role considered to be one of stewardship, to protect the interests of future generations. Allocation, use, transfer, etc, are determined by the leaders of the community according to its needs, rather than through payment, though some form of token amount (e.g. beer money, or cattle) is often extracted as a sign of agreement. With urban expansion, the system has become subject to commercial pressures and may only benefit members of the group.

*Private tenure*

This is largely an imported concept in developing countries and is generally concentrated in urban areas, where it was designed to serve the interests of colonial settlers. As such, it may co-exist with other indigenous tenure systems. The system permits the almost unrestricted use and exchange of land and is intended to ensure its most intense and efficient use. Its primary limitation is the difficulty of access by lower income groups.

*Public tenure*

Virtually all societies acknowledge the concept of public land ownership to some degree. In socialist countries, all rights are vested in the state, while in capitalist countries, it may be restricted to a narrow range of public requirements, such as strategic or communal uses.

The concept of public land ownership is largely a reaction to the perceived limitations of private ownership in that it seeks to enable all sections of society to obtain access to land under conditions of increasing competition. Although it has frequently achieved higher levels of equity than private systems, it has rarely achieved high levels of efficiency due to bureaucratic inefficiency or systems of patronage and clientelism.

*Religious land tenure systems*

The traditional forms of tenure in Islamic countries represent another variation in this range. There are four main categories of land tenure within Islamic societies. 'Waqf' land is land 'held for God', whilst 'mulk', or private lands, are also protected in law; 'miri', or state controlled land which carries 'tassruf' or usufruct rights, is increasingly common, whilst 'musha', or communal lands, are gradually ceasing to be a major factor under the requirement by land registries that ownership of land parcels has to be proven (United Nations 1973:Vol V:37). The religious foundations of the Waqf hold substantial areas of land in some cities, notably Baghdad and Beirut, which are protected from legislative encroachment (United Nations 1973:Vol V:37). Because they are outside the commercial land market, waqf lands are often inefficiently managed (as in Lahore).

*Non-formal tenure categories*

As stated above, these include a wide range of categories with varying degrees of legality or illegality. They include regularised and un-regularised squatting, unauthorised subdivisions on legally owned land and various forms of unofficial rental arrangements. In some cases, several forms of tenure may co-exist on the same plot, as in Calcutta, where 'thika' tenants rent plots and then sublet rooms to others who sub-let beds on a shift system, with each party entitled to certain rights. Some of these non-formal categories, such as squatting, started as a response to the inability of public allocation systems or commercial markets to provide for the needs of the poor and operated on a socially determined basis. However, as demand has intensified, even these informal tenure categories have become commercialised, so that access by lower income groups is increasingly constrained. Despite this, they represent the most common urban tenure category in many countries and accommodate the majority of lower income households. They are also often expanding more rapidly than any other category.

- religious tenure and
- informal tenures

Box 2.1 on the previous page provides Payne's more detailed descriptions of the characteristics of each type of tenure. The informal tenures category is useful for its portrayal of actual tenure practices. However Payne's model is influenced by eurocentric concepts and ideologies of land and land tenure, as can be seen for instance, in the oversimplified description of customary tenure, and for the dismissal of *waqf* lands being inefficiently managed by religious institutions, based on a land-market driven perspective of land. Thus, given the above this model is not adopted in this research.

### 2.4.3 Detailed Model of Land Tenure Systems

A third slightly more detailed model is that developed by Doebele [1983], which is again based on the legality of rights of property ownership held within each category:

- i. ***Informal, de facto tenure (non-customary)***: referred to formerly as 'squatting' tenures, this category covers privately held lands and/or public lands that are occupied and used informally – i.e., without any state-guaranteed rights. It represents a high proportion of residential areas of major cities of developing countries.
- ii. ***Informal, de facto tenure (customary)***: refers to customary land that is occupied and used informally, under arrangements made between customary land owners and their tenants. Note that while it is legal under customary law, it is not legal under the statutory laws of the governing state.
- iii. ***Private freehold***: the most familiar form of tenure, this category covers land 'owned' legally by a private individual or corporation, in conditions where land use and disposal is controlled by market forces and by public regulations.

- iv. **Private leasehold:** tenures in which a private individual or corporation leases and/or rents the land from a private owner for a specified time, and usually, with restrictions being placed on certain uses and activities.
- v. **Public freehold:** category for lands that are ‘owned’ by the government and used by the public – such as public building sites, parks, and roads.
- vi. **Public leasehold:** category for sites owned by the government and leased to a private individual or corporation for a specified time, with specified restrictions on uses and activities.
- vii. **Formal Communal ownership (customary):** category for territory that is formally (i.e. legally) held and controlled communally by an ethnic or cultural group as a whole, with chiefs or leaders allocating specific sites for residential, agricultural, and other uses, and resolving any disputes. Individuals have usufructuary rights to their lands, which are passed on to their heirs, but may not be alienated to members who are not part of their group.
- viii. **Formal Communal ownership (non-customary):** category for lands held communally by various land owners who voluntarily pool their ownership into one organization that controls all dealings relating to the pooled lands – examples include a cooperative organization, communally held lands of a condominium, or communally held lands of a religious group, such as the Mennonites or Hutterites of Canada. Some of these tenures have developed to prevent land speculation and/or gentrification of low-income housing areas, while others have developed in response to external threats to the community from government.

Each category has its advantages and limitations depending on the context (socio-cultural, political, economic, ecological, technological) in which they occur. It should also be noted that while these broad categories emulate tenure arrangements in many jurisdictions, they do not always reflect the total reality of actual arrangements, due to the problems associated with eurocentricity, the dual nature of land as a private and public



good, tenure pluralism, and tenure continuum, which were discussed in Chapter 1. The implications of these problems for comparing and analysing cross-cultural tenure systems, and for reforming or developing land administration systems to better manage land tenure systems, needs to be examined and appropriate solutions incorporated where required. For instance, resolving issues stemming from the dual nature of land requires identifying tenure arrangements that can reconcile the contradictions between the public and private natures of land [Doebele, 1983].

## ***2.5 Concluding Summary***

The objective of this chapter was to review concepts of land, land tenure, land administration and land management, and to understand the linkages between land tenure, land management and land administration. Chapter 2 therefore began with a review of basic concepts and definitions for land and land tenure. This was followed by a review of basic definitions of land administration and land management in order to illustrate the linkages between land tenure on the one hand, and land administration and land management on the other hand. An overview of existing land tenure models was then provided, to set the context for Chapter 3. It was concluded that while the detailed model of land tenure systems was the most realistic of the three models reviewed, they each do not always reflect the total reality of actual land tenure arrangements. This is due largely to the problems associated with tenure eurocentricity, the dual nature of land as a private and public good, tenure pluralism, and tenure continuum, as discussed in Chapter 1. The alleviation of these problems using a conceptual analytical land tenure framework will be examined in the next chapter.

## **Chapter 3: Design of a Conceptual Analytical Framework for Cross-cultural Land Tenure Research**

### ***3.1 Introduction***

The purpose of Chapter 3 is to fulfill Objectives 1 and 2 of this thesis, namely, to develop comparators or design criteria for describing and comparing land tenure systems; and to design and develop a conceptual analytical framework for describing, analysing, modelling, comparing and evaluating the land tenure systems of different Aboriginal groups from an ethnocentrically neutral perspective. This chapter critiques approaches that have been taken over the years towards conducting cross-cultural land tenure research, and designs and develops a conceptual analytical framework for describing, analysing, modelling, comparing and evaluating cross-cultural land tenure systems from an ethnocentrically neutral perspective.

### ***3.2 Concepts & Theories affecting Comparative Land Tenure Research***

The Canadian cross-cultural land tenure literature spans over 400 years of research, from the writings of the early explorers and missionaries in Canada such as Cartier [1534] and Denys [1672] in the sixteenth and seventeenth century, to the contemporary writings of scholars such as Henderson et al [2000], Ray [2003] and McNeil [2002] in the twenty-first century. Since land tenure systems involve people and their dynamic culturally-based relationships with each other and with land, cross-cultural land tenure studies are multidisciplinary, involving various disciplines, including:

- biblical & classical studies [LeClercq, 1691; Les Carbot, 1606; Westra, 2003]
- history [Denys, 1672; McGee, 1974; Whitehead & McGee, 1983; Bear Nicholas, 1994; Coates, 1999; Dickason, 2002; Ray, 2003]

- anthropology [Speck, 1915; Leacock, 1954; Gluckman, 1969; Bohannan, 1960; Crocombe, 1971; Pospisil, 1971; Tindale, 1976; Sinclair, 1975; Peterson, 1986; Berndt, 1981; Rose, 1996; Kawharu, 1977; Little Bear, 1998; Feit, 1991; Davis, 1991; Henderson et al., 2000; Tanner & Henderson, 1992; Griffiths, 1986; Wiber 1993; Benda-Beckman, 1995; Rigsby, 1998]
- geography [Chapelle, 1978; Brookfield, 1973; Frazer, 1973; Ward, 1997],
- law [Simpson, 1976; Grossi, 1981; Fingleton, 1998; Gilling, 1991; McHugh, 1983; Slattery, 1983; Bartlett, 1986; Henderson, 1980; Morse, 1984; Henderson, 1996; Neate, 1999; McNeil, 2002],
- economics [Demsetz, 1967; Denman & Prodano, 1972; Feder, 1999; Dunkerley, 1983; Doebele, 1983; de Soto & McLaughlin, 1995; Bruce & Migot-Adholla, 1994; Jaffe, 1998 ; Payne, 2000]
- surveying/geomatics engineering [Dowson & Shepherd, 1952; McLaughlin, 1971; Dale, 1979; Dale & McLaughlin, 1988; Nichols, 1993; McLaughlin, Wells & Nichols, 1993; Ogleby, 1993; McEwen, 1992; Barnes, 1985; Larrison, 1991; Rakai & Williamson, 1995; Ezigbalike & Benwell, 1994; Ezigbalike et al., 1996; Barry, 1999; Sevatdal, 1999; Fourie & Williamson, 1998; Brazenor, 2000; Williamson & Ting, 2001; Mulolwa, 2002; Zevenbergen, 2002].

Such land tenure studies have identified various issues affecting the cross-cultural study of land tenure systems. One issue concerns the need to efficiently synthesize and integrate where relevant, the various concepts, theories and problems of the multiple disciplines involved with studying and working in land tenure. As discussed in Chapter 1, other challenging issues affecting cross-cultural comparative studies include eurocentric influences on post-colonial land tenure systems [Benda-Beckmann, 1995; Peterson 1976; Bohannan, 1960], legal pluralism [Benda-Beckmann, 1999; Wiber, 1993; Delville, 1999] and the existence of tenure systems along a continuum [Barnes, 1985; Payne, 2000]. Since comparative studies tend to draw largely from ethnographic studies (studies of social organizations of ethnic groups), some distinction should first be made between ethnographic studies and comparative studies.

In distinguishing between ethnography and comparative studies in land tenure, Bohannan [1969] pointed out that *ethnography* was concerned with describing the land tenure system of different cultural groups from the cultural groups' perspectives, using their concepts and ideas. *Comparative studies* on the other hand, was concerned with stringently describing different cultures from the perspective of the researcher's own profession or discipline, using concepts and ideas endorsed by the discipline [Bohannan, 1969]. The latter means that in order to be able to compare for instance, a cultural group's traditional land tenure system based on its traditional laws and institutions, with a colonially-established land tenure system based on English jurisprudence and institutions, a comparative researcher would first need to identify or develop a 'theory' to describe the laws and institutions of the cultural group being studied. This would then allow the researcher to develop a 'framework' with which to compare the laws and institutions of the subject culture with English jurisprudence, and thus compare the land tenure systems of the two cultural groups.

The next section will begin with a critique of two epistemological problems underlying comparative land tenure studies. This will be followed by a review of various concepts and theories that have been developed to compare cross-cultural land tenure systems. It will also involve a discussion of some of the issues that have emanated from the various cultural, economics, legal and geographical perspectives and concepts that have been used to conduct comparative studies.

### **3.2.1 Epistemological Problems underlying Comparative Land Tenure Studies**

There are two fundamental epistemological problems in comparative cross-cultural land tenure studies, which arise from the historic problem of bias towards eurocentric concepts of land and land tenure in many former European colonies. One concerns finding a way to overcome the long-standing practice of fitting or translating foreign concepts of land tenure into a local area – what Paul Bohannan [1969] called ‘backwards translation’, and the other concerns finding an appropriate rigorous method of controlled comparisons for conducting these studies.

The first problem of ‘backwards translation’ may be minimised by clarifying assumptions being made in the research and as strongly advocated by Bohannan [1969], by using Native terms in the research. However some caution needs to be placed on the extent of Native terms to be used, since incomplete or mistranslation of Native terms used will ostensibly arise. Furthermore, there is the danger that excessive use of Native terms and concepts can hinder understanding by non-Native scholars and the public of the local land tenure system being studied. Gluckman [1969] and Pospisil [1971] for instance, argued against the profuse use of Native terms, pointing out that their own research in southern Africa and in Papua New Guinea respectively, had shown that European ethnographic concepts (e.g. use rights and responsibilities) could be successfully used to conduct objective cross-cultural land tenure comparisons. Their arguments are unintentionally supported by Henderson et al. [2000], who dismissed the idea of English and Native concepts being fully translatable between them, in their examination of Mi’kmaq and English concepts of land tenure and property. It is therefore clear that while the use of Native terms is certainly to be encouraged to facilitate improved

understanding of cross-cultural land tenure issues, it should not be used to the extent that it will degrade the quality of translations or interpretations that are conducted, and thus deter understanding and effective use of the results of the comparisons being made.

Bohannan [1969: 415] also suggested that the second problem of finding an appropriate rigorous method of controlled comparisons could be resolved by developing a “superlanguage” or ‘whole new independent language without a national home’ such as Fortran or some other computer language. However there is no need for any “superlanguage”, since English, with some new terms, has been seen to be sufficient to express the new, non-Aboriginal analytical conceptualizations. This is possible since as Pospisil argued, the English terms “ have heuristic value as categories that are operationally workable” in cross-cultural analysis [Pospisil, 1972:12-13]. What this research therefore proposes to do to address the two epistemological problems of ‘backwards translation’ and conducting rigorous controlled comparisons, is to develop a neutral framework that fosters the use of Native terms, worldviews, goals and institutions in its analysis of the situation, and develops conceptual models to conduct controlled comparisons. The next sections will review frameworks that exist for comparative studies of cross-cultural land tenure systems, as a step towards designing and developing a neutral framework for comparative cross-cultural land tenure studies.

### **3.2.2 Review of Concepts and Theories for Cross-cultural Land Tenure Studies**

As noted in Section 2.2.1, Bohannan’s analysis of the applicability of concepts used in cross-cultural land tenure studies concluded that much of the concepts and thinking about land had been and remained largely ethnocentric [Bohannan, 1960]. To minimize this

problem, Bohannan [1960] recommended that the following three assumptions be incorporated into cross-cultural land tenure studies:

1. that people have their own concept of land and their own representational ‘map’ of the country in which they live – i.e., their own world view or ‘folk view of geography’ of their area
2. that they have their own set of concepts for describing and dealing with the relationships they have with land – i.e., their person – land relationships
3. that they have their own spatially-based concepts for organizing themselves socially and dealing with their relationships with each other – i.e., their person – person relationships

Bohannan’s recommendation has since become widely accepted and almost commonplace among anthropologists and sociologists. However the literature shows that ethnocentric concepts, more particularly eurocentric concepts still tend to influence much of the land tenure systems and land administration systems practiced in many countries, including Australia, Indonesia and Canada [Peterson, 1976; Benda-Beckmann & Benda-Beckmann, 1999; Rakai & Nichols, 2001]. One reason for this pervading eurocentric influence lies in the difficulty of translating Bohannan’s assumptions into workable practices that can be used by land administrators and land managers to effectively manage the complex land tenure systems existing in their jurisdictions. Efforts in the geomatics engineering/surveying discipline to address the difficulty have been minimal if not lacking, to date. More successful efforts to address the eurocentric issues have been made by those in the social science disciplines of for example, anthropology, law, economics, geography and history. This section therefore reviews the concepts and theories advanced by selected scholars in anthropology for cross-cultural land tenure research.

Salamon [1998: 166] has proposed that any investigation of land tenure must take into account the culture of the people in the area, because “culture shapes the physical world, and, correspondingly, culture is acted on by what it created”. In discussing the cultural dimensions of land tenure in the United States, Salamon [1998] proposes the concept, espoused previously by Crocombe [1974], Wiber [1993] and Benda-Beckmann [1995], of land tenure being analyzed as a process produced by various layers of culture, with each layer being affected by internal factors, and by external factors from other layers and historical events. Thus for instance, at the national level, national policies provide the broad context within which a specific cultural system operates. At the community level, a community’s perception of land and/or its land-acquisition goals, which originates from the community’s ethnic origins, shapes the local community context for the domestic culture of a family [Salamon, 1998]. At the family level, “culture is enacted and social relationships are reproduced in conjunction with the intergenerational transmission of land” [Salamon, 1998: 159]. Salamon’s perspective of land tenure being formed by (and at) various layers of culture and influenced by internal and external forces, reflect the thinking of other anthropologists like Crocombe [1974], Wiber [1993], and Benda-Beckmann [1995]. These scholars used a combination of structural and functional approaches, systems approach and legal pluralistic approaches to study land tenure systems in their studies in the South Pacific, Philippines and Indonesia respectfully, and are discussed next.



Benda-Beckmann used the following three basic units to classify tenure or property<sup>12</sup> relationships [Benda-Beckmann, 1995: 312]:

1. the **social units** that have the capacity to **hold** property relationships;
2. the **natural and social environment units** that are the **objects** of a property relationship; and
3. the **rights, duties, privileges and possibilities** that express what property holders may or must (not) **do** with property objects

A notable feature of Benda-Beckmann's classification is his novel inclusion of 'possibilities' in his definition of the various interests that express what property holders may or may not do with the property objectives. This seminal definition has the advantage of encouraging flexible approaches to improving land tenure systems. In Canada, New Zealand and Australia for instance, this concept of 'possibilities' allows new emerging interests and relationships – such as Aboriginal rights, Aboriginal title and Aboriginal self-governance, to be seamlessly accepted and integrated into the existing land tenure institutions.

Using the classification, Benda-Beckmann and Benda-Beckmann [1999] proposed that land tenure could be analyzed as a social function and consequently developed a functional approach for cross-cultural land tenure studies. They argued that as a function, land tenure relationships could be measured using the above three units of social organization, since the units can be seen “in a wide variety of social phenomena, at different layers of social organisation, and with a variety of social, economic and political

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<sup>12</sup> Benda-Beckmann actually used the term 'property' in his publication. However, as noted in Chapter 2, property is defined in this thesis to be a subset of land tenure and therefore Benda-Beckmann's use of the term 'property' is taken to mean 'land tenure' in this dissertation.

functions” [Benda-Beckmann & Benda-Beckmann, 1999:21]. They further argued that since actual land tenure functions do not always reflect the functions that are purported or expected to exist, land tenure functions in each layer could be further classified into 2 categories: NORMATIVE functions and ACTUAL functions [Benda-Beckmann & Benda-Beckmann, 1999]. Normative functions are those land tenure functions that exist under existing legal and socio-cultural norms or standards – functions that may be viewed legally as *de jure* functions. Actual functions are those land tenure functions that actually exist as a result of varying social, economic, political or ecological conditions – functions that may be viewed legally as *de facto* functions. Supporting the argument unintentionally is the perspective provided by Ward, a geographer, who observed that with respect to customary tenures, changing tenure practices give rise to changes in customary tenures: "Custom, being the commonly accepted norm, changes as practice changes – although usually with some lag in time behind practice" [Ward, 1997: 40]. As a result, the tenure practices of today (or of the last decade or year) is likely to become the customary tenure in the future. Conversely, what is currently customary tenure this year may be radically changed by new tenure practices, and other agents of change, such as land market forces, by the following decade or years.

Ward’s concept of a dynamic tenure system that changes continuously with changing tenure practices and customs, and Benda-Beckmann’s classification of actual and normative functions, are useful in supporting and recognizing the concept of *de jure* and *de facto* land tenure systems that may exist at different levels. However the problem of translating the concepts into a workable efficient and equitable land tenure system, and its accompanying land administration system to control and regulate it, remains.

Wiber [1993] similarly defined land tenure systems as exhibiting both expected *de jure* behaviours and actual *de facto* behaviours, and like Benda-Beckmann, viewed land tenure<sup>13</sup> systems as being both structure and process. Wiber's structural perspective of tenure included 3 variables that resemble Bohannan's and Benda-Beckmann's ideas:

1. **resources** – or uses to which resources are/can be put (i.e., land in Bohannan's framework; objects in Benda-Beckmann's framework);
2. **social entities** with an interest in those resources (i.e., persons in Bohannan's framework; social units in Benda-Beckmann's framework);
3. **rules** with respect to expected relationship between resources and social entity (i.e., relationships in Bohannan's and in Benda-Beckmann's framework)

Wiber's process or functional aspects of tenure systems include production, dispute, devolution, inheritance, alienation and other behavioural processes that affect tenure and use of tenure by social entities [Wiber, 1993]. As structure, tenure systems are intertwined with other societal structures, and hence religion, kinship, politics and law was included in her analysis of the Ibaloi tenure system in the Philippines [Wiber, 1993]. However, processes affecting tenure are in themselves also affected by other societal structures and their processes: e.g., production by kinship, religion and politics; dispute by law, politics and kinship; inheritance, devolution and alienation by kinship, law, politics and religion. Wiber [1993] noted that analysing the relationship between structure and process had always been a problem in anthropological analysis. Pointing out that the processes that give rise to legal pluralism are found in every heterogeneous

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<sup>13</sup> Note that like Benda-Beckmann, Wiber used the term 'property' and not land tenure specifically for her research. However, given the distinction made in Chapter 1 of 'property' being a subset of the broader term 'land tenure', and that Wiber's definition of property resembles this thesis' adopted definition for land tenure, I have substituted 'land tenure' for 'property' in the ensuing descriptions of Wiber's research.

society, Wiber used legal pluralism very effectively to understand the complexities in the processes and structures of the Ibaloi tenure systems [Wiber, 1993]. Wiber's use of legal pluralism to study land tenure systems is valuable and useful for its practical documentation of the processes and structures of land tenure systems. At the same time however, legal pluralism tends to lead to the illumination of very complex relationships and situations. While the resulting complexity is not easily modelled for land administration purposes, it is more easily understood, modelled and managed from a systems perspective.

Crocombe [1974] utilized a combined structural and functional approach in his analytical cross-cultural studies of land tenure systems in the South Pacific. Crocombe is of particular interest to this thesis for his use of a systems perspective in his research. He proposed that as a system, land tenure is a product of diverse forces, forces which could be classified into four broad categories: ethological factors, environmental factors, technological factors and socio-cultural factors [Crocombe, 1974: 1].

Ethological factors include the world-views, philosophy, values, goals and aspirations of a community, and their influences on the community's concepts of territoriality. Environmental factors include geographical variables such as the physical environment and the nature of the land, as well as biotic variables that include flora and fauna. Technological factors include the skills, facilities and equipment used by a group or society. Socio-cultural factors include cultural influences such as customary rules, practices and institutions, and their effects on the nature, control and distribution of power. Socio-cultural factors also include the demographic structure of a society or

group, and economic influences such as the productive potential of the land with regards to current technological levels, patterns of settlement, and so on.

A difficulty with Crocombe's classification lies in not being able to clearly distinguish between ethological and cultural factors. Ethological factors such as worldviews, philosophy, values, goals and aspirations are clearly influenced and even defined by socio-cultural factors – so where exactly one needs to draw the line between ethological and socio-cultural factors needs to be clarified.

To study the structures and functions of land tenure systems, Crocombe [1974] classified land tenure relationships (which he called *territorial relationships*) into 6 categories, each category containing a set of rights and associated obligations (responsibilities and restrictions):

1. rights of or claims to **direct use**;
2. rights of **indirect economic gain**, such as rights to tribute or rental income;
3. rights of **control** – or rights by others that limit a user's use rights, e.g. chief's rights;
4. rights of **transfer**;
5. **residual** rights – e.g. reversionary rights when right holder dies without heirs; and
6. **symbolic** rights or rights of identification – e.g. taboo areas, historic areas.

Each specific land right and obligation could be measured in terms of four dimensions Crocombe [1974]:

1. an **area** dimension,
2. a **time** dimension,
3. a **population** dimension, and
4. a **legal and customary** dimension that is influenced by the social and political structure of the group or society.

Crocombe's detailed structural and functional classification is useful for systematically documenting the various rights and obligations that may exist at any one time. However Crocombe's method of measuring each interest using four dimensions is limited by his failure to provide a more detailed definition for what is meant by a 'legal and customary dimension'. Nevertheless, Crocombe's systems approach is useful for the cadastral surveying/geomatics discipline because it provides the basis for understanding and exploring the important role that the cadastral surveying/geomatics discipline has for translating concepts of land tenure into a land tenure system that can be implemented – e.g. his first three dimensions of 'area', 'time' and 'population' are readily measured, documented and graphically illustrated using conventional surveying and mapping techniques; and his fourth 'legal and customary' dimension, despite lacking a detailed definition as noted above, may be documented and/or measured using land registration techniques.

In summary, the individual contributions of the preceding anthropologists to this thesis are as follows:

- Bohannan is noted for highlighting the importance of considering people's concepts of land when studying their land tenure systems; and of bringing attention to the epistemological problems in cross-cultural studies of ethnocentrism and the need for rigorous methods of comparative studies;
- Salamon is noted for emphasizing the importance of considering culture when investigating land tenure, since culture shapes the physical world and is in turn shaped by it; and for her realistic illustration of tenure dualism and pluralism at various levels of culture;
- Benda-Beckmann is noted for extending the definition of land tenure interests to include the concept of 'possibilities', which allows for flexible approaches to

improving land tenure systems; and for using a functional approach to study land tenure, which highlighted the existence of normative and actual functions of tenure;

- Wiber is noted for clearly demonstrating the usefulness of legal pluralism for evaluating the structural and functional complexities of land tenure systems;
- Crocombe is noted for using a systems approach that incorporated the recognition of diverse forces that influence a land tenure system, and a functional approach that detailed the structures and functions at various levels, of land tenure systems. Crocombe's four dimensions for measuring each specific interest (right and obligation) was also useful for promoting a better appreciation of the role that surveyors or geomatics engineers play in measuring interests in land.

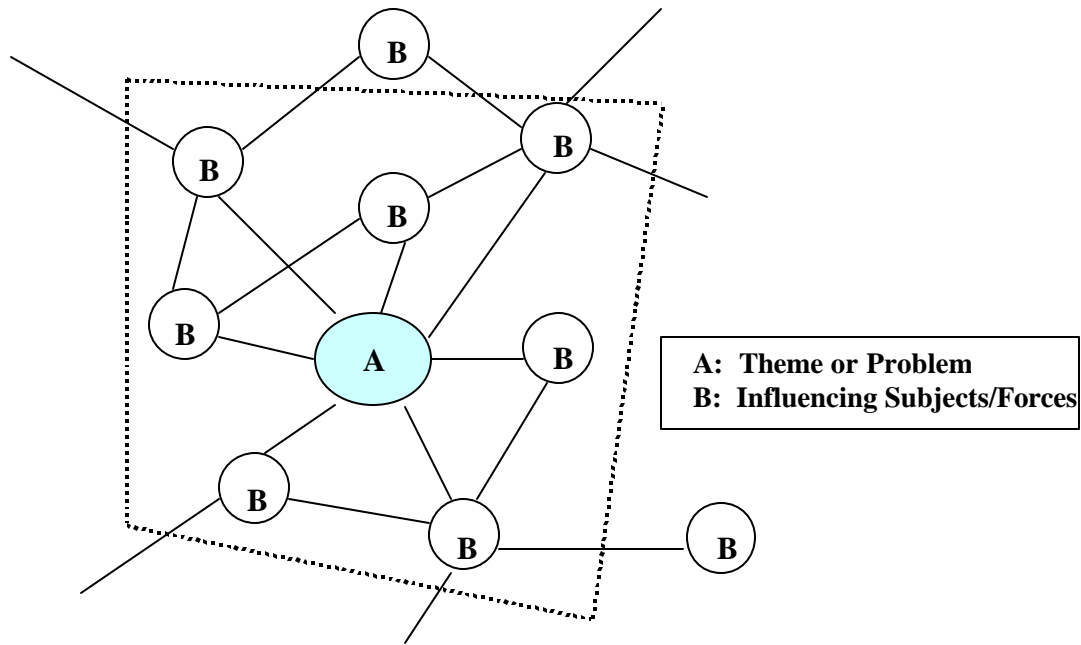
Together, the anthropological scholars demonstrated the need to use a holistic approach that could account for both cultural and physical factors, and for the effects of legal pluralism in creating diverse interests, structures and functions in land. Also demonstrated was the need to use a combined functional/structural approach for studying cross-cultural land tenure systems. However it is also clear that the complexities in land tenure systems that are highlighted with such a holistic approach are difficult to model and resolve. There is a need to find a method of modelling the complexities, in order to be able to identify ways in which the complex problems may be improved upon. Crocombe's work suggested the use of the systems approach as a possible method. The systems approach is based on using systems ideas. Since systems ideas are intrinsically concerned with relationships, systems models can be effectively used to model the complex interacting and overlapping land tenure related relationships that may occur daily. The next section discusses this approach, which has been used in geomatics engineering/surveying to study land registration and cadastral systems.

### 3.2.3 Systems Thinking

This section will begin with a brief overview of systems thinking, an approach that has been found to be useful in the surveying/geomatics discipline for studying land administration problems, particularly cadastral surveying and land registration issues [McLaughlin, 1971; Dale, 1979; Nichols, 1992; Zevenbergen, 2002]. Systems thinking is an approach that views an object of interest (e.g. land tenure) as a system. The term ‘system’ may be defined as a set of elements that are connected together to form a whole, thus reflecting properties that emerge as properties of the whole, rather than properties of its component parts [Checkland, 1981]. Systems deal with the complex organization of a number of different connected elements. Systems are concerned with wholes and their properties – the term ‘systems’ thus refers to the existence at certain levels of complexity, of properties that are *emergent* at that level, and which cannot be reduced to lower levels [Checkland, 1981]. Systems thinking thus uses the concept of wholeness associated with the term ‘system’, to order our thoughts.

McLaughlin [1971] successfully used systems thinking to develop descriptive models of dominant influence, represented by a universal inversion structure, to rigorously analyse a land survey system. McLaughlin’s model makes the theme or problem to be analysed the centre of the model, with a framework of interrelated influencing subjects being built around the theme or problem. The framework extends outwards from the central theme, until it ultimately encompasses the universe. However for analytical purposes, a limiting boundary is defined, which results in the establishment of a model of dominant influence.





**Figure 3.1 : Model of Dominant Influence**

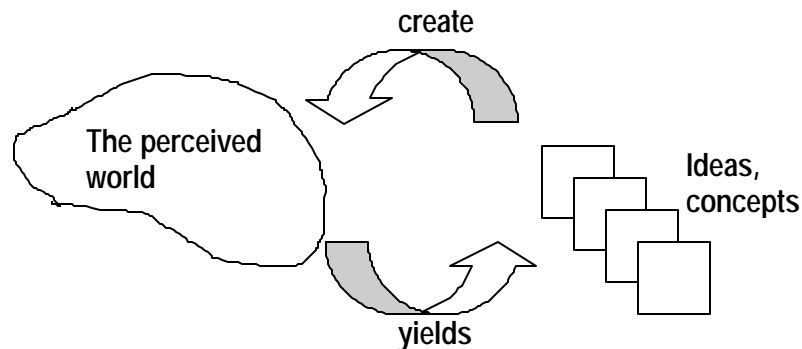
[Source: McLaughlin, 1971:50]

The subjects within the model produce the dominant influencing forces upon the defining characteristics of the theme or problem, forces that may be either important variables or constraints, and are dynamic in nature [McLaughlin, 1971]. McLaughlin's descriptive model is useful to this dissertation for its conceptualisation of a dynamic system. However it is limited to analysing a linear system and does not capture the complex hierarchical multi-dimensional systems of land tenure that exist as a result of legal pluralism, tenure pluralism and tenure continuum.

Dale [1979] and Barnes [1994] have also used systems thinking to conceptualise and analyse cadastral problems. Nichols [1992] and Zevenbergen [2002] have also successfully used systems thinking to conceptualise and analyse land registration and land administration problems. However the use of systems thinking to conceptualise, analyse and model Aboriginal land tenure systems does not appear to have been reported in the geomatics or surveying literature.

The philosopher Immanuel Kant held the view that people *structure* the world through their existing, innate ideas; ideas that are derived from their *a posteriori* or empirical knowledge acquired through personal experiences of the world, and from their *a priori* knowledge acquired through reasoning independent of direct experience [Checkland & Scholes, 1990; and Kant, 1929:42a]. Checkland and Scholes [1990:21] thus noted that “... the world is continually interpreted using ideas whose source is ultimately the perceived world itself, in a process of mutual creation”, as shown in Figure 3.2.

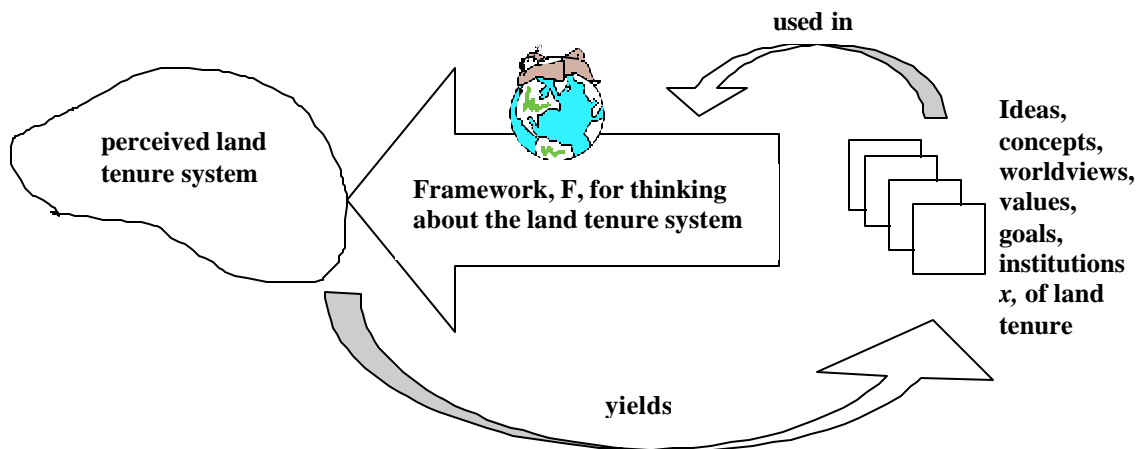
In terms of land tenure, Figure 3.2 demonstrates that perceptions of land tenure (or the ‘perceived world’) will be based on the ideas and concepts that people have of their land and land tenure system; ideas and concepts that are inherently based on their experiences and *a priori* knowledge of the land tenure system, and on their world views, values and goals.



**Figure 3.2 : The world interpreted by ideas whose source is the land tenure itself**  
[Source: Checkland & Scholes, 1990:21]

This continuous cyclic interpretation of land tenure as a system that is evident in Figure 3.2 reflects the processes that are enacted daily by humans in other aspects or ‘systems’ of their lives [Checkland, 1990]. The ability of humans to think and rationalize about the various processes affecting their land tenure system, invariably leads to the situation

depicted in Figure 3.3, in which the ideas and concepts (shown as 'x' in Figure 3.3) are used in some framework, F, to interpret the perceived land tenure system [Checkland, 1990]. Figure 3.3 depicts systems thinking, where 'x' denotes one of many land tenure subsystems that may exist, and there are formally defined methodologies such as systems engineering or systems analysis to interpret the perceived land tenure system [Checkland & Scholes, 1990]. The next section discusses the use of soft systems methodology, which is based on systems thinking, as a framework to compare and analyse land tenure systems.



**Figure 3.3 : Land Tenure viewed from a Systems Thinking Perspective**  
[adapted from Checkland & Scholes, 1990:21]

### 3.2.4 Soft Systems Methodology

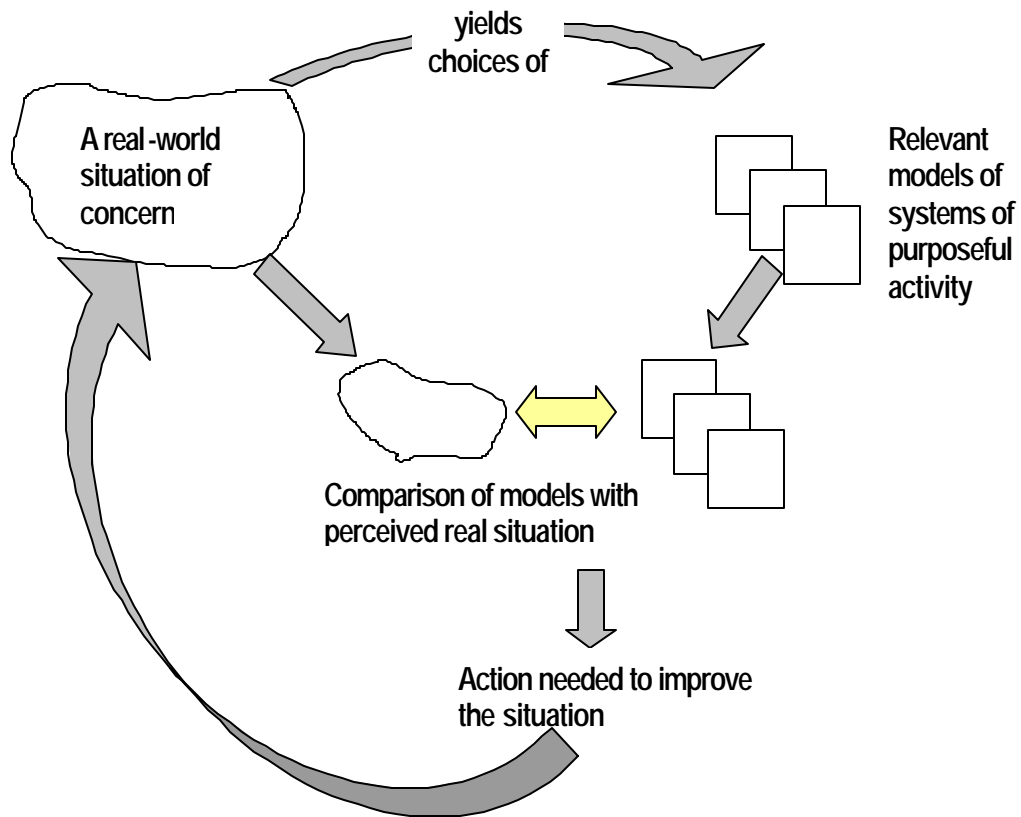
Following the overview of systems thinking, this section will provide a brief description of soft systems methodology, a methodology that was developed by Peter Checkland [1981] to help improve problems with unclear, undefined or ill-defined objectives. Soft systems methodology allows for the ideas developed for cross-cultural studies and discussed in section 3.3, to be incorporated into this methodology.

Soft Systems Methodology (SSM) was developed in the 1970s in response to the failure of established methods of 'systems engineering' to respond to complex problematic situations involving people with unclear, ill-defined objectives. Systems engineering is concerned with creating systems to meet well-defined objectives. It works well in situations where general agreement on the objective to be achieved exists, and thus the problem to be dealt with is simply one of selecting the most appropriate method for achieving the objective [Checkland and Scholes, 1990]. However most human situations, including those involving land tenure reforms, do not have well-defined, clear objectives. Soft Systems Methodology (SSM) was therefore developed specifically to cope with the more common situation where people in a problematic situation perceive and interpret the world in their own ways, and thus develop objectives and conclusions about it using standards and values that may not be shared by others [Checkland and Scholes, 1990]. Soft Systems Methodology (SSM) is thus useful for helping managers of all kinds and at all levels, to cope with their assigned tasks. Checkland describes SSM as being [Checkland and Scholes, 1990:1]:

*.. an organised way of tackling messy situations in the real world. It is based on systems thinking, which enables it to be highly defined and structured, but is flexible in use and broad in scope.*

The principle of SSM is that in a problematic situation, models relevant to the problematic situation will be developed and then used to analyse the situation by comparing them with perceptions of the real world. The comparative analysis leads to a decision on the action needed to improve the problematic situation. Figure 3.4 on the next page, which was developed by Checkland & Scholes [1990], is a model of how soft systems methodology (SSM) works.

It should be emphasized that soft systems methodology (SSM) is methodology (the principles of method) rather than a solitary technique or method [Checkland and Scholes, 1990]. This implies that unlike a technique or method, SSM will always be dependent on its user, with respect to the set of methods that will be used for a particular problematic situation – a characteristic that engenders a flexible approach to using SSM.



**Figure 3.4 : A Model of how Soft Systems Methodology works**

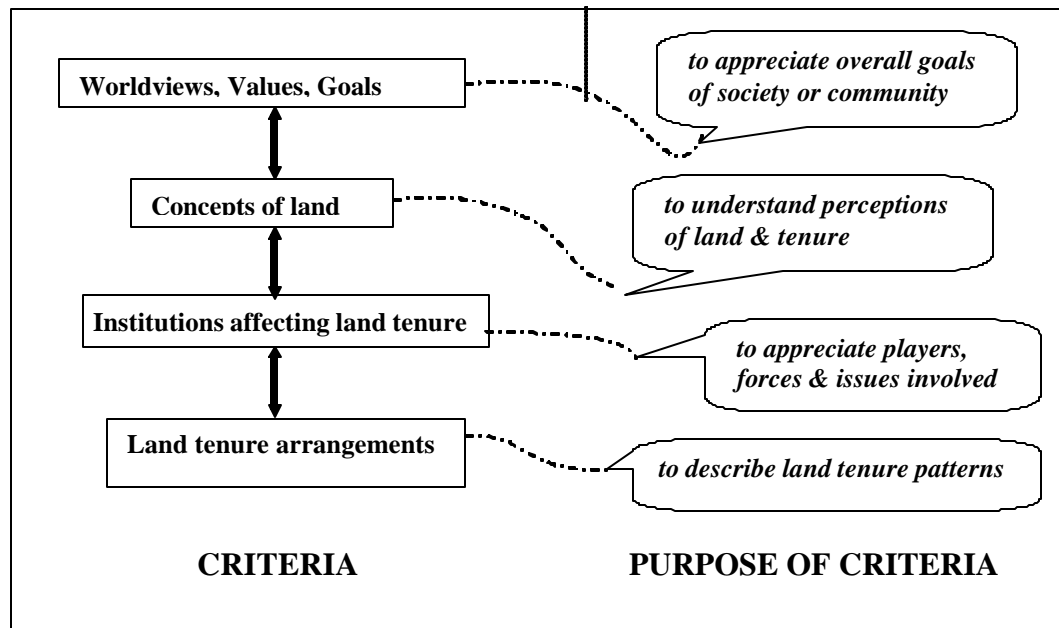
[Source: Checkland, 1990:7]

Barry [1999] has used Checkland's soft systems theory as the most suitable methodology to analyse cadastral systems in periods of uncertainty or unstable situations. However the application of Checkland's soft systems methodology to analyse, model and compare Aboriginal land tenure systems does not appear to have been reported. The next section

develops principles or design criteria with which to compare cross-cultural land tenure systems, criteria to be used in a conceptual framework for comparing land tenure systems.

### ***3.3 Design Criteria for Describing Cross-cultural Land Tenure Studies***

Land tenure and property concepts of a society are best understood by an appreciation of the worldview and philosophy of that society, since the roots of those concepts arise from and are ramifications of the society's worldview and philosophy [Little Bear, 1998]. It is therefore important to have some understanding of a society's worldviews, as well as the values, goals and aspirations that help shape those worldviews, when attempting to understand and describe the society's concepts of land, their institutions, and ultimately their land tenure arrangements. Figure 3.5 has been developed by the author to illustrate the criteria to be used as 'comparators' for describing and comparing the salient features of cross-cultural land tenure systems. It is not the 'new language' that Bohannan envisioned, since as noted earlier, a set of English terms or attributes common to all cultures may be sufficient to express analytical concepts, unlike the difficulty of finding a 'super language' that is independent of all cultures, and yet applicable to all cultures [Pospisil, 1971]. Therefore, a neutral set of English terms or attributes common to all cultures will be used in place of the logical and independent 'language' that Bohannan and other social scientists have long advocated for. This neutral set of attributes which was discussed in Chapter 2, includes: the concepts of land; worldviews, values, goals and aspirations; land tenure institutions and land tenure arrangements of a community. Figure 3.5 on the next page, depicts these criteria.



**Figure 3.5 : Criteria for Describing Cross-Cultural Land Tenure Arrangements**

As noted earlier, the data to be used for these criteria can be obtained from the ethnographic literature and data provided by ethnographers to explain and describe specific cultures. However, given the fact that culture pervades all facets of society, including laws, philosophy, concepts, goals and aspirations, some bias will invariably occur [Bohannan, 1969]. Since some bias of some known culture may have been incorporated into the ethnographic documentation, it is important for the comparative researcher to identify and investigate any biases that may exist, and institute controls for them [Bohannan, 1969]. The criteria depicted on the left side of Figure 3.5 is aimed at minimizing the effects of the problem of bias, by first attempting to understand the worldviews and values of the members of the community being studied, in order to better appreciate or identify the overall goals and aspirations of the community. A more informed understanding of the community's concepts of land will help to provide a better

appreciation of their perceptions of land and tenure. A basic understanding of the institutions that shape, structure and control their land tenure systems will help to provide an appreciation of the players involved; the external and internal forces impacting on them; and the resulting issues that affect them and their community's land tenure arrangements. Finally a description of the various tenure processes or functions, focusing on how the interests are acquired, used, distributed/shared and transferred between community members (and non-members where applicable), will help to complete a general description of the land tenure arrangements.

A conceptual comparative framework is now required to organise the way in which the descriptive criteria identified in this section, can be used to describe, compare and analyse cross-cultural land tenure systems. The next section therefore describes the design and development of the conceptual comparative framework.

### ***3.4 Design of Conceptual Frameworks for Describing, Comparing and Analyzing Cross-Cultural Land Tenure Systems***

A conceptual framework is needed to provide a holistic approach towards improving problematic land tenure situations; an approach that seeks to understand the various structures and functions of relevant components of a land tenure system, and how they are related to each other. Since a conceptual framework is neither a model nor a theory [Rapoport, 1985], some understanding of what a conceptual framework is and how it relates to models and theories should first be discussed to set the context of a conceptual framework within this research.

In distinguishing between frameworks, models and theories, Rapoport [1985:256] noted that:



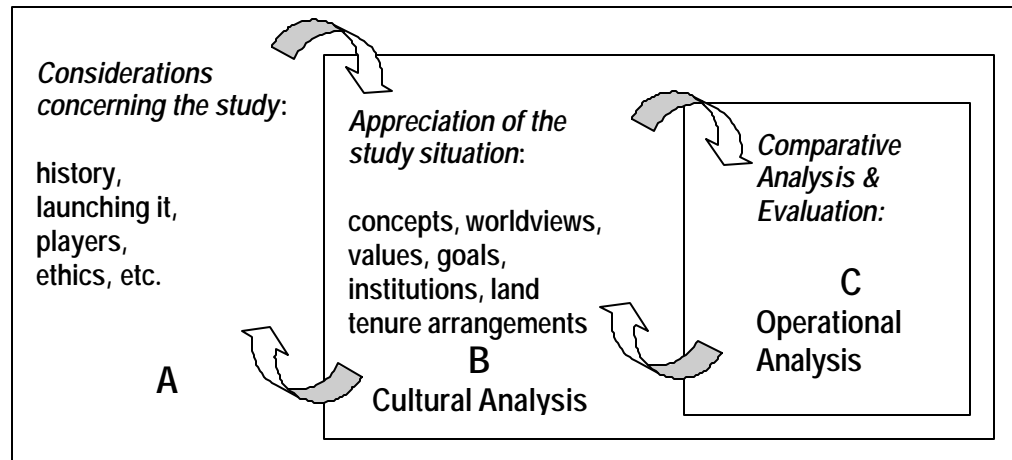
*Models describe how things work, whereas theories explain phenomena. Conceptual frameworks do neither; rather they help to think about phenomena, to order material, revealing patterns – and pattern recognition typically leads to models and theories.*

A conceptual framework for studying land tenure is therefore required to help us think about, understand and analyse the diverse concepts of land, the various structural and functional or operational components of a land tenure system, and the resulting pattern of relationships and land use activities that arise from them. The Economist Donald Denman opined over 30 years ago, that understanding land tenure problems is a primary prerequisite to developing policies for managing and administering land and its resources [Denman, 1972]. Without a clear understanding of cross-cultural land tenure problems, any devised policy for resource management and land administration will not be as successful as it should be. This section provides an overview of a suitable conceptual framework for comparing and analysing cross-cultural land tenure systems.

### **3.4.1 Conceptual Comparative Framework**

The systems approach, and more accurately a ‘soft’ systems approach, is suitable for this research because it espouses holistic methods of observation and analysis of phenomena; methods in which the relations between a system’s elements and its common goal as a whole is studied [Zevenbergen, 2002]. Furthermore, the holistic nature of the soft systems approach is suitable because it challenges the reductionist philosophy of breaking down the universe into individual components and analyzing them separately, without taking the whole universe into account [Checkland, 1990]. The development of the conceptual comparative framework draws largely from the ideas advanced by Benda-Beckmann [1999], Wiber [1993], Crocombe [1974], Little Bear [n.d.] and McLaughlin

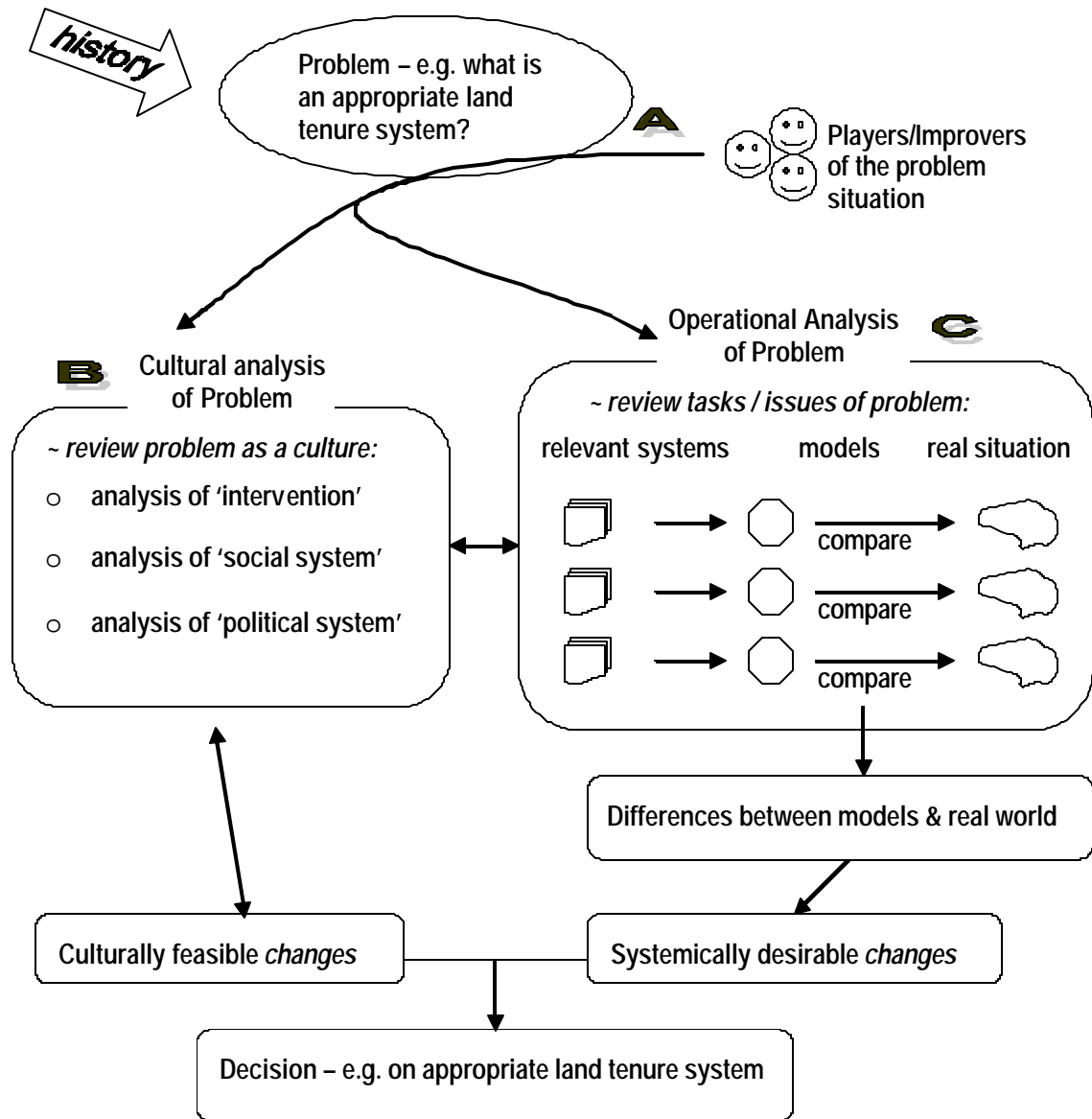
[1971], and integrates these ideas with Checklands' soft systems approach. Figure 3.6 depicts a basic framework for conducting comparative land tenure studies that allows for an integration of the above ideas with soft systems methodology.



**Figure 3.6 : Basic Framework for Conducting Comparative Land Tenure Studies**  
[adapted from Checkland & Scholes, 1990:278]

Figure 3.7 on the next page expands on Figure 3.6, to depict a more detailed conceptual framework for conducting comparative analysis and evaluation of cross-cultural studies for this research. Section A of Figure 3.6 is the top portion of Figure 3.7, which deals with the preliminary work that is normally required for any study. Land tenure problems are a product of a particular *history*, a history of which there will always be more than one account. It is therefore important to learn and reflect upon the different historical accounts in order to learn from past mistakes, particularly those that occurred due to an emphasis on operational issues and inattention to cultural issues. The players or 'improvers' of the problematic land tenure situation include one or more persons who are willing to improve the problem situation, either as part of their normal daily work (e.g., First Nation land officers, Band Councillors, interested Band members), or as part of a research study (e.g. the author). Since resolving the problems will require a collaborative

approach, the participation of all players or ‘improvers’ and the community will be an important part of the process.

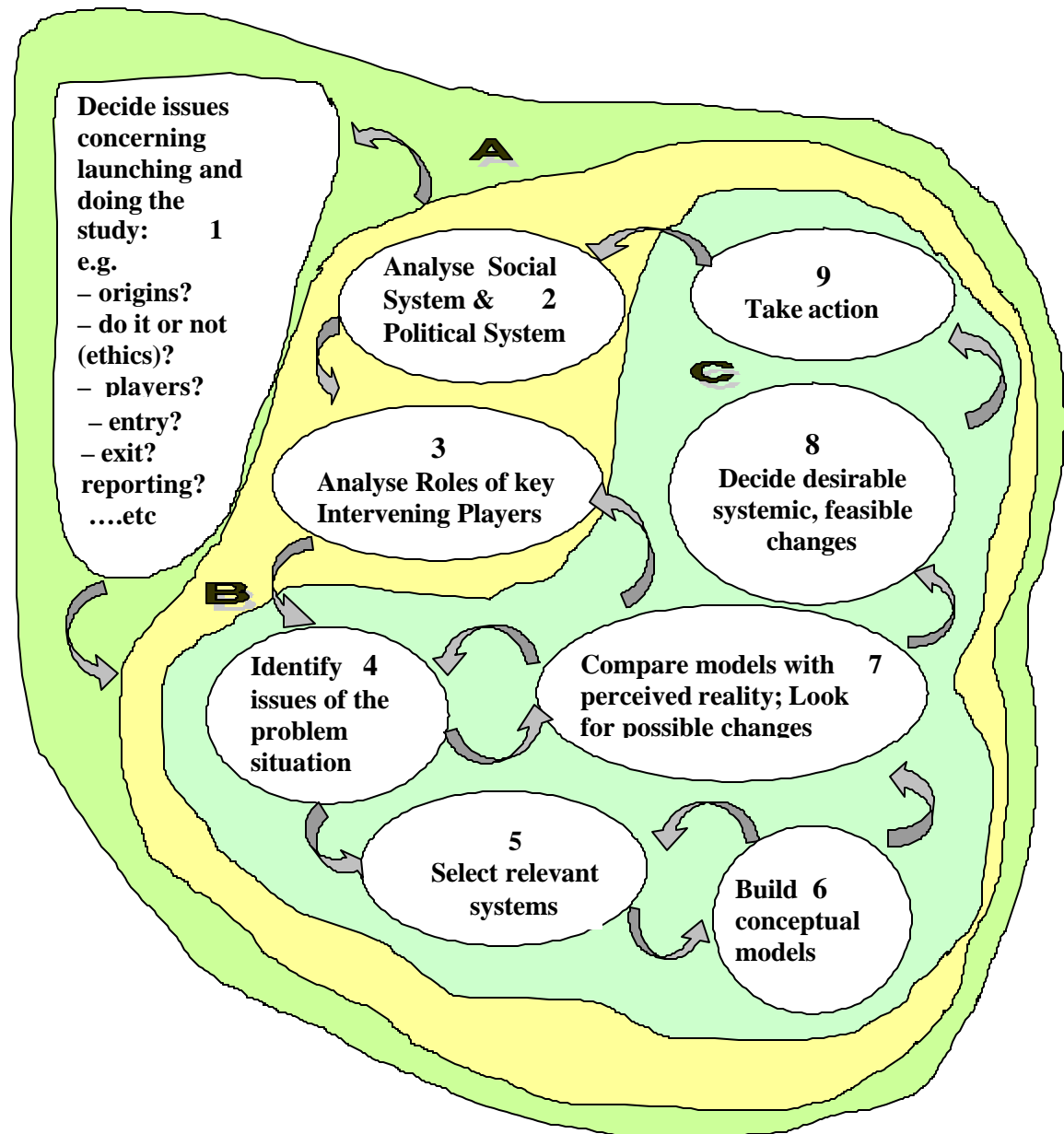


**Figure 3.7 : Conceptual Framework for Comparative Land Tenure Studies**  
[adapted from Checkland & Scholes, 1990]

Section B of Figure 3.6 corresponds to the left-hand side of Figure 3.7, which is concerned with obtaining an appreciation of the problematic land tenure situation, by analysing the cultural aspects of the land tenure system. It consists of analysing three aspects of the situation – firstly, the intervention or alleviation of the problematic land

tenure situation itself; secondly, the structure and processes of the ‘social system’ under which the land tenure functions; and thirdly, the ‘political system’ that influences the power-based aspects of relationships with land and humans. Understanding the above three aspects of the problem will help to identify changes that are culturally feasible for the community. Figure 3.7 also shows two points – firstly, that understanding the culture in which the problematic land tenure situation operates is crucial to successfully improving the situation, and this continues throughout a study, right up to its conclusion; secondly, that having a continued understanding of the cultural aspects of the situation is of equal importance to the operational analysis of the situation.

Section C of Figure 3.6 corresponds to the right-hand side of Figure 3.7, which is concerned with logically analysing the operational aspects of the problematic land tenure situation. The operational analysis here corresponds with Figure 3.4, in which models of land tenure activities and issues relevant to the problematic land tenure situation are developed and used to illuminate the land tenure problem(s). The problems are then analysed by *comparing* the models with the problematic land tenure system (or situation) as it exists in real life. The comparative analysis is intended to highlight any differences that may occur between the models and the real world, and is useful for stimulating ideas and debates about possible changes in the land tenure system. This will help in the identification of any changes that are desirable for the land tenure system, and that may be implemented in the real world.



**Figure 3.8 : Using Conceptual Framework for Comparative Land Tenure Studies**  
[adapted from Checkland & Scholes, 1990]

As shown in Figure 3.7, the cultural analysis stream and the operational analysis stream will interact and inform each other. Which selected 'relevant' systems are actually found to be relevant to the community will tell us something about the culture of that community. Similarly, knowledge of that culture will help both in selecting potentially

relevant systems (and sub-systems) of land tenure, and in identifying the changes which are culturally feasible [Checkland & Scholes, 1990].

Figure 3.8 on the previous page illustrates the steps involved with using the conceptual framework in Figure 3.7 for comparative cross-cultural land tenure studies. As shown in Figure 3.8, the changes to be actioned (Step 9 – “Take action”) as a result of using the framework to conduct the comparative land tenure study (i.e. the land tenure reform to be implemented) will change, hopefully for the better, the problem situation as originally perceived. It is then possible to use the framework to then compare the new land tenure system with other land tenure systems as required. What will also be required is a system to evaluate, monitor and control the implementation of the land tenure system as it is being reformed. The criteria for evaluating the success of the changes or reforms being implemented, and the system to carry out the monitoring and control of the reforms is discussed in the next section.

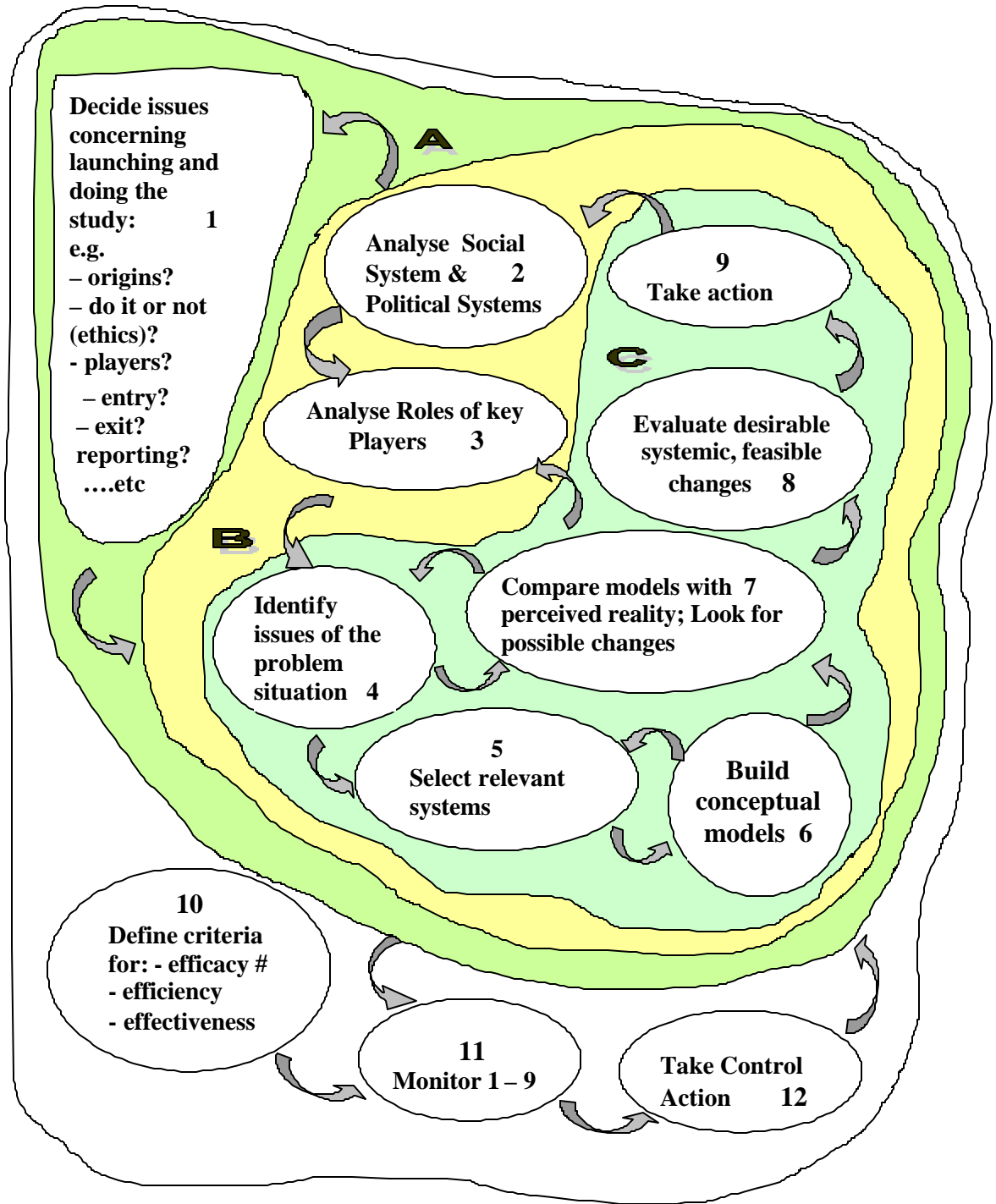
### **3.4.2 Evaluating the Selected Reformed Land Tenure System**

The systems approach includes the processes of monitoring and control to guarantee the survival of a system or sub-system in a changing environment. Figure 3.9, which has been developed further from Figure 3.8 and is based on the soft systems methodology developed by Peter Checkland [Checkland & Scholes, 1990], depicts in steps 10 to 12, a framework for a monitoring and control subsystem. Checkland [1999] reports that experience with the logical analysis of transformations have revealed three basic criteria – efficacy, efficiency, and effectiveness – for evaluating the success of a transformation. The first criteria, efficacy, checks whether the chosen transformation actually works in

producing the required output. The second criteria, efficiency considers whether the transformation is being carried out with a minimum use of resources. Finally, since a transformation that works and uses minimum resources may still be unsuccessful if it is not achieving the community's goals and aspirations, the third criteria, effectiveness, checks to see if the transformation allows the goals to be achieved [Checkland & Scholes, 1990]. Evaluating these three criteria can also be simply expressed as “do P by Q in order to achieve R”, where for this study, P is the land tenure reform; Q is the means used to carry out the land tenure reform; and R is the goal or long term aim of the people for whom the land tenure system is being reformed. The following three criteria are therefore used in this dissertation to evaluate the success of any transformation or land tenure model proposed:

- Efficacy – for ‘does the transformation work?’
- Efficiency – for ‘was optimum output produced by a minimum use of resource?’
- Effectiveness – for ‘is the transformation meeting the longer term goals?’

Figure 3.9 depicts in step 10, the criteria for evaluating the success of the selected land tenure reform option.



# efficacy: does it work?  
 efficiency : was reform achieved with minimum use of resources?  
 effectiveness : does reform meet goals?

Figure 3.9 : Model for Comparing & Evaluating Land Tenure Systems  
 [adapted from Checkland & Scholes, 1990:294]



### **3.6 Concluding Remarks**

The objective of this chapter was to fulfil Objectives 1 and 2 of this thesis, which were to identify comparators and develop a conceptual comparative framework for describing, comparing and analyzing cross-cultural land tenure systems from a neutral or culturally unbiased perspective. To this effect a review was conducted of approaches that have been used for conducting comparative cross-cultural land tenure studies, and of the frameworks that have been developed to conduct the studies. In terms of fulfilling Objective 2, it was found that various frameworks existed, including those developed using a systems approach that combined a structural and functional perspective of the system [Crocombe, 1971]; a combined functional/legal pluralism approach ([Pospisil, 1971]; Wiber [1993]; and [Benda-Beckmann, 1999]) and a systems thinking-based approach described as soft systems methodology [Checkland, 1990]. The review also included systems thinking approaches that had been used in geomatics to model and analyse land survey systems [McLaughlin, 1971], land registration systems [Nichols, 1992 and Zevenbergen, 2002] and cadastral systems [Dale, 1979, Barnes, 1994 and Barry, 1999]. Relevant ideas and methods in the above approaches were synthesized and integrated to derive an appropriate framework with which to study cross-cultural land tenure systems.

To achieve Objective 1, it was found that the following cultural attributes could be used as ethnocentrically neutral comparators for cross-cultural comparative analysis:

1. worldviews, values, goals of community – to appreciate the overall goals of a community;
2. concepts of land – to understand the community's perceptions of land and tenure;

3. institutions affecting land tenure – to appreciate the players, the external and internal forces impacting on them, and the resulting issues involved;
4. land tenure arrangements – to identify the land tenure patterns of the community concerned

This chapter has therefore addressed the first and second objectives of this dissertation, those of identifying comparators (Objective 1) and developing a conceptual analytical framework for describing, comparing and analyzing land tenure systems of different cultures from an ethnocentrically equitable perspective (Objective 2). The conceptual framework will now be used in chapters 4 and 5 to address the third objective, i.e., to analyze and compare the cross-cultural land tenure systems of Aboriginal communities in Canada's maritime provinces of Nova Scotia and British Columbia.

## **Chapter 4: Modelling and Analysis of Mi'kmaw Land Tenure Systems in Nova Scotia**

### ***4.1 Introduction***

As the first step in achieving Objective 3 of this thesis, the purpose of this chapter is to analyse and compare the land tenure systems of Aboriginal peoples in Canada using the conceptual analytical framework developed in Chapter 3. This chapter is specifically concerned with describing and analysing the traditional and contemporary land tenure systems of the Mi'kmaq<sup>14</sup> of mainland Nova Scotia, as a step towards identifying suitable land tenure reform models or options for them. Using the framework developed in Chapter 3 as a guideline, this chapter will begin with a review of considerations concerning the study. This will be followed by a review and analysis of firstly the cultural aspects of Mi'kmaw land tenure; then secondly the operational or functional aspects of Mi'kmaw land tenure, in order to identify land tenure reforms that will be culturally feasible and systemically desirable for the Mi'kmaq of mainland Nova Scotia.

### ***4.2 Considerations concerning the study***

In accordance with the framework developed in Chapter 3 and depicted in Figures 3.6 and 3.7, this section is intended to set the context of the study by describing the players (or stakeholders), ethics and reporting issues of the study and reviewing its historical background.

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<sup>14</sup> See note 4 in Chapter 1, which explains when and how the terms Mi'kmaq (plural noun) or Mi'kmaw (singular noun and adjective) should be used. Thus the term Mi'kmaw plays two grammatical roles: 1) it is the singular of Mi'kmaq and 2) it is an adjective in circumstances where it precedes a noun (e.g. Mi'kmaw people, Mi'kmaw treaties, Mi'kmaw person, etc.).”

#### 4.2.1 Players, Ethics, Reporting

The fieldwork for this research was conducted between July 2001 and August 2002 in Nova Scotia, for the *Confederacy of Mainland Mi'kmaq* (CMM), a tribal council for six Bands<sup>15</sup> in mainland Nova Scotia. As noted in Chapter 1, the research was intended to assist the CMM's future response to the federal government's current policy of devolving their land management responsibilities to First Nation Bands in Canada. The main goal of the research was to identify land tenure options for the seven First Nations on mainland Nova Scotia that comprise the CMM. Figure 4.5 on page 112 depicts the names and locations of these seven First Nations.

Players or research participants include the administration and research staff of the CMM, the Band Council and Members of the respective six bands, and staff of governmental and non-governmental organisations involved with Mi'kmaw land tenure (e.g., Indian and Northern Affairs Canada, the Legal Surveys Division, the Assembly of First Nations, and the author). The participation of all players is a characteristic that is crucial to the success of this research, which required a collaborative approach.

Informal meetings were held with the CMM staff, where interviews of relevant staff members were conducted as required. The interviews were conducted over 1 to 2 hours in an unstructured, informal manner, to put the interviewees at ease and so allow them to recollect and describe their knowledge and experiences of traditional and current Mi'kmaw tenure. All records from CMM interviews, and all information and resources

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<sup>15</sup> Section 2 of the *Indian Act* defines a 'band' as being "a body of Indians for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart..."

obtained as part of the research are to be handed over to CMM at the end of the research, as is the normal practice for research conducted for the CMM. This will help to ensure the security of the data after completion of the research. It was also agreed that any requests for information or documents relating to this research should be addressed to the CMM for their consent and dissemination. Interim reports would be submitted to the Lands Committee, a committee established by the CMM to oversee this research. The function of the Lands Committee was to work collaboratively with the author to support the author with relevant documents, discuss issues related to the study and critique interim reports prepared by the author. To this end, various meetings were held with the committee during the study period. It should be noted that as requested by the CMM, no interviews of individual Mi'kmaw Band members were actually conducted, since extensive interviews had already been conducted in conjunction with earlier research undertaken by CMM's Research Unit<sup>16</sup>. It was therefore considered that sufficient information was already available and hence further interviews by the author of Mi'kmaw Band members were not necessary. At the conclusion of the research, the research findings were presented to the CMM in a report.

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<sup>16</sup> This research included detailed interviews of Mi'kmaw elders, youth, women and leaders as part of their Traditional Use Studies project and as part of their Beneficiaries project – both projects involving background studies for resolving claims concerning Aboriginal title.

### 4.2.2 Historical Background

The Mi'kmaq or *Souriquois* as they were called by the early French settlers, occupied *Mi'kma'ki*<sup>17</sup> – a territory that covered what is now Nova Scotia, Prince Edward Island, the northern portion of New Brunswick, part of the Gaspé Peninsula in Quebec and southern and western Newfoundland [McMillan, 1996; Tanner and Henderson, 1992; DIAND, 1972] see Figure 4.1 on page 93. Given the extensiveness of their territory, and the fact that the Mi'kmaq had inhabited their territory for thousands of years before the arrival of Europeans, it is clear that the Mi'kmaq had their own political, social, legal and educational systems – systems which included their own forms of government and their own form of land tenure and property systems. Whitehead and McGee [1983] noted that the name 'Mi'kmaq' comes from the word *nikmaq*, which means 'my kin-friends'. The Mi'kmaq used this word to greet newcomers from Europe, and it was in turn subsequently used by the French to address the Mi'kmaq themselves<sup>18</sup> [Whitehead and McGee, 1983]. Over the years, the word *nikmaq* came to be written as firstly 'Micmac' and now 'Mi'kmaq' (see footnote 4 for the Mi'kmaw explanation). The earliest known

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<sup>17</sup> The spelling for *Mi'kma'ki* has been adopted from the Francis/Smith Orthography style that was introduced in the 1970s by Nova Scotia linguists Smith and Bernie Francis. Another term for the Mi'kmaw territory, *Meegamagee*, which is based on the French Pacifique style of the 1800s, has also been widely used and continues to be the preferred term used in New Brunswick. Henderson et al. (2000) notes that *Mi'kma'ki* is translated as the "space or land of friendship". It is not known when the seven districts of *Mi'kma'ki*, which includes New Foundland, were first formed. While some researchers argue that the seven districts developed after contact, McMillan (1996) has pointed out that Hoffman's research suggests that a pre-contact division existed.

<sup>18</sup> RCAP [1996] however notes that the word Mi'kmaq means the people who lived farthest east; hence they are often referred to as the people of the dawn. Jenness [1977, originally published 1932] wrote that it meant 'Allies', because of their alleged union with French and English settlers in exterminating the Beothuks of Newfoundland. Dickason [2002] however has pointed out that oral Mi'kmaw traditions assert that at the time of European arrival, the Mi'kmaq were cohabiting in Newfoundland with the Beothuks and intermarrying with them.

European contact with the Atlantic region is believed to have occurred in the late 10<sup>th</sup> century, with the Viking expeditions into Iceland, Baffin Island, Labrador and an area stretching from Newfoundland to Florida. However documentary evidence of Viking contact with the Mi'kmaq is not available [Gonzalez, 1981]. Davis [1986] estimates the pre-contact Mi'kmaw population to be around 9,000 to 10,000.

Determining traditional pre-settlement and early contact Mi'kmaw land tenure arrangements relies on two main sources: **written records** left by missionaries, explorers, scholars, administrators from the 1600's – generally non-Mi'kmaq scholars<sup>19</sup>; and **oral evidence** as passed down to today's Mi'kmaq – generally interpreted and translated from non-English speaking Mi'kmaw elders. This provides us with two issues or problems, one with using written records and the other with using oral evidence.

The problem with using written records lies in the lack of reliable written records available to us today, given firstly, the eurocentric bias of the European writers, and secondly, the fact that the early European writers tended to be those arising from the first permanent settlements that were established in Canada. However those first permanent settlements occurred more than 100 years after first contact with European settlers<sup>20</sup> [Davis, 1986]. This gives the Mi'kmaq at least 100 years for adapting their lifestyle and tenure arrangements as a result of contact with early settlers, and implies that what

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<sup>19</sup> While some form of written records had been developed by the Mi'kmaw, such as the wampum belts, it was not a form of communication that could be shared widely with Europeans and non-Mi'ka w people

<sup>20</sup> Dickason [2002] for example, refers to the Norse (1000 AD), the Basques and the Portuguese who had long exploited the fisheries off the North Atlantic before the French and English. Davis [1986] similarly notes that while the first permanent settlement was established by the French at St. Croix in 1604, the Norwegians, Swedish, Spanish, Portuguese, French, etc. had visited, fished, and traded with the Mi'kmaq from before the 1500s.

written records we now have reflect Mi'kmaw tenure arrangements that are not pre-European arrangements.

The problem with using oral evidence provided by Mi'kmaw elders lies in the errors associated with understanding, interpreting and translating into English, the perceptions, attitudes and views of non-English speaking Mi'kmaw elders. Another problem lies in the loss of information that may have occurred over time, as a result of fading accuracies in the memories of Mi'kmaw elders due to factors such as relocation to other places, or bias in the elder transmitting the stories. However such problems with bias and fading accuracies affect the writers and recipients of the written word as well. Therefore, the fact that much oral evidence represents testimonies that have withstood the test of many witnesses over unduly long periods of time, suggests that they can be accepted with an acceptable degree of reliability in the absence of hard scientific evidence.

It must therefore be stressed at the outset that any literary description of pre-European Mi'kmaw tenure systems will not necessarily be a true reflection of the land tenure systems of the time. Therefore a caveat on the authenticity of the description of the tenure system will always be present. As Dickason observed [2002:xi] "reconstructing their pre-contact history in the western sense of the term is a daunting task." Section 4.3 of this chapter attempts to describe the more prominent theories and models describing pre-contact and post-contact Mi'kmaw tenure, by drawing from ethnographic, historical, archaeological and anthropological literature, all of which are based on a combination of western or scientific evidence and on oral evidence provided by Mi'kmaw elders over the centuries.



### **4.3 Describing and Analysing Mi'kmaw Social and Political Systems**

In accordance with the framework developed in Chapter 3 and depicted in Figures 3.6 to 3.9, sections 4.3 and 4.4 are intended to develop an appreciation of the study situation by analyzing the cultural aspects of the situation. Section 4.3 will use the design criteria developed in section 3.3 to describe and analyze the social process and power-based aspects of Mi'kmaw land tenure, while section 4.4 will analyze the role of the players (or improvers of the problematic land tenure situation) that will participate in any proposed land tenure intervention or reform. This section, Section 4.3, will therefore begin with a description of traditional Mi'kmaw worldviews, values, aspirations, concepts of land and tenure, institutions and tenure arrangements over the period 1400 – 1500. This will be followed by a description of the establishment of the Indian reserves as well as the enactment of the *Indian Act*, and their effects on contemporary Mi'kmaw land tenure systems. A summary of contemporary Mi'kmaw social and political systems will then conclude this section.

#### **4.3.1 Traditional Mi'kmaw World-views, Values and Aspirations: 1400-1500**

As noted in Chapter 3, traditional Mi'kmaw land tenure and property concepts are best understood by an appreciation of the worldview and philosophy of Mi'kmaw society, since the roots of those land tenure concepts arise from and are ramifications of the society's worldview and philosophy [Little Bear, 1998]. The traditional Mi'kmaw view is that all things in the world have their own unique spirit, and all things must work in harmony with each other [Marshall, 1997]. The traditional Mi'kmaw worldview may be described as being cyclical, holistic, generalist and process-oriented, unlike European society's linear/singular worldview [Little Bear, no date]. It is **cyclical** in that time is

viewed not as an artificial creation of “time units,” but as cosmological cycles and patterns in which changes in the cosmological cycles are generally imperceptible [Little Bear, no date]. Thus at the functional, operative, day-to-day level, time is not considered dynamic, and therefore, is not an important reference point. Mi'kmaw worldview is **holistic** in that it implicitly assumes that all things in creation are inter-related and equal [Little Bear, no date]. Equality springs from the implicit belief that everything – humans, animals, plants, and inorganic matter – is imbued with a spirit [Little Bear, no date]. The Mi'kmaw worldview is **generalist** because it is biased towards generalist knowledge and processes, as a result of the slow and imperceptible but continuously changing patterns in the cosmos and the interrelationship of all creation [Little Bear, no date]. The cyclical aspect of the Mi'kmaw worldview leads to respect for cycles, phases, and repetition. Thus repetitive patterns focus on the **process** - which produces a product when followed - and not on goal orientation as they would in a linear Eurocentric worldview [Little Bear, no date].

The Mi'kmaw worldview and philosophy influenced their values, goals and aspirations, which included the sharing of wealth and resources with their wider community. Their philosophy of sharing was reflected in their social system, which included sharing in the ceremonial practices – including the various songs, chants and dances accompanying wedding, funeral and other traditional ceremonies that the Mi'kmaq practiced; and being involved in competitive traditional sports like canoeing, *waltes*, a traditional dice game, and archery [Julien, 1997]. It was also reflected in their economic system, which was characterized by the co-operative quest and distribution of food and trading goods, and the co-operative consumption of wealth [Julien, 1997]. As Paul [2000] noted,

accumulation of individual wealth through stockpiling of land and resources was not a common practice for the largely subsistent-based Mi'kmaw. The Mi'kmaw philosophy of sharing was also reflected in their political system, which was democratic and people-oriented [Julien, 1997].

#### **4.3.2 Traditional Mi'kmaw Concepts of Land and Land Tenure: 1400-1500**

Mi'kmaw worldview and philosophy was naturally reflected in Mi'kmaw concepts of land, which differed from British common law concepts of land ownership in that they (Aboriginal and Mi'kmaq people) believed that their territories were original grants from the Creator to them [Little Bear, no date]. They furthermore believed that the grants were given not in terms of ownership, but in terms of stewardship<sup>21</sup> [Bear Nicholas, 1993], in order to maintain the continuity of creation [Little Bear, no date], in accordance with their worldview and philosophy of relating to all of creation. Alienation of their territories was therefore not the normal practice [Jenness, 1932].

In addition, as noted previously, the Mi'kmaw view of land was that it was to be shared with other forms of life, including plants, animals, and even inanimate objects such as rocks or stones. As Dickason [2002:335] noted:

*Furthermore, rights to the use of land belong not only to the living but to those who have gone before as well as to those who will come; neither do they belong exclusively to humans, but to other living things as well – animals, plants, sometimes (under special circumstances) even rocks.*

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<sup>21</sup> Bear-Nicholas [personal communication, 1999] has pointed out that the concept of rights is alien to First Nations; that for First Nations, the emphasis was on 'responsibility' rather than 'rights'. The Mi'kmaq therefore emphasized responsibility, not rights, for controlling the use of their land and resources. These responsibilities tended to be inherited, although assignments could also be made for past favours; for gifts; or for trading or exchange purposes.

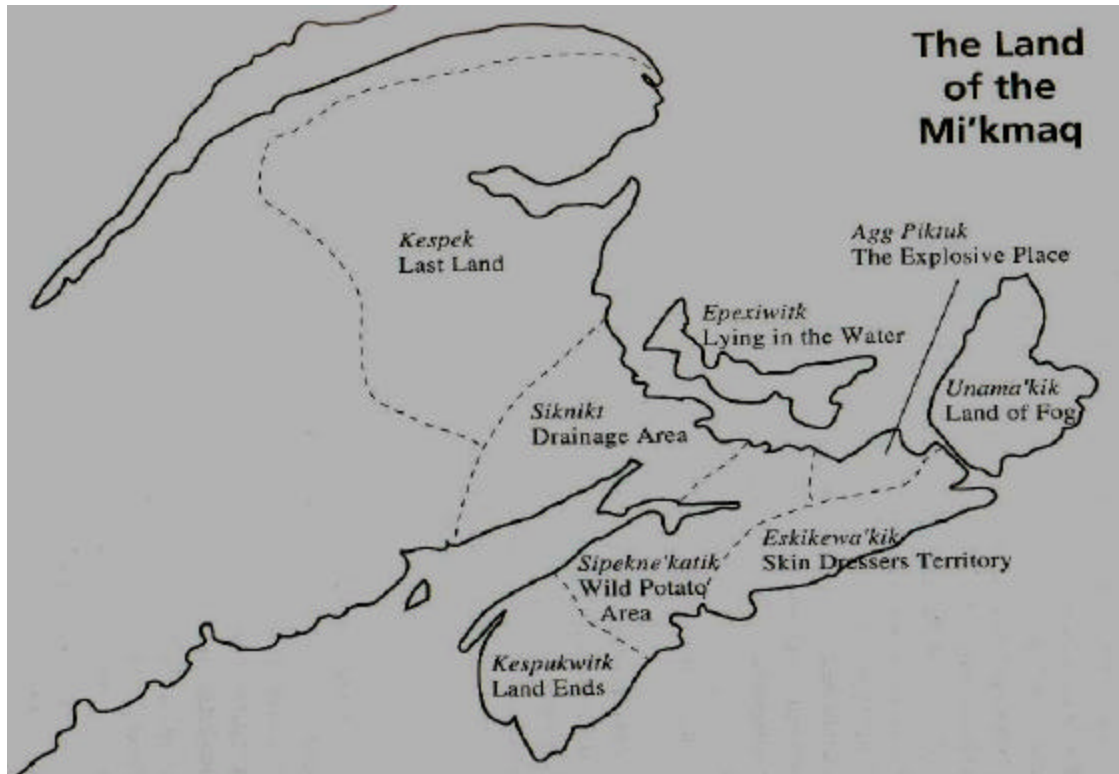
Ownership rights to land as evidenced by a 'deed' or a certificate of 'title' constitutes a property interest in land, under Canadian, British and American law [Little Bear, no date]. However for Aboriginal people, it is the songs and stories about their lands and the specific places in their lands, and the renewal ceremonies that occur about those places in their lands, that provide evidence of their title to land [Little Bear, 1998].

Don Julien [n.d. b] noted that while all land was held in common by the tribe and bands, individuals or groups of individuals had usufructory rights to the land. The Mi'kmaw Grand Council and local village chiefs allotted hunting, fishing and berry gathering areas to the heads of family units in each district, and these territories were exclusive to the family groups as long as any of the sons were living to work them [Julien, n.d. b]. Julien [n.d. b] has opined that territories were acquired through paternal inheritance. The Mi'kmaw Grand Council was also involved in exchanges of territories between districts and individuals through intermarriage or total loss of a village by war or sickness.

### **4.3.3 Traditional Mi'kmaw Institutions over 1400 – 1500**

The term *institutions* has been defined in Chapter 2 as being the humanly devised constraints that shape human interactions [Sevatdal, 1999] – such as the established customs, practices and laws of a society or group. As such they include the 'socio-political' or social and political structures (such as political, religious, customary and social structures) that may be in place to regulate land tenure related activities. Institutions are important to the successful operation of a land tenure system because they both shape, structure and control the various components and operations of a land tenure system. They are also important for providing mechanisms to deal with the external

and/or environmental forces and issues that may affect them. Institutions therefore form a crucially important part of any land tenure study.



**Figure 4.1 : Mi'kma'ki – the Land of the Mi'kmaq**  
[Source: Paul, 2000]

The traditional government or power-based aspect of the Mi'kmaq Nation is known as the *Mi'kmawey Mawíomi* [McMillan, 1996] or *Santé Mawíomi* [Leavitt, 1995] or Mi'kmaq Grand Council<sup>22</sup>. The Mi'kmaq Grand Council united the seven districts (*sakamowti*) of *Mi'kma'ki*, which as mentioned earlier, included the Gaspé peninsula of Quebec, northern and eastern New Brunswick, all of Nova Scotia and Prince Edward

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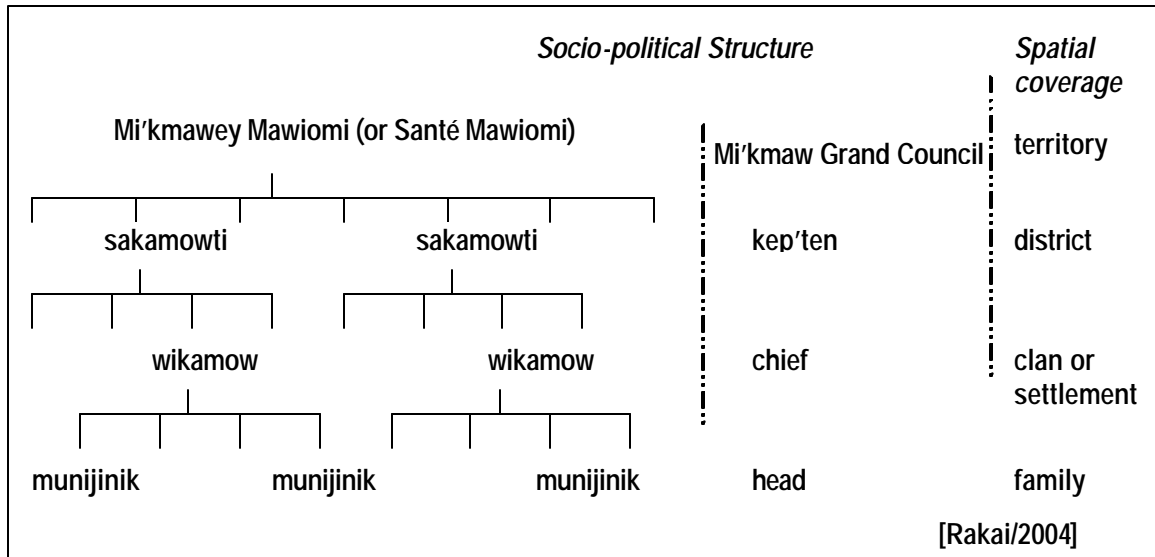
<sup>22</sup> The Grand Council then (and now) was the traditional spiritual, political and military government of the Mi'kmaq Nation (Leavitt, 1995). Will Basque (Leavitt, 1995) maintains that the Grand Council has never ceased to exercise its powers and policies, and was only submerged/subdued in the 1960's when the Department of Indian Affairs and Northern Development (DIAND) created band governments in Nova Scotia to administer its (DIAND's) policies and programs. Leslie McMillan (1996) also argues that it is an aboriginal construct governing the Mi'kmaq people and remains salient to Mi'kmaq culture and society.

Island and the island of Newfoundland (see Figure 4.1). Each of the *sakamowti* or districts was made up of several small, clan-based (extended family groups) settlements or *wigamow*. Each *wigamow* or clan-based settlement in turn was made up of a number of families of kinsmen. Each family or *munijinik* formed the basic socially organized unit – man, his wife and their kids [Jenness, 1977].

Each *wigamow* had a local chief, who was chosen for his ability and knowledge of the territory [Julien, 1997 and Leavitt, 1995]. The local chiefs in turn elected a *kep'ten* (“captain”) or district chief for his ability to lead men and inspire confidence, his territorial knowledge, his skills as a good spokesman, his superior hunting abilities, his lavish generosity towards the people, and his courage and valor in warfare [Julien, 1997; Julien, n.d. b]. In terms of land tenure, the *kep'ten* or district chief was responsible for presiding over his *sakamowti* (district), providing an organized plan for mobilizing *wigamow* to summer and winter camps, assigning places for hunting, fishing and trapping within the *sakamowti*, and attending the annual Assemblies of the Grand Council or *Mi'kmawey Mawíomi*<sup>23</sup> to assist with the government of the Mi'kmaq. Figure 4.2 has been developed by the author to depict a generalized hierarchy of traditional Mi'kmaw social and political structure, and the geographical or spatial coverage held at each level on the hierarchy.

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<sup>23</sup> Chute [1998] has suggested that the three-tiered ranking order of chiefs emerged after the establishment of formal relationships between the Mi'kmaq and French in Louisbourg after 1720. However McMillan [1996] has pointed out that evidence indicates that the Grand Council is an Aboriginal construct, predating contact with European missionaries, traders, explorers, settlers and the early fishers. McMillan [1996] noted that while early 17<sup>th</sup> century sources hint at the power and importance of the Mi'kmaw Grand Council, its political power diminished in the 18<sup>th</sup> century with European colonization of Mi'kmaw territory, and that it effectively disappeared from European view in the 19<sup>th</sup> and early 20<sup>th</sup> centuries.



**Figure 4.2 : Traditional Mi'kmaw Socio-political Structure**

The *kep'ten* or district chief thus represented the entire district at the Grand Council or *Mi'kmawey Mawiomi*. The *kep'ten* elected from among themselves, two key leadership positions on the Grand Council: the *jisagamore*<sup>24</sup> or Grand Chief and the *jikep'ten* or Grand Captain, both to guide them, and one to speak for them [Henderson et al., 2000]. Also selected were *putuís* – the advisors, speakers or wampum-readers who were responsible for guarding the laws of the nation and remembering treaties entered into with other nations; and the *smankus* or leader of the warriors [Henderson et al., 2000 and Leavitt, 1995]. All matters relating to the Mi'kmaq were discussed and voted on by the *Mi'kmawey Mawiomi*, which was responsible for dividing the territories (by re-allotment

<sup>24</sup> Another term that is now becoming more widely used is *Kji Saqmaw*. A famous *Kji Saqmaw* of the Mi'kmaq from Gaspe to Cape Sable was the chief Membertou, who, when he died in 1611, was estimated to be over 100 years old. He had met Jacques Cartier as a chief with adult children, when Cartier had visited the Bay of Chaleur in 1534 (DIAND, 1972). Membertou is renowned for his courage, physical strength, diplomacy, and for his loyalty and trustworthiness to the French (DIAND, 1972). A famous modern *Kji Saqmaw* is Donald Marshall, who held the position for 27 years, until his death in 1991.

of areas) as required [Julien, n.d.]. Council discussions were recorded on Wampum Belts that were kept by each district to record its history [Julien, 1997].

Balcom [1979] noted that while the French and British ignored these divisions, they did recognize that there were groupings within the tribe. Thus the French divided the tribe according to the principal villages or missions, while the “less informed, or perhaps less particular, British took note only of such large groupings as the Cape Sable or the Cape Breton Indians” [Balcom, 1979: 1]. Henderson et al. [2000:416] however noted that:

*The continuity and authority of the Mawíomi exist in Mi'kmaw culture, in a common bond or vision that transcends temporary interests. This bond arises naturally from the fate of being born into a family (munijinik), community (wikamouw)[sic], territory (Mi'kma'ki), and people (kinuk).*

In an ethnohistoric analysis of the changing economic roles of Mi'kmaw men and women over 4 centuries of European contact, Gonzalez [1981] characterized the early contact traditional Mi'kmaw tenure system as being a subsistent system based on a hunting-gathering-fishing economy. In terms of division of labour, Gonzalez [1981] noted that Mi'kmaw men and women were dependent on each other for labour, an interdependence which was necessary for success in the Mi'kmaw aboriginal subsistence cycle. For instance, women also played a role in the hunting of large animals – while men caught the prey, women were responsible for turning the raw material into an edible, wearable and tradeable item [Gonzalez, 1981]. In manufacturing snowshoes or canoes, men made the frames while women completed the remaining tasks [Hoffman, 1955a]. In fishing, men prepared the traps and weirs while women caught the fish [Hoffman, 1955a]. While men made the bows and arrows, women made the quivers [Lescarbot 1606, quoted by Gonzalez, 1981].



A feature of a hunting-gathering subsistence base is the constant and crucial contribution of foodstuff by women to the social group [Gonzalez, 1981]. These gathering contributions, together with Mi'kmaw women's participation in fishing and small game hunting, suggests that Mi'kmaw women had a dominant role to play in providing for the Mi'kmaw food base and thus the economy of early-contact Mi'kmaw [Gonzalez, 1981]. Box 4.1 provides a more detailed description of the general characteristics of pre-settlement Mi'kmaw land tenure arrangements.

**Box 4.1: Pre-settlement Mi'kmaw land tenure arrangements**

[Source: Canada (RCAP, Vol. 1), 1996]

Internal peace was maintained among the families by dividing up the national territory into seven districts, each with a chief, and by acknowledging family rights to certain hunting grounds and fishing waters. District and territory divisions depended on the size of the family and the abundance of game and fish. These families made up several small gatherings or councils. From each settlement of kinsmen and their dependents, or wigamow, the Holy Gathering, also known now as the Grand Council of the Mi'kmaq (Santé Mawíomi) was created. The Mawíomi, which continues into the present time, recognizes one or more *kep'tinaq* (captains; singular: *kep'tin*) to show the people the good path, to help them with gifts of knowledge and goods, and to sit with the whole Mawíomi as the government of all the Mi'kmaq. From among themselves, the *kep'tinaq* recognize a *jisaqamow* (grand chief) and *jikeptin* (grand captain), both to guide them and one to speak for them. From others of good spirit they choose advisers and speakers, including the *putu's*, and the leader of the warriors, or *smaknis*. When the birds begin their migration south, *lnapskuk*, the symbolic wampum laws of the Mi'kmaq alliances, are read and explained to the people.

At the annual meeting, the *kep'tinaq* and Mawíomi saw that each family had sufficient planting grounds for the summer, fishing stations for spring and autumn and hunting range for winter. Once assigned and managed for seven generations, these properties were inviolable. If disputes arose, they were arbitrated by the *kep'tinaq* individually or in council.

The Mi'kmaq were neither settled nor migratory. The environment of their birth has always been suited best to seasonal use so that, compatible with the rhythms of the earth, families were responsible for a hunting ground, a fishing river or waters and a planting home, and they travelled to other resources throughout the year. They lived within the beauty and cycles of their lands. Given this deep attachment to the land, it is not surprising that all natural features within the Mi'kmaq territory have ancient names in the Mi'kmaq language, names that bear witness to their continuous use and possession of them. The trees, the shore, the mist in the dark woods, the clearings were holy in their memory and experience, recalling not only their lives but also the lives of their ancestors since the world began. This sacred order was never seen as a commodity that could be sold; it could only be shared.

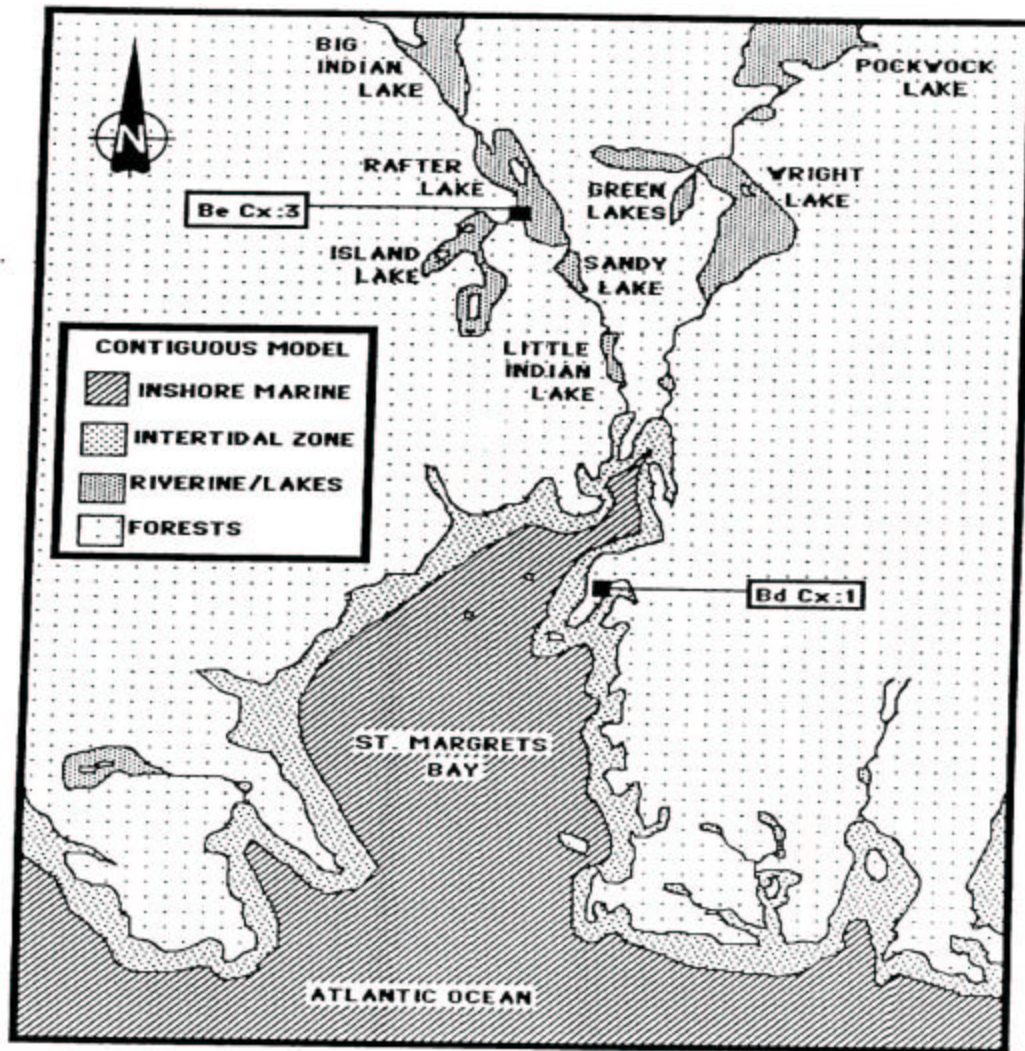
#### 4.3.4 Traditional Mi'kmaw Tenure Arrangements over 1400 - 1500

Significant contact between Mi'kmaw and European fishermen was well established by the 16<sup>th</sup> century, after the explorations of Cabot, Cartier, Corte-Reals and Verrazano in Nova Scotia and Prince Edward Island in the 15<sup>th</sup> century. Fur trading was also well established by the end of the 16<sup>th</sup> century. The activities of the fisheries and fur trading began affecting traditional Mi'kmaw tenure patterns from as early as 1610 [Gonzalez, 1981]. Archeological evidence found in sites across Nova Scotia indicates that the early Mi'kmaq lived in separate family groups, using and occupying the whole of Nova Scotia to maintain their social, economic, political, educational and property systems [Julien, n.d.]. Various models have been proposed to explain the settlement patterns of pre-settlement Mi'kmaw, including ethnohistoric models, a contiguous habitat model and a family hunting territories model.

Based on ethnohistoric data, the long accepted model proposed that traditionally the Mi'kmaq led a strict seasonal round of subsistent pursuits, usually wandering in extended family groupings in the woods in winter and relocating to the seashore in summer [Balcom, 1979; Gonzalez, 1981; Friesen, 1997; Julien, n.d. b]. Thus, within each of the seven *sakamowti* or districts, there were a number of traditional summering and wintering spots. The Mi'kmaq hunted moose, caribou and other woodland game throughout the winter and moved to the seashore in spring to gather shellfish, to fish at river mouths and to hunt seals along the coast [DIAND, 1972].

Davis [1986] however found that archaeological evidence contradicted the above ethnohistoric-based model, and has argued that the above model of the Mi'kmaq being inland in winter and coastal in summer was too simplistic. He pointed for instance, to

evidence of substantial dwellings that had presumably been constructed for the cold months of winter, in archaeological sites excavated on the coasts of Passamaquoddy Bay.



**Figure 4.3 : Stephen Davis' Contiguous Habitat Model, showing the four Economic Habitat Zones**

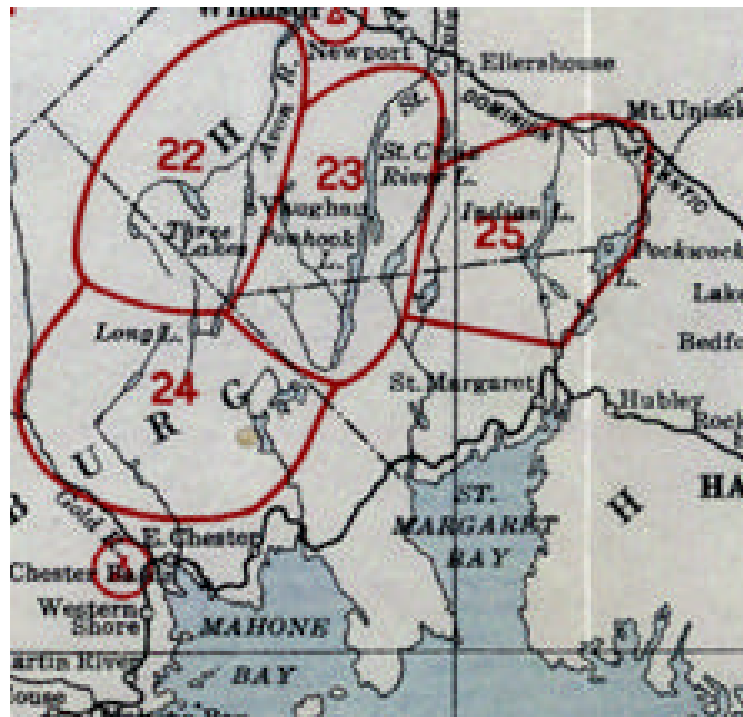
[Source: Davis, 1986].

Davis [1986] developed a contiguous habitat model - an economic model based on contemporary resources of the four major habitat zones in the area (see Figure 4.3):

1. inshore marine habitat zone : containing salt-water fish and marine mammals, such as sturgeons, bass, whales – as described by Denys

2. intertidal habitat zone: containing seals, shellfish, lobster, squid, oyster, tomcod, wild geese, brant, ducks – as described by Denys, Biard, LeClercq
3. riverine/lakes habitat zone: containing brook trout, atlantic salmon, beavers – as described by Denys
4. forest zone: the zone bounding coasts, rivers and lakes, and containing land mammals, birds and edible plants

Using a combination of archaeological evidence, ethnohistorical records and data on current economically important natural resources in the habitat zones, Davis argued that the Mi'kmaq did not move an entire village to a particular resource, as was suggested by the former model. Instead, they operated from a central 'homebase' and exploited the four habitat zones throughout the year. In delineating the forest zone and riverine/lakes habitat zone, Davis' model is supported by Frank Speck's model of family hunting territories for the maritimes (see Figure 4.4 below).



**Figure 4.4 : Speck's Map showing the Hunting Territories of the Mi'kmaq near the St. Margaret Bay area**  
[Source: Speck, 1922].

Figure 4.4 depicts the portion of Speck's map of Mi'kmaw hunting territories in the St. Margaret's Bay area. Speck, an anthropologist, proposed that private property had existed amongst 'primitive' societies by showing that Algonkian<sup>25</sup> social organization was based on the family hunting band [Speck, 1915]. He thus attempted to demonstrate that the Montagnais hunters of the Labrador Peninsula, as well as the Mi'kmaw hunters of Newfoundland and Nova Scotia, divided their lands into tracts or 'hunting grounds,' that were individually owned and were passed down from father to son.

Speck argued that early records for the area indicated that that had been the case before the arrival of Europeans in the area, and that his literature review suggested that similar forms of landownership occurred worldwide and were ancient. It should be noted that the concept of tenure pluralism, where various interests, including private family hunting rights, may subsist at any one time in any one place, supports Speck's theory. Speck's proposition that privately held hunting tracts were an aboriginal right has however been disputed by other anthropologists, such as Jenness [1977], Leacock [1972] and Feit [1991]. For instance, Leacock's research among the same Indians in Labrador that Speck had worked with, led to her concluding that the hunting-ground system had actually developed as a result of the fur trade [Leacock, 1972]. The controversy over the authenticity of Speck's private family hunting rights continues today [Tanner, personal communication, 2004].

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<sup>25</sup> The term 'Algonkian' refers to the linguistic classification of First Nations peoples – the Mi'kmaq are classified as Algonkian speakers.

However, the Archaeological evidence submitted by Davis [1986] implies that Speck's model may in fact reflect the actual settlement and hunting patterns of the Mi'kmaw of the pre-European settlement era. Furthermore, Leacock's work was influenced by Marx's evolutionary ideas and by Steward's ecological/evolutionary anthropology approach – approaches that are now criticized by contemporary scholars for being based on a number of ethnocentric assumptions about 'primitive societies' [Benda-Beckmann, 1995] and for being prejudicial consequently to Aboriginal peoples' quest for basic economic rights [Ray, 2003 and Rigsby, 1998].

#### **4.3.5 Establishment of Indian Reserves and the Indian Act**

An Indian reserve is a tract of land that has been historically set aside and reserved for the use and benefit of a particular Indian Band or First Nation. There are nearly 2300 Indian reserves in Canada, which are occupied by over 600 First Nations or Indian Bands. This section describes the establishment of Indian or First Nation reserves in Nova Scotia, and the enactment of the *Indian Act* of 1876, to set the context for the description in sections 4.3.6 to 4.3.9, of contemporary land tenure arrangements in the Indian reserves. The period between 1500 and the late 1700s saw traditional Mi'kmaw land tenure and lifestyles changing from a highly mobile existence – one where the Mi'kmaq operated from a central home base to freely and widely roam their family-based territories, in tune with the seasons, their ecological habitats, their customs and their laws – to a sedentary, confining existence where the Mi'kmaq were exposed to disputes with encroaching settlers and land grabbers and forced to become sedentary commercial farmers or wage-earning workers [Paul, 2000]. For reasons of brevity, the land tenure system in the

intervening period before the establishment of the Indian reserves (i.e., between 1500 and late 1700s) will not be discussed in this chapter.

### **Indian Reserves**

European contact with the Mi'kmaq inevitably brought disease and disputes over land and resources that resulted in hostilities and the eventual displacement of the Mi'kmaq [Paul, 2000]. Henderson observed [1980:20]:

*... in the aftermath of displacement, the Indians were left largely to their own resources. In the years prior to 1840, many would stubbornly cling to as much of their ancestral lands as they could keep out of the hands of white settlers, others petitioned for lands and received licenses to occupy "during pleasure". The balance resorted to nomadic ways or were permitted to settle on private lands. There was no policy to encourage Indian settlement and the emergence of reserves, such as they were, was sporadic.*

A policy of providing the First Nations with reserves of land had been introduced into the Maritime Provinces from as early as 1765, when land was set aside on the banks of the St. John River at St. Ann's for the Maliseets in New Brunswick [DIAND, 1972]. In Nova Scotia, the Executive Council issued a proclamation in 1773 setting aside tracts of land for the use and benefit of the Indians or Mi'kmaq and forbidding land negotiations with the Indians other than by governmental authority [DIAND, 1972]. In 1779 a reserve with an area of 2 square miles was set aside on the Stewiacke River for the Mi'kmaq of Shubenacadie and Cobequid [DIAND, 1972].

Indian reserves were established in the Atlantic provinces in the latter half of the 18<sup>th</sup> century to provide land on which the Mi'kmaq might settle and possibly cultivate [Bartlett, 1986]. However the absence of governmental policy to encourage Indian settlement [Henderson, 1980], together with the refusal of the Mi'kmaq to leave their traditional ancestral lands and settle on small and marginal reserve lands, led to the

sporadic emergence of reserves. Nevertheless, despite being generally small areas of land, the reserve lands were subject to severe encroachment by settlers [Bartlett, 1986]. Consequently the governments of Nova Scotia, New Brunswick and Prince Edward Island passed legislation to protect Indian reserves from encroachment and to provide for the disposal of reserve lands in which squatter settlements had already taken place [Gould and Semple, 1980].

After Confederation in 1867, under Section 91(24) of the *British North America Act*, responsibility for the Indians and lands reserved for Indians was transferred from the province of Nova Scotia to the Dominion of Canada. The Dominion sought to remove squatters from the reserves and to this end, developed a combined policy of seeking the removal of squatters and of seeking surrenders from the Mi'kmaq [Bartlett, 1986].

To support the reserve system that had been established, and to honour where applicable the treaties that had been negotiated and signed for its establishment<sup>26</sup>, the Federal Government established a land tenure system that was strictly regulated by the *Indian Act* [initially of 1876, currently of 1985].

### **The Indian Act**

The *Indian Act* of 1876 evolved historically to protect the small share of Canada's land base that remained with the Indians [Henderson, 1996]. Until 1850, legislation regarding the Indians had been enacted in a piecemeal fashion, and thus tended to be incomplete

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<sup>26</sup> Earlier reserves created in Atlantic Canada in the 18<sup>th</sup> and 19<sup>th</sup> centuries tended to be created without treaties, while those created in western Canada and Ontario in the 19<sup>th</sup> centuries tended to be created as part of treaties



and virtually unenforceable [INAC, 1978]. After 1850, two objectives emerged: firstly, the protection of Indians from destructive elements of “white” society until Christianity and education raised them to an acceptable level; and secondly, the protection of Indian lands until Indian people were able to occupy and protect them in the same way as other citizens [INAC, 1978]. To these ends, the two *Land Acts* of 1850 (for Upper and Lower Canada respectively) and the *Civilization and Enfranchisement Acts* of 1857 and 1859 were carefully framed [INAC, 1978]. The intent of their main provisions became the foundation for subsequent legislation affecting Indians after 1867 [INAC, 1978].

Most of the changes in the *Indian Act* after Confederation in 1867 were based on the principle that Indians needed to be assimilated into the majority community [INAC, 1978]. Legislative changes thus reflected the prime interests of “white” society, rather than those of Indian people [INAC, 1978]. The most significant legislative change was in the consolidation of all laws respecting Indians into the *1876 Indian Act*. The *1876 Indian Act* derived its authority from Section 91(24) of the *British North America Act* (BNA), which provided for federal legislative power over “Indians, and lands reserved for Indians” [INAC, 1978]. In practice, the *Indian Act* coincided with the extension of federal government jurisdiction, first to the Maritimes and later to the West [INAC, 1978]. It also clarified three main areas of concern: lands, membership, and local government [INAC, 1978]. It has since been the most influential instrument used by firstly the British colonial government and later the Canadian federal government to control and manage the lifestyles and land tenure systems of the Indians in Canada and of the Mi'kmaq in Nova Scotia. Sections 4.3.6 to 4.3.9 describe the land tenure arrangements that currently exist since the enactment of the *Indian Act* in 1876.

#### **4.3.6 Contemporary Mi'kmaw Worldviews, Values and Goals**

The establishment of the reserves and the rising numbers of non-Mi'kmaw immigrants from Europe, and from the Loyalists arriving in Nova Scotia after the American Revolution of 1783 (Loyalists in Nova Scotia numbered around 32,000 after the American Revolution), led to the Mi'kmaq losing much of their traditional lands to the settlers [Gonzalez, 1981]. This meant that with time, access to their traditional resources – the forests, the fisheries – was greatly diminished, forcing them to petition for numerous land grants. The few lands that were granted (in marginal areas and/or over areas already settled by the Mi'kmaq) were not granted outright, they were granted solely for hunting and fishing purposes [Upton, 1975]. The reduced numbers of the once abundant wildlife (such as moose and caribou), coupled with the severely diminished access to the forests and fisheries, resulted in starvation, poor health and declining population for the Mi'kmaq. This meant that while the traditional worldviews and values of the Mi'kmaq towards land remained generally unchanged, as can be seen in their continued dependence on hunting and fishing, their goals in terms of traditional economic needs and activities changed. For instance while activities enforced by governmental policy such as sedentary farming increased, their traditional activities such as hunting and fishing declined. The goals of the contemporary Mi'kmaq are similar to the goals of other Canadians, which are to promote the economically, ecologically and culturally sustainable development of their communities [Julien, personal communication, 2001].

#### **4.3.7 Contemporary Mi'kmaw Concepts of Land and Land Tenure**

As the 19<sup>th</sup> century progressed, the pressure exerted by the British government on the Mi'kmaq to become sedentary farmers intensified. This pressure coupled with the reality

of decreasing hunting and fishing areas and a corresponding decline in mobility, created an environment which made the Reserve system and the ownership of private land grants one recourse for Mi'kmaw survival [Gonzalez, 1981:66]. As early as 1800, land licenses were given to *heads of families* to protect their hunting and fishing rights. Later, when the British administration set aside Reserve lands for groups of Mi'kmaw, they dealt with them as *individualized* families for distributing tools, seeds and other supplies [Gonzalez, 1981]. In doing so, the British concept of the nuclear family as the agricultural unit was transferred to the Mi'kmaq. Gonzalez [1981:66] writes:

*The ethnohistorical data from the mid-19<sup>th</sup> century suggests that while the Mi'kmaq ideal continued to be the communal sharing of property, their real behaviour, influenced by governmental pressure and the realities of their economic situation, began utilizing private property as one of their economic mechanisms and the nuclear family gradually grew in importance as the basic economic unit.*

The most dramatic change in traditional Mi'kmaw concepts of land and land tenure and thus in Mi'kmaw economic patterns, occurred in the rift in the division of labour between male and female [Gonzalez, 1981]. The literature documents that handicraft making was the main income-generating occupation for the Mi'kmaw women of the 19<sup>th</sup> century. The federal government directed farming and coopering activities towards men; and spinning and knitting activities towards women [Gonzalez, 1981]. While the former male-oriented activity was very successful, the latter female-oriented activity of spinning and knitting was never implemented at all. This effectively excluded Mi'kmaw women from those activities which were profitable in the European community of the mid-19<sup>th</sup> century – a reflection perhaps of the same exclusion of their female European counterparts [Gonzalez, 1981].

#### **4.3.8 Contemporary Land Tenure Institutions in Reserves under the Indian Act**

The primary institution established by the federal government to administer its Indian Reserve land tenure system is what is now known as Indian and Northern Affairs Canada (INAC). Legally known under the *Indian Act* R.S.C. 1985 as the Department of Indian Affairs and Northern Development (DIAND), INAC has been responsible for managing all land matters within the reserves since 1830<sup>27</sup>. It has for instance controlled all land acquisitions, land transfers, and land use in a reserve.

The Indian Lands Registry (ILR) was established by DIAND in accordance with Sections 21 and 55 of the *Indian Act* to record all interests held in a reserve, and all transactions affecting those interests. However the Indian Lands Registry has been widely criticized for failing to carry out its responsibilities because it does not have complete and reliable records regarding interests in reserves [Adams, personal communication, 2001].

Another institution, the federal Surveyor General's office or Legal Surveys Division (LSD), currently under the Department of Natural Resources and referred to currently as Natural Resources Canada (NRCan), has also played a role in assisting INAC with its administration of First Nation reserves. The Legal Surveys Division has been responsible

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<sup>27</sup> In 1830, the *British Indian Department* stopped operating as a branch of the British military and became the *Department of Indian Affairs*, a branch of the public service. Until 1830, dealings between the British government and the Indians were largely concerned with developing military alliances. In 1844, the control of the Department of Indian Affairs was transferred from the British Imperial authorities to the Province of Canada [Bartlett, 1988:3].

since 1936<sup>28</sup>, for the survey and mapping of the spatial extent (i.e., boundaries) of interests in Canada Lands, which includes Reserve lands. The Legal Surveys Division (LSD) is the custodian of all survey-related documents pertaining to Reserve lands.

Complex land tenure structures have been established by the federal government to deal with the development of natural resources on reserve lands. For instance, the *Indian Oil and Gas Act* [1985] and the *Indian Oil and Gas Regulations* [1994] vests the management of oil and gas resources on reserve land in Indian Oil and Gas Canada, a federal agency, for the benefit of the First Nation on which the resource is located. The *Indian Mining Regulations* [1990] and the *Indian Timber Regulations* [1994] define mechanisms and procedures for exploiting minerals and timber on reserve lands. For example, the *Indian Mining Regulations* [1990] sets out a system of permits for mineral exploration, as well as leases and a royalty structure for mineral extraction. The *Indian Timber Regulations* [1994] sets out a system of permits and licenses for the extraction and removal of timber.

In addition, where land tenure systems continue to be governed by Aboriginal customs and consensus, traditional institutions such as the Council of chiefs and elders, and the potlatch ceremony in western Canada, continue to subsist alongside Canadian government-induced institutions.

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<sup>28</sup> From 1880 to 1936 all surveys of Indian reserves were undertaken by Indian Affairs, not by the federal surveyor general's office (LSD). It should also be noted that the survey and mapping of Indian reserves by the Legal Surveys Division (LSD) is just one of its many functions, since it is responsible for the surveying and mapping of all federal lands ("Canada Lands"), which includes Indian Reserves, National Parks, the oceans, and the Yukon, North West Territories and Nunavut as well as all federally owned properties.

#### 4.3.8.1 Legal Reform: Indian Act, 1952

The strong participation of Indians in both world wars helped to foster a new attitude by the Canadian public towards improving Indian conditions [INAC, 1978]. This led to a revision of the *Indian Act* that was aimed at developing a new statute that would be acceptable to both Indians and the Government [INAC, 1978]. In a report to the Special Joint Committee hearings for revising the *Indian Act*, Justice Macdonald of the Supreme Court of Alberta wrote (quoted in INAC, 1978:138):

*The Indian Act is loosely drawn and is replete with inconsistencies. I venture to say that flexibility rather than rigidity and elasticity rather than a strict and narrow view should govern its interpretation. (CP, S.J.C. 1947, pp. 541-542).*

In presenting to the same Special Joint Committee, the views of the unaffiliated Indians of Alberta on the relationship between treaties and the *Indian Act*, Chief Yellowfly said [INAC, 1978: 137]:

*The Indian Act, apart from its relationship to the treaties, is in its simplest form and purpose a codified sociological affair. We believe that fundamentally the object of the Indian Act is twofold. Firstly, the Crown through the treaties made certain promises to the Indian people. In order to implement those promises it was necessary to legislate or create an Act respecting Indians, and the treaties. Secondly, to enact laws designed to protect and guide the Indian during the process of his adoption and assimilation of the culture which the Indian had to assume and accept.*

The ensuing amended *Indian Act*, R.S.C. 1952, c.149, did not differ in many respects from previous legislation [INAC, 1978]. The main features of the earliest Dominion legislation – protection of Indian lands from alienation and Indian property from depredation, provision for a form of local government, methods of ending Indian status – all remained intact [INAC, 1978].

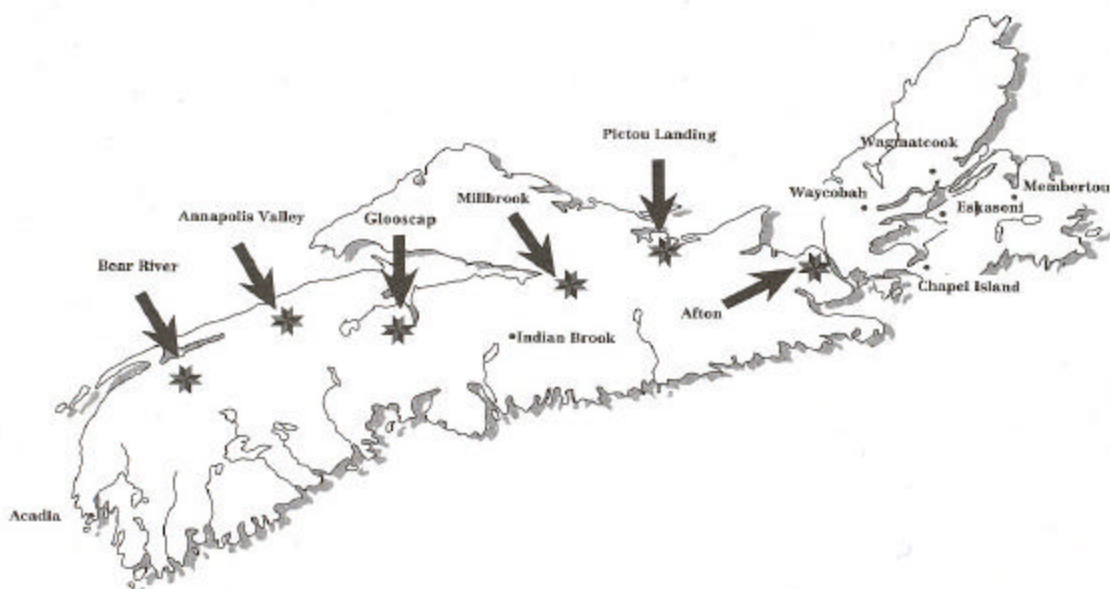
However, the reduction of the Minister or Superintendent-General's responsibilities to a supervisory role, but with veto power, meant that the powers of the Minister had never

appeared so limited since the initial 1876 Act [INAC, 1978]. Whereas the previous 1876 *Indian Act* had empowered the Minister to initiate action in 78 sections of the Act, the new 1952 *Indian Act* reduced this to 26 such sections [INAC, 1978]. The Minister now required approval of the Band Members before intervening in most band and personal matters, thus giving the Bands greater autonomy in managing their reserves [INAC, 1978]. Indians were no longer forbidden to perform certain ceremonies and dances (e.g., the potlatch ceremonies) could now sell their produce or stock without permission from the Indian agent, and no longer needed permission to attend fairs and rodeos [INAC, 1987]. However, the powers of the Ministry and Governor-in-Council remained formidable – administration of over half of the Act was at the discretion of the Minister or Governor-in-Council, with the latter having the power to declare any or all parts of the Act inapplicable to any band or individual Indian, subject only to another statute or treaty [INAC, 1987].

Subsequent amendments to the 1952 *Indian Act* over the next decade, included amendments in 1953 concerning the sale and patent of surrendered lands, the right to seize minerals or other resources unlawfully taken from reserves, loans to Indians for purchasing farm equipment and for bringing new land under cultivation [INAC, 1987]. On 14 April 1958, Canada and Nova Scotia entered into an agreement regarding the legal status of reserve lands in the province, under which title to lands was legally and officially vested in the federal Crown in right of Canada.

Discussions were held in 1956-1958 to divide the Mi'kmaq into individual bands to allow them to administer unoccupied reserves within their regions [Julien, 1997]. Thus in 1960, the Mi'kmaq of Nova Scotia were divided into eleven bands with assigned land

holdings and trust funds [DIAND, 1972 and Julien, 1997]. Two more bands were later recognized – Acadia, near Yarmouth, in 1965 and Horton (now Annapolis Valley) in the Annapolis Valley, in 1984 [Julien, 1997]. Figure 4.5 depicts the location of the contemporary Mi'kmaw Bands in Nova Scotia. It should be noted that this research is mainly concerned with the six Bands in mainland Nova Scotia that are under the jurisdiction of the Confederacy of Mainland Mi'kmaq.



**Figure 4.5 : Map showing Mi'kmaw Bands in Mainland Nova Scotia**  
[Source: Confederacy of Mainland Mi'kmaq, 2001]

#### 4.3.8.2 Indian Act, 1985

Recognition of "existing aboriginal and treaty rights" in the *Constitution Act, 1982* and proclamation of the *Canadian Charter of Rights and Freedoms* led to important changes for First Nations women in Canada. Government had long promised to remove involuntary loss of registration (called "enfranchisement") of Indian men and women from the Act, especially the provision that deprived Indian women of their status and



Band membership when they married men who were not registered Indians [Henderson, 1996 and Imai, 1998]. In comparison, non-Indian women who married Indian men gained status and membership. The 1985 amendments (*Bill C-31*) was thus introduced and passed [*Indian Act* R.S.C. 1985, c. 32 (1st Supp.)] to remove the discriminatory provisions. *Bill C-31* reinstated not only those who had previously lost status, but their children as well. This resulted in a large increase overnight of the status Indian population and created increased demands upon both community and band resources that are yet to be resolved. For instance, while there had been approximately 300,000 status Indians in 1985, the number of status Indians had grown to 600,000 in 1996 [Henderson, 1996].

#### **4.3.9 Contemporary Land Tenure Arrangements in Reserves**

The land tenure arrangements concerning rights, restrictions and responsibilities for control, ownership and use of Reserve lands have been controlled by the *Indian Act*, and by the policies emanating from the *Indian Act* and DIAND (or INAC). In terms of the legal socio-political control and ownership of reserve lands, reserve lands are not legally owned and controlled by the First Nation, but by the federal government, who holds it in trust for a particular First Nation. This means that although the First Nations or Mi'kmaq have lived on and used the resources on a reserve since the establishment of the first reserve in Nova Scotia in 1779, they technically do not have ultimate socio-political rights of control and ownership over the management and use of their lands and resources. Rather, under the *Indian Act*, their rights to control, own and use their lands and resources have been subject to the statutory approval of the INAC Minister. See Box 4.2 on the next page for a brief description of how interests in land may be held under an

*Indian Act*-based land tenure system. Under this land tenure system, ownership of land vests in the federal government, for which direct responsibility is held by the Minister of Indian and Northern Affairs Canada (INAC).

**Box 4.2: General characteristics of an *Indian Act*-based land tenure system**

[Sources: DIAND, 1995 and McEwen, 1992:333]

**Under the *Indian Act*, interests in land may be held as follows:**

- **unallotted land** – also known as “common Band land”, this is reserve land that has not been allotted by the band council to an individual but is held by the band members in common;
- **allotted land** - reserve land formally allotted by the band council under the *Indian Act*, to individual band members, either in severalty or under co-ownership such as husband and wife joint tenancy; generally evidenced by a Certificate of Possession
- **leases of designated lands, issued by the Crown to non-Indians;**
- **leases of allotted lands, issued to non-Indians by the Crown on behalf and for the benefit of the individual Indian, or “locatee”, to whom the land was allotted by the band council; and**
- **various forms of leases and permits for agriculture, mining, oil and gas exploitation, or timber extraction.**

The *Indian Act* thus vests wide-ranging powers over First Nations land in the INAC Minister, who is empowered to regulate the allocation, use, transfer and distribution of rights, responsibilities and restrictions over land, to the Mi'kmaq. For instance the Minister has the authority to control the possession of land in reserves – he/she can prevent the transfer of reserve lands from one individual Mi'kmaq to another, and has the power to allocate the land according to the federal government's wishes, even if it contravenes the wishes of the Mi'kmaq [Driben, 1986]. The *Indian Act* provides for the election of Band Councils to carry out the administrative duties set out by the Minister of

INAC. All dealings in land under this tenure system therefore requires prior permission from INAC, after being processed by the Band Council.

Rights of residence and rights of access to resources attach only to registered members of the First Nation (commonly referred to as 'status Indians') under the *Indian Act*.

Generally speaking, non-Indians cannot live on, use or occupy Indian reserve land unless

[Henderson, 1996]:

- the community has "surrendered" it to the Crown for sale and the non- Indian has an agreement with the Crown to purchase the land
- the community has "designated" it for leasing and the individual has entered into a proper lease
- the Minister has leased it for the benefit of an individual Band member
- the Minister has granted a permit for more limited use, or
- the non-Indian is the child of a member.

All other occupation of lands in Indian reserves by non-Indians is a trespass. Agreements with individual Indians or Bands to use and occupy reserve land are void, in keeping with the exclusive right of the Crown to deal with Indians in respect of their lands as originally set out in the *Royal Proclamation*<sup>29</sup> of 1763 [Henderson, 1996b].

Interests attached to reserve lands are held communally by members of a First Nation or Band. While this exclusive right can be sold or willed to other Band members, under the *Indian Act*, both the original allotment and any subsequent transfer of those rights require the approval of the Minister of Indian Affairs [Ballantyne et al., 2001 and Driben, 1996].

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<sup>29</sup> The *Royal Proclamation of 1763*, which is still in effect today, reserved all the lands in Atlantic Canada as the "Hunting Grounds" of the Indian nations and tribes, the only exemption being for land that was either ceded or purchased [Tanner and Henderson, 1992]. It should also be noted that it remains a very important document, and in Canada, applied not only to Atlantic Canada, but to Quebec, Ontario and the West Coast as well.

With some exceptions, reserve lands cannot be mortgaged, pledged or otherwise used as security for financing. This is because reserve lands cannot be legally seized by financiers for non-payment of a loan or mortgage.

In terms of land allocations, while the *Indian Act* was intended to regulate land tenure in all First Nation reserves, only about half of the communities actually applied the provisions of the *Indian Act* for allocating reserve lands to its members [Henderson 1996]. Where the statutory *Indian Act* provisions are not used, individual land tenure is either governed by custom and consensus or is unregulated [Henderson, 1996]. For instance most First Nation bands in the Prairies have tended to allocate lands under customary laws rather than the *Indian Act*, to avoid ministerial supervision from INAC [Bartlett, 1988]. In addition, other reserves are developing their own land tenure systems under different legislation, such as the *First Nations Lands Management Act* (1999); or under sections 53 and 60 of the *Indian Act*; or even under the *First Nations Governance Act* (2002), which was recently enacted in June 2002. These initiatives, which will be discussed in Chapter 5, are recent initiatives aimed at encouraging the devolution of land management in reserves from the federal government to First Nations.

#### **4.3.9.1 Tenure Reforms in the 20<sup>th</sup> century**

Julien [1997] has noted that as early as 1918, the Department of Indian Affairs began discussing what later became known as the **centralization** policy for all Indians or First Nations in Canada. In Nova Scotia, this policy was aimed at relocating all Mi'kmaq into two large reserves, Eskasoni on Cape Breton Island, and Shubenacadie on mainland Nova Scotia. Centralization was first implemented in Nova Scotia in 1941 in order to [Julien, 1997]:

- obtain two central land bases that would free up the existing smaller parcels for resettlement by non-Native settlers
- facilitate the administration of the reserves;
- allow the government to have more control over the centralized Mi'kmaq; and
- provide an opportunity for education in the Catholic Residential School in Shubenacadie

However, because many Mi'kmaw did not want to uproot their families, and lose their land and their way of life to share communities and services with other families, centralization attempts did not occur smoothly [Julien, 1997]. Thus not all Mi'kmaq moved, and centralization was finally abandoned in Nova Scotia in 1949, resulting in the various scattered settlements that now exist throughout Nova Scotia [Julien, 1997].

Tenure patterns did not change drastically between the first world war and the early 1970s, although the allocation of land for Mi'kmaw war veterans reduced the overall quantity of lands available for the reserve population and created land administration problems where no records of such land allocations were kept. Since 1973, and more particularly since the 1980's, court decisions<sup>30</sup> have led to improved access to resources outside of the reserves. For instance, forestry, hunting and fishing have undergone changes that have been generally favourable to the Mi'kmaq, in terms of opening access to these resources. Tenure patterns are currently undergoing changes, as a result of contemporary issues that are now being addressed by the courts and by the federal and provincial governments. Such issues, which will be discussed in section 4.5 of this

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<sup>30</sup> some court decisions include *Calder v. Attorney-General of British Columbia*, [1973] 4 W.W.R. 1 (S.C.C.); *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Simon v. R.*, [1985] 2 S.C.R. 387; *Marshall v. R.*, [1999]

Chapter, include aboriginal title; aboriginal rights such as fishing, hunting and logging rights; treaty rights such as commercial fishing and hunting rights; and self-government.

#### **4.3.10 Analysis of Social and Political Systems of Mi'kmaw land tenure**

Using the design criteria developed in Chapter 3, the social and political aspects of the traditional and contemporary land tenure systems of the Mi'kmaw may be compared and summarised as follows:

1. Before European settlement, **traditional** Mi'kmaw land tenure arrangements were based on a worldview that was cyclical/wholistic, generalist and process-oriented. Land was perceived to be grants given to them from the Creator as part of their relating to and maintaining continuity with creation, and these grants were evidenced in the stories, songs and ceremonies that were expressed or celebrated by them. Land was acquired, used, distributed and transferred in accordance with the seasons, the environment and the norms set by their traditional institutions, which were governed by the Mi'kmaw Grand Council. Land tenure patterns were characterized as being adaptive highly mobile resource-based systems that operated from a family-centred home base, to harvest resources in contiguous habitat zones and to trade.
2. During European settlement and colonization, **commercially-based** trapping rather than subsistence-based food production evolved into the more prominent form of land use. This contributed significantly to the diminished role of women in decision-making, as trapping for commercial purposes increased the role of men in decision-making. As settlement increased, land grabbing and squatting by non-Mi'kmaw settlers accelerated, giving rise to land disputes that led to conflicts and wars. These conflicts resulted in peace and friendship treaties being signed between the Mi'kmaq and the British colonial government. The traditional highly mobile way of life of the Mi'kmaq thus changed from one of socio-political control and sole inhabitants of the area, to a sedentary, confined existence on reserves where they were forced to adapt to the conflicts and changes wrought by the non-Mikmaw settlers and their commodities.

3. The severe land loss, establishment of Indian reserves and introduction of the *Indian Act* led to the control and regulation by the British colonial government, of the Mi'kmaw way of life and thus of their land tenure system. Policies concerning land administration, assimilation, enfranchisement, centralization and others took their toll on the Mi'kmaw land tenure arrangements and way of life, resulting in even more drastic changes to the traditional land tenure arrangements and lifestyle of the Mi'kmaq. The effects are still being felt today, as can be seen in the sometimes overcrowded reserves and in the unresolved issues that include aboriginal rights, aboriginal title, treaty rights, beneficiaries, self-determination, and self-governance.

#### ***4.4 Cultural Analysis – Analysing the Role of Key Land Tenure Reform Players***

Section 4.3 analyzed the cultural aspects of Mi'kmaw land tenure systems by reviewing the social and political systems of the Mi'kmaq. This section, Section 4.4, completes the cultural analysis of the Mi'kmaw land tenure situation by analyzing the proposed intervention or reforms from the perspective of the roles that key players will have to play in any land tenure reform. Since the success of any reform or intervention is greatly dependent on the roles played by key reform players, it is useful to think of any intervention in a problem situation as being problematical itself [Checkland and Scholes, 1990]. Any intervention, such as that purporting to reform land tenure, can be structurally viewed using the following 3 roles [Checkland & Scholes, 1990]:

- client
- actor or problem solver
- problem owner

The 'client' is the person or persons who want(s) to know or do something about the problematic situation and commissions the study, and who therefore may effect change or at least cause something to happen as a result of the study. Keeping in mind the client's

reasons for wanting the intervention or land tenure reform is useful in identifying suitable reforms required.

The actor or 'problem solver' (who can also be the 'client') in a tenure activity system includes all those who would like to be involved with reforming the land tenure system. The actor(s) is(are) able to alter the content (its activities) and their arrangements within the tenure activity system or sub-systems, and can decide resource allocation within the system. Any attempted reform will therefore need to consider their perceptions, knowledge and readiness to make resources available if the reform is to be successful.

The owner or 'problem owner' is the person(s) or institution that is uneasy about a situation and wishes something to be done about it. The problem owner(s) may not be able to precisely articulate the uneasy feeling and thus define a 'solution' for it. However they can delay or even stop the proposed reform at any one time or place by withdrawing their financial, political and moral support, if the proposed reform is deemed to be inappropriate by them. The 'problem owner' is thus of crucial importance to any proposed reform or intervention, since the completion of the reform will be dependent on the support of the problem owner. Checkland and Scholes [1990] recommend that the 'problem solver' should decide on and prepare a list of possible problem owners, a list that will also include those in the roles of 'client' and 'problem solver'.

For this research, the three roles were held as follows:

- **Client:** the Confederacy of Mainland Mi'kmaq (CMM) was the client, since they were the ones that commissioned the study, in anticipation of the need to reform their land tenure system given the federal government's current policy of devolving responsibilities for Indian reserves, and given the possibility of



Mi'kmaw Aboriginal title being recognized by the provincial and federal governments;

- **Actor** or Problem solver: the research staff members of CMM were the actors or problem solvers since any reform of the land tenure system would first need to involve them. The author was recruited to assist them in this task by conducting necessary background research for them. In addition to the CMM and author, other actors or problem solvers were the Band Councils of each Band, and potentially, interested members of the Mi'kmaw community.
- **Problem Owner**: the list of possible 'owners' included first and foremost, the CMM, since they were funding and overseeing the research project and therefore could delay or even stop the research or/and any ensuing proposed land tenure reform. Potentially however, various other parties, such as Indian and Northern Affairs Canada (INAC), and the Legal Surveys Division (LSD), could delay or even stop any ensuing land tenure reform. For this research however, the problem owner was identified to be the CMM only, since they controlled the nature and direction of the research and could stop the research and any proposed land reform if they so desired.

Making the actor or 'problem solver' one of the possible 'problem owners', as is the case for this study, where CMM was both an actor/problem solver and problem owner, often means that the first relevant system to be done will be 'a system to do the study'. This study thus represents the development of a 'system to do the study' for the CMM. The resulting model to be built often tends to be a model of the structured set of activities that the problem solver(s) hopes to do in conducting the study [Checkland & Scholes, 1990].

#### ***4.5 Operational Analysis – Identifying the Land Tenure Issues & Tasks***

In accordance with the framework developed in Chapter 3 and depicted in Figures 3.6 to 3.9, sections 4.5 to 4.8 are aimed at analyzing the logical operational or functional aspects

of the Mi'kmaw land tenure situation. Section 4.5 will review the problematic land tenure issues and tasks requiring reform, from the perspective of the Mi'kmaw. Section 4.6 will select and define conceptual systems that mirror typical human (Mi'kmaw) activities relevant to the problematic issues and tasks identified in section 4.5. Section 4.7 will develop conceptual models of the systems that were selected and defined in section 4.6. Section 4.8 will compare the conceptual models developed in section 4.7 with the existing Mi'kmaw land tenure situations, in order to help identify reforms that may be needed.

#### **4.5.1 Access to Land and Resources**

The changes in Mi'kmaw land tenure since settlement (e.g., with respect to land availability, access to land and resources, land use patterns, socio-political control, the *Indian Act*, establishment of Indian Reserves) have clearly wrought issues that affect the Mi'kmaw land tenure today. One of the most crucial issues concerns access to land and resources. Many Mi'kmaq view the land and its resources as being the key to their self-sufficiency and survival, and that their ancestors signed treaties to ensure their continued access to the land and its resources [Atlantic Policy Congress, 1998]. There is some frustration therefore with the lack of easy access to traditional resources – e.g., with the need to first obtain government permission to obtain ash for basket-making and traditional medicines which, in most cases, is not available on reserve land [Atlantic Policy Congress, 1998].

In addition, a study on land acquisition options for the Mi'kmaq noted that the Mi'kmaq have real and at times urgent needs for additional land for housing, community services, commercial development, industrial development and cultural preservation [Nichols and

Rakai, 1999]. Overcrowding, the return of disenfranchised women and their families with *Bill C-31*, as well as entrepreneurs on the reserves have exerted real pressure on reserve land [Henderson, 1980]. There is consequently a need for more land for reserves that are either too small or contain land of very poor quality. This need is further exacerbated by the fact that most of the Aboriginal population is under 25 and will need land and housing when they come of age [Atlantic Policy Congress, 1998].

Current tenure arrangements for accessing land and resources thus needs to be reviewed and improved upon, to suit the needs of the increasing Mi'kmaw population. Any such review would need to include a review of aboriginal rights, including aboriginal title, and treaty rights of the Mi'kmaw. Related policies such as the Additions to Reserve (ATR) policy, which controls the manner in which lands may be acquired and added to reserves needs to be made more efficient, in order to meet the demand by overcrowded reserves, for more land [Nichols and Rakai, 1999].

#### **4.5.2 Aboriginal Rights and Treaty Rights**

In his opening speech at the 2001 national annual meeting of the Assembly of First Nations (AFN), the AFN National Chief, Matthew Coon Come said [Coon Come, 2001]:

*The treaties reflect and validate our rights as nations. Aboriginal rights and Aboriginal title means that we are the original owners and occupiers of the land. Many fundamental treaty obligations have not been fulfilled by the other party to our treaties. We need to settle the unfinished business and to obtain reparation where treaties have been violated. We must place even greater emphasis on the Treaties because they are the means by which we can come to terms with the Europeans and other newcomers about their place in our land. It was not the theory of discovery or the order of the British Crown that gave Europeans some rights to live in our land. It was the treaties.*

Mi'kmaw land tenure systems in Nova Scotia were changed considerably by colonialism, in which the underlying notion was that the Mi'kmaq had lost their rights to land, if they

ever had any, by European colonization. This eurocentric colonialist notion has since been overturned by cases such as *Simon v. R.* [1985], which dealt with treaty hunting rights, and *R. v. Marshall*, [1999], which recognized the commercial fishing rights of the Mi'kmaq. Aboriginal rights are the rights that Canada's Aboriginal peoples have as a result of their long standing use and occupation of their territories by their ancestors, before the arrival of the Europeans. Treaty rights are simply Aboriginal rights that have been legally recognized and formalized in a treaty. Both rights are important in validating the right of Aboriginal peoples to continue carrying out their traditional land use practices of the past. Such land use practices include logging, fishing, hunting, gathering, and trapping.

Logging rights and forestry are major concerns, as highlighted by the aftermath of the initial *R. v. Peter Paul* (T.P.)<sup>31</sup> [1998] ruling, which dealt with the logging rights of Mi'kmaq in New Brunswick. For the short period in which the decision had favored the recognition of their logging rights, it had provided the Mi'kmaq and other First Nations in the Maritimes with an opportunity to free themselves from welfare dependency and provide a better way of life for their families [Atlantic Policy Congress, 1998].

Fishing rights are another major concern, as highlighted by the aftermath of the *Marshall* [1999] decision, which dealt with the treaty rights of the Mi'kmaq to trade and earn what the Supreme Court of Canada took pains to define as a 'moderate income'. *Marshall* [1999] has revealed the beneficial impacts that recognition of commercial aboriginal

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<sup>31</sup> *Regina v. Peter Paul* (T.P.) [1998], 158 D.L.R. (4<sup>th</sup>) 231, hereinafter *Thomas Peter Paul*. The decision in the New Brunswick Court of Appeal had ruled that the Mi'kmaq had aboriginal logging rights on the basis of their aboriginal title. It was later overturned by the provincial supreme court for technical reasons.

fishing rights holds for the Mi'kmaq in the Maritimes, in terms of providing them with more job opportunities and increased sources of income. However the decision has sometimes led to violent confrontations particularly in reserves such as Burnt Church in New Brunswick and Indian Brook in Nova Scotia, revealing that more public awareness, education and negotiations are necessary to promote an equitable sharing of resources in Nova Scotia.

It is thus clear that resolution of these issues will impact greatly on current and future Mi'kmaw tenure arrangements, and ultimately on their economic and social development. The contiguous habitat model proposed by Davis [1986], and the family hunting territories model proposed and mapped by Speck (see Figures 4.2 and 4.3) illustrate that historically the traditional territory of the Mi'kmaw included the whole of Nova Scotia. These models are useful in demonstrating the historical basis of the Mi'kmaw aboriginal rights to natural resources. In summary the validation and affirmation of the aboriginal and treaty rights of the Mi'kmaw to continue carrying out their traditional land use practices impacts essentially on their ability to access land and resources as required.

### **4.5.3 Aboriginal Title**

The recognition of Mi'kmaw Aboriginal title by provincial and federal governments is expected to provide the Mi'kmaq with more opportunities to access and benefit from their land and resources. Aboriginal title may be described as being the aboriginal or native interest in lands occupied and possessed prior to European settlement and for which no compensation has been made to the Aboriginal peoples or natives by way of treaty or otherwise [Henderson, 1980]. Aboriginal title has been legally recognised in Canada since the Supreme Court of Canada's *Calder v. Attorney-General of British*

*Columbia* (1973) decision (hereinafter referred to as *Calder*), which held that the Aboriginal peoples or Natives of Canada had possessory rights recognisable under English law, over their lands at the time of European colonisation. Aboriginal title in Canada is thus based on the fact that before Europeans asserted their sovereignty, the aboriginal people who occupied the land maintained their own local systems of land ownership, between members of the band, and between neighbouring bands [Woodward, 1989]. The *Calder* [1973] decision paved the way for the present Aboriginal or Native land claims being pursued in Canada. A framework for determining 'aboriginal title' was developed in December 1997 by the Supreme Court of Canada in its *Delgamuukw v. British Columbia* [1997] decision (hereinafter referred to as *Delgamuukw*). Claims for Aboriginal title are handled in Canada through the federal 'Comprehensive Claims' process.

To date however, the existence of aboriginal title in Nova Scotia and Atlantic Canada continues to be disputed by the provincial and federal governments and is therefore yet to be settled. A comprehensive claim filed by the Mi'kmaq in 1977 was rejected as having no merit, and another is being prepared [Leavitt, 1995]. While the Mi'kmaq contend that Aboriginal title still exists in the region because it has never been surrendered, the government argues that aboriginal title has been extinguished by federal and provincial legislation and therefore no longer exists [Leavitt, 1995]. However in the *Sparrow v. The Queen*, [1990] (hereinafter known as *Sparrow* ) and *Delgamuukw* [1997] decisions, which dealt respectively with aboriginal fishing rights and with aboriginal title, the Supreme Court of Canada held that a law extinguishing or infringing an aboriginal right or aboriginal title would not be valid if it did not have a valid legislative objective, or if it

breached the Crown's fiduciary duty when enacted. It was also held that, under the Canadian Constitution, while the federal Crown can extinguish aboriginal title – the provincial Crown cannot. Since these decisions effectively nullify the government's argument of Aboriginal title being extinguished, the uncertainty over this long-standing question remains to be settled. The Mi'kmaq are presently addressing the issue of aboriginal title through the Tripartite Forum. The Tripartite Forum comprises Mi'kmaw, Federal and Provincial representatives and was established in 1996 to address issues affecting the Mi'kmaq of Nova Scotia.

#### **4.5.4 Band Membership & Beneficiaries**

The issue of defining who is or is not a band member has been a long-standing issue with all First Nations since the enactment of the *Indian Act*, 1876. Under section 18 of the *Indian Act* the Indian Affairs Minister has final authority over band membership. The Indian Association of Alberta had recommended as far back as 1946, that the *Indian Act* be amended to either allow the band majority to define band membership, or to empower chiefs and band councils to decide on behalf of band members [INAC, 1978:134]. The Atlantic Policy Congress [1998] reported that some Aboriginal Peoples had suggested that blood quantum should not be a consideration for defining band membership, and that the criteria for band membership should be community acceptance. This and other associated issues are being addressed by the CMM in its Beneficiaries Project, which commenced in October 2000. The benefits of resolving these issues for Mi'kmaw land tenure arrangements includes providing equitable access to resources for all Mi'kmaq and improving the efficient management and administration of their land and resources.

#### 4.5.5 Potential Impact of Treaties and Recent Court Decisions

Treaties and court decisions are important for the Mi'kmaq because they create more opportunities for opening up Mi'kmaw access to land and resources. First Nations in Canada have had their aboriginal and treaty rights recognized and affirmed constitutionally since 1982. Section 35 of the 1982 *Constitution Act* requires that all laws and policies in Canada must be consistent with the recognition and affirmation of aboriginal and treaty rights [Assembly of First Nations, 1990]. In addition, the courts in landmark cases such as *Guerin v. The Queen*, [1984], hereinafter known as '*Guerin*', and *Simon* [1985] have enunciated principles that may be used by the Mi'kmaq (and other Aboriginal parties to treaties) to their advantage. These principles include the fiduciary obligations owed by federal and provincial governments to Aboriginal peoples; and the fact that any violation of treaty promises would be viewed by the courts as comprising the honor and integrity of the Crown [Royal Commission on Aboriginal Peoples, 1996].

Fairly recent court decisions such as the Supreme Court of Canada decision in *Marshall* [1999] and the New Brunswick Provincial court decision in *Joshua Bernard* [2000] continue to be widely debated in the Maritime region. The beneficial impact of *Marshall* [1999] for many Mi'kmaw Bands has been in opening up their access to resources. For instance, while a few reserves such as Indian Brook have yet to benefit from *Marshall* [1999], most of the other reserves, such as Millbrook, have received substantial benefits in the form of funding, training, fishing boats and fishing implements (e.g., lobster traps) as a result of signing fishing agreements with the Department of Fisheries and Oceans. *Marshall* [1999] has also allowed Mi'kmaw hunters to benefit from the sale of the products of their hunting.



The potential impact of treaties and court decisions on Mi'kmaw land tenure in the short term, may be minimal, since as the Mi'kmaq know only too well, their securing power legally through court decisions does not necessarily guarantee them the ability to exercise their rights in practice [Coates, 2000]. Coates [2000] has opined that the Mi'kmaq's continued reliance on the legal court system, despite it being costly, slow and very time-consuming, illustrates the frustration and distrust that the Mi'kmaq have towards the political process. However in Nova Scotia, the existence of the tripartite forum for resolving through informed discussions, the issues affecting both Mi'kmaw and non-Mi'kmaw people, offers much hope for all groups. Careful negotiations are a very important mechanism for the Mi'kmaq in benefiting substantially from treaties and recent court decisions [Zscheile, personal communication, 2001]. In the long term then, the treaties and court decisions are expected to create more opportunities for opening up Mi'kmaw access to resources.

With regard to **new (modern) treaties**, the consensus in almost every Aboriginal community in the Maritimes was that new treaties should not be entered into [Atlantic Policy Congress, 1998]. They questioned the wisdom of entering into new treaties, since the ancient treaties have yet to be fully honoured [Atlantic Policy Congress, 1998]. In general, while some Mi'kmaq believe that new treaties are unnecessary because the basis for the relationship has already been established in the ancient treaties, others believe that more education about the contents and meanings of treaties is needed for the Mi'kmaq [Atlantic Policy Congress, 1998].

#### **4.5.6 Potential Impact of Current Federal Policies on Mi'kmaw Land Tenure**

Despite the constitutionally-based legal foundation of aboriginal and treaty rights, the federal government's approach to aboriginal matters has remained fundamentally unchanged and continues to be a source of frustration for the aboriginal peoples of Canada [Assembly of First Nations, 1990]. For the Mi'kmaw, a source of frustration is the *Additions to Reserve* (ATR) policy, which as noted earlier, controls the manner in which additional land parcels may be acquired and added to reserves. The existing lengthy, tedious bureaucratic requirements of the policy indicates that there is a need for the policy to be made more efficient and effective, in order to meet the demand for more land by overcrowded reserves [Nichols and Rakai, 1999].

The *First Nations Land Management Act*, 1999 (previously *Bill C-49*) holds much potential for the Mi'kmaq, in terms of allowing them to control, administer and manage their own resources, for the first time in history. Lessons learnt from other First Nations that are developing and implementing their own policies under the *First Nations Land Management Act* may be useful for the Mi'kmaq and will be reviewed in Chapter 5 of this thesis.

The federal government has also recently introduced a new *First Nations Governance Act* [2002] that will have some impact on Mi'kmaq land tenure. Coon Come [2001:9] denounced it as being based "on an ad-hoc, selective so-called consultation process that invites distrust, by-passes the First Nations elected leadership, and will go ahead and implement First Nations government and electoral structures whether First Nations agree or not." Coon Come noted that at the time [July 2001], 71% of First Nations leaders had formally rejected the Minister's Governance Act by resolution.

#### 4.5.7 Impact of RCAP on Mi'kmaw Land Tenure

While the Mi'kmaq view the final report of the *Royal Commission on Aboriginal Peoples* (RCAP) [1999] as having many good recommendations, some land tenure-related concerns exist, with regards to the protection of privately held property, the starting point for land negotiations and a new treaty process [Atlantic Policy Congress, 1998]. In terms of **protecting privately held property** when Aboriginal claims are being addressed, the RCAP report [1999] had recommended that privately held lands be protected or not be subject to such Aboriginal claims. Most Mi'kmaq were concerned with this recommendation since in many cases, those very lands had been fraudulently obtained from the Mi'kmaq, and therefore should not receive protection from Aboriginal claims [Atlantic Policy Congress, 1998]. The RCAP report [1999] had also recommended that the **allocation of lands** and the **starting point for land negotiations** be based on the level of traditional use and the needs for self-reliance. Some Mi'kmaq questioned why that should be so, particularly in light of the *Peter-Paul* [1998] decision that stated that the title to their land had never been relinquished by their treaties [Atlantic Policy Congress, 1998]. In summary, it is clear that a predominant land tenure issue emerging from the RCAP report is that of providing or improving access to land and resources.

#### 4.5.8 Summary of Issues

Sections 4.5.1 to 4.5.7 indicate that one of the most critical issues affecting Indian reserves in Canada concerns the control over the access and use of land and its resources. Since the enactment of the *Indian Act* in 1876, the land tenure arrangements in these reserves have tended to be based on the eurocentric land management policies emanating from the *Indian Act* and DIAND. Many First Nations have viewed the land management

provisions of the *Indian Act* as giving too much power and authority to government officials [Atlantic Policy Congress, 1998]. These provisions have prevented First Nation communities from developing their own lands and resources in the ways they wanted to. For instance, land development or even traditional activities such as fishing, hunting, trapping and gathering were highly regulated by the *Indian Act*. Similarly, acquiring much needed additional lands for densely populated reserves was a difficult, time-consuming task that was hampered by stringent regulatory policies, such as DIAND's *Additions to Reserve* policy [Nichols and Rakai, 1999].

A second important issue emanating from Sections 4.5.1 to 4.5.7 concerns the recognition and incorporation of Aboriginal or First Nation cultural views, values, goals/aspirations, concepts and institutions in their land tenure systems. This has begun to be addressed in various ways, including legislative and legal reforms. For instance, amendments made to the *Indian Act* in 1985 as a result of Bill C-31<sup>32</sup>, and the enactment of the *First Nations Land Management Act* [1999] have brought increased recognition of First Nation rights, as well as attempts to incorporate First Nation views, values, laws and institutions into the land tenure systems. In addition, other land tenure related issues, such as governance and equity are also being addressed in First Nation Reserves.

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<sup>32</sup> Bill C-31 dealing with the de-enfranchisement of women, was passed and became law as an amendment to the *Indian Act* in 1985. While equitably restoring the inherent rights of Aboriginal women, it led to dramatic increases in Band populations, thereby exacerbating other issues, such as overcrowding, the need for more lands, houses and essential services for the dramatically increased population.

In summary, the issues discussed in Sections 4.3 to 4.5 indicate that the following will need to be resolved for the Mi'kmaw in any reform of its land tenure system:

1. amend the *Indian Act*
2. replace the *Indian Act* with a new Act
3. change the *Additions to Reserve* policy
4. improve access to land and resources
5. recognize aboriginal title, aboriginal rights, treaty rights
6. train/educate the Mi'kmaw members to better understand issues concerning both Aboriginal and non-Aboriginal land tenure systems
7. improve the management and administration of land tenure systems in reserves
8. increase Band Council accountability
9. define Mi'kmaw cultural values, norms, goals and aspirations

#### ***4.6 Selecting and Defining Relevant Systems to be Modelled***

The purpose of Section 4.6 is to select and define systems of relevant land tenure-related Mi'kmaw activities that are derived from the issues and tasks discussed in section 4.5, and that can be conceptually modelled in Section 4.7. This section therefore begins with an overview of Mi'kmaw or human activity systems based on the land tenure tasks and issues identified in Section 4.5. The relevant land tenure-based Mi'kmaw activity systems will then be selected and defined. This will allow these activity systems to be conceptually modelled in Section 4.7.

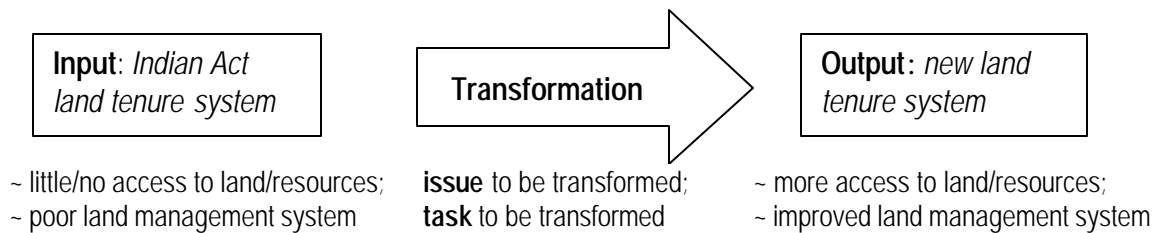
##### **4.6.1 Relevant Task Management-based Systems and Issues-based Systems**

The soft systems engineering literature indicates that there are two main types of relevant human activity systems that can be selected – a task management-based system or an issues-based system [Checkland and Scholes, 1990]. These two types of systems are at the two ends of a spectrum of systems of human activities. **Task Management-based**

**systems** deal with existing institutionalized arrangements at one end, and are therefore aimed at improving the institutionalized arrangements. At the other end are **Issues-based systems** that deal with issues that need innovation, and thus draw from innovative concepts and processes that may not necessarily exist in formalized real-world arrangements. Section 4.5 for instance indicates that for the Mi'kmaq, issues-based systems based on the issues of access to land and resources; aboriginal rights; treaty rights; aboriginal title; and band membership and beneficiaries, will need to be addressed using innovative processes. Section 4.5 also indicates that a task management-based system should be developed to review and evaluate the impact of treaties, court decisions, government policies, the report of the Royal Commission on Aboriginal Peoples (RCAP), and resolution of Aboriginal title, on the management of Mi'kmaw land tenure. Two conclusions emerge from the issues-based system and the task management-based systems identified in Section 4.5 – one is the need to address the issue of poor Mi'kmaw access to land and resources; the other is the need to improve the current tasks and processes associated with the management and administration of land tenure in Mi'kmaw reserves, including interpreting the implications of treaties, court decisions, government policies and the RCAP recommendations for the Mi'kmaq.

#### **4.6.2 Selecting Relevant Multi-level Activity Systems to be Modelled**

The preceding sections have shown that the transformation or reform with which this chapter (and thesis) is concerned is the reform of the current *Indian Act*-based land tenure system of the Mi'kmaq into a new land tenure system (see Figure 4.6 on the next page). This is intended to improve Mi'kmaw access to land and resources, and to improve current land management and land administration systems in the Mi'kmaw reserves.



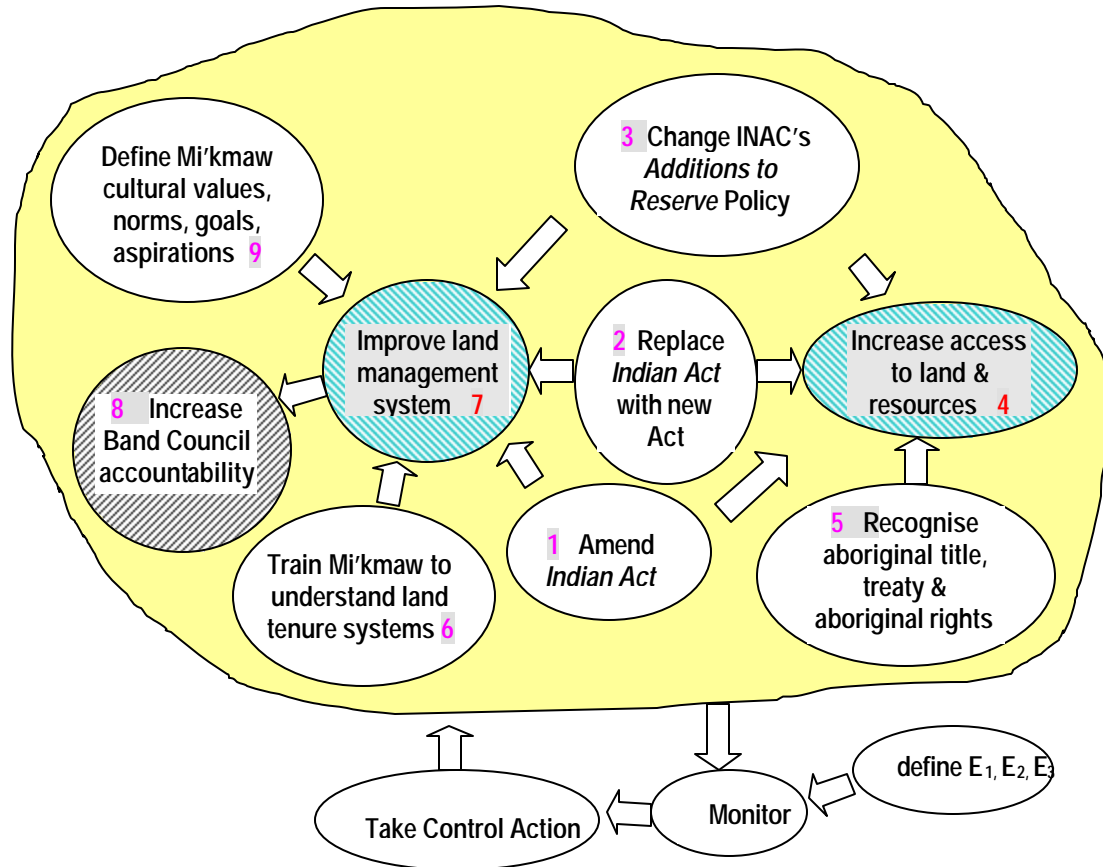
**Figure 4.6 : General Transformation Process for Mi'kmaw Land Tenure**

The transformation process depicted in Figure 4.6 above shows that there are two primary systems to be modelled, one based on the **key issue** to be transformed – that of improving access to land and resources – and the other on the **key task** to be transformed – that of improving the management of the land tenure system. Each primary system consists of a set of relevant land tenure-related activities or subsystems that are connected together to form the primary system as a whole, thus contributing to the structure and functioning of each primary system as a whole, and exhibiting together the emergent properties of each primary system as a whole.

Selection of the actual relevant activities or sub-systems (or reform options) to be modelled will depend on their relevance to the issues or tasks to be addressed for a community. As noted earlier, Sections 4.3 to 4.5 also indicated that in order to be able to carry out the desired transformation, one or more of the following land tenure-related activities (or options for reforming land tenure) will need to take place (see Figure 4.7) :

1. amend the *Indian Act*
2. replace the *Indian Act* with a new Act
3. change the *Additions to Reserve* policy
4. improve access to land and resources
5. recognize aboriginal title, aboriginal rights, treaty rights

6. train/educate the Mi'kmaw members to better understand issues concerning both Aboriginal and non-Aboriginal land tenure systems
7. improve the management and administration of land tenure systems in reserves
8. increase Band Council accountability
9. define Mi'kmaw cultural values, norms, goals and aspirations



**Figure 4.7 : Overview of Relevant Activity Systems to Reform Mi'kmaw Land Tenure**

Activities 1 and 2 above will help to minimise the problems existing under the current system. Activity 3 will facilitate a more efficient process for increasing the areas of inadequately sized reserves, by providing more land as needed to them [Nichols and Rakai, 1999]. Activity 4, which is directly dependent on Activities 3 and 5, and



indirectly dependent on Activities 1 and 2, is intended to meet the current Mi'kmaw demand for more access to land and resources.

Activity 5 is self-explanatory and is intended to have the Mi'kmaw aboriginal title recognized in Nova Scotia; and to have their legally affirmed aboriginal rights and treaty rights better understood and honoured by the provincial and federal governments and the general public. Activity 6 is intended to help the Mi'kmaw better understand and deal with both Mi'kmaw and non-Mikmaw concepts, worldviews, principles and issues concerning land tenure systems. Activity 7 is intended to help improve the management and administration of their land tenure systems. Activity 8 is aimed at improving the accountability of Band Councils to members. Activity 9 is aimed at arriving at a consensual definition by the Mi'kmaq of the values, norms, goals and aspirations of their community.

It should be noted that each of the relevant activities defined above is very broad in its own right, and therefore is actually broken down further into the various subsystems that comprise the overall activity, for more detailed comparative analysis. For instance, Activity 2, which is concerned with developing a system to replace the *Indian Act* with a new Act, would require separate subsystems to understand the *Indian Act*; to identify and develop a new Act to replace the *Indian Act*; and to understand and implement the new Act – in order to allow systems 4 and 7 to proceed successfully. However details of each of these individual subsystems are not described here for logistical reasons, in order to keep the length of the thesis at a more manageable level.

Figure 4.7 on page 137 provides an overview of the relevant land tenure activity systems (or reform options) described above, and how they are related to each other. As noted earlier, some activities depend on others (e.g., Activity 4 depends on Activities 3 and 5; while some activities are completely independent and can stand on their own (e.g., Activities 1, 2 and 3). From a systems perspective, each activity or option is an individual subsystem of an overall system to reform the Mi'kmaw land tenure system as a whole. The next section describes how the main purpose of the selected relevant activity systems to be modelled in this research can be defined.

#### **4.6.3 Defining the Purpose of Relevant Systems to be Modelled**

Once relevant activity systems (or land tenure options) reflecting the selected problematic tasks or issues to be addressed have been selected to be modelled, the next step is to clearly define the main purpose of these relevant systems. This ensures that any conceptual modelling to be done is focussed on the identified tasks and issues of the community. As noted in section 3.4.2, the definition of the main purpose can be expressed in three ways [Checkland and Scholes, 1990]:

- as a transformation process diagram (as depicted in Figure 4.6);
- as a simple written expression; or
- as written sentences.

In the first method, the main purpose of the system to be modelled can be defined as a transformation process in which some entity, the 'input', is changed, or transformed, into some new form of that same entity, the 'output' [Checkland, 1999]. The input, transformation and output for the Mi'kmaw land tenure situation and their associated issues and tasks are as shown in Figure 4.6. In the second method, the main purpose of

the system to be modelled can be expressed as ‘*a system to do P by Q in order to contribute to achieving R*’, where P would be the transformation process; Q would be the means of achieving the transformation; and R would be the goals and aspirations of the owner [Checkland, 1999]. In the third method, the main purpose of the system to be modelled is defined using written sentences. Clearly, each relevant activity will have various methods for which it can be transformed, based on the different worldviews or interpretations of its purpose. It is therefore important to link the transformation process to the worldview of the users and players, if the transformation or reform is to be meaningful for them.

As noted earlier Figure 4.6 shows that there are two primary systems to be modelled, one based on the **key issue** to be transformed – that of improving access to land and resources – and the other on the **key task** to be transformed – that of improving the management of the land tenure system. This leads to the following definitions of the main goal or purpose of the relevant activity systems to be modelled:

*A new land tenure system concerned with improving access to land and resources, in keeping with Mi'kmaw worldviews, values and culture, in order to best contribute to the social, economic and ecological sustainability of the Mi'kmaq.*

**Definition for System to Improve Access to Land & Resources**

*An improved land management system concerned with improving the management of land tenure structures and processes, in keeping with Mi'kmaw worldviews, cultural values and norms, in order to facilitate the sustainable development of Mi'kmaw reserves.*

**Definition for System to Improve Management of Mi'kmaw Land Tenure**

The next section develops criteria for evaluating the performance of the conceptual model to be developed for each system.

#### **4.6.4 Measures of Performance**

In systems thinking a system is perceived to be a whole entity that can survive and adapt in a changing environment. Models of systems must therefore be developed in a form that allows the system to adapt to changing circumstances [Checkland, 1999]. This can be done by building the models of relevant human activity systems as sets of linked activities, and linking them with another set of activities that monitor the operational system and provide feedback for taking control action if necessary (the monitoring and control system). To do the latter, it is necessary to define the criteria for evaluating the performance of the system as a whole. The basic structure of the monitoring and control sub-system consists of two activities – a ‘monitor’ activity that depends on the criteria defined for evaluating system performance; and a ‘control’ activity that depends on the monitoring to provide feedback and advise when it is appropriate to ‘take control action’ [Checkland, 1999].

Measuring or evaluating the performance of a transformed or reformed system can be conducted by focusing on the following three issues, as noted in Chapter 3:

- checking that the transformation actually works and thus produces the required output (Efficacy);
- checking whether minimum resources are being used to obtain it (Efficiency); and
- checking, at a higher level, that the transformation is worth doing through its contribution to some higher level or long term aspiration or goal (Effectiveness).

The three issues define the three criteria or ‘3Es’ that are relevant for evaluating the performance of every model: the criteria of efficacy ( $E_1$ ), efficiency ( $E_2$ ), and effectiveness ( $E_3$ ) [Checkland and Scholes, 1990]. This basic set of criteria can be extended to suit particular circumstances – for example by adding  $E_4$  for ethicality (is this

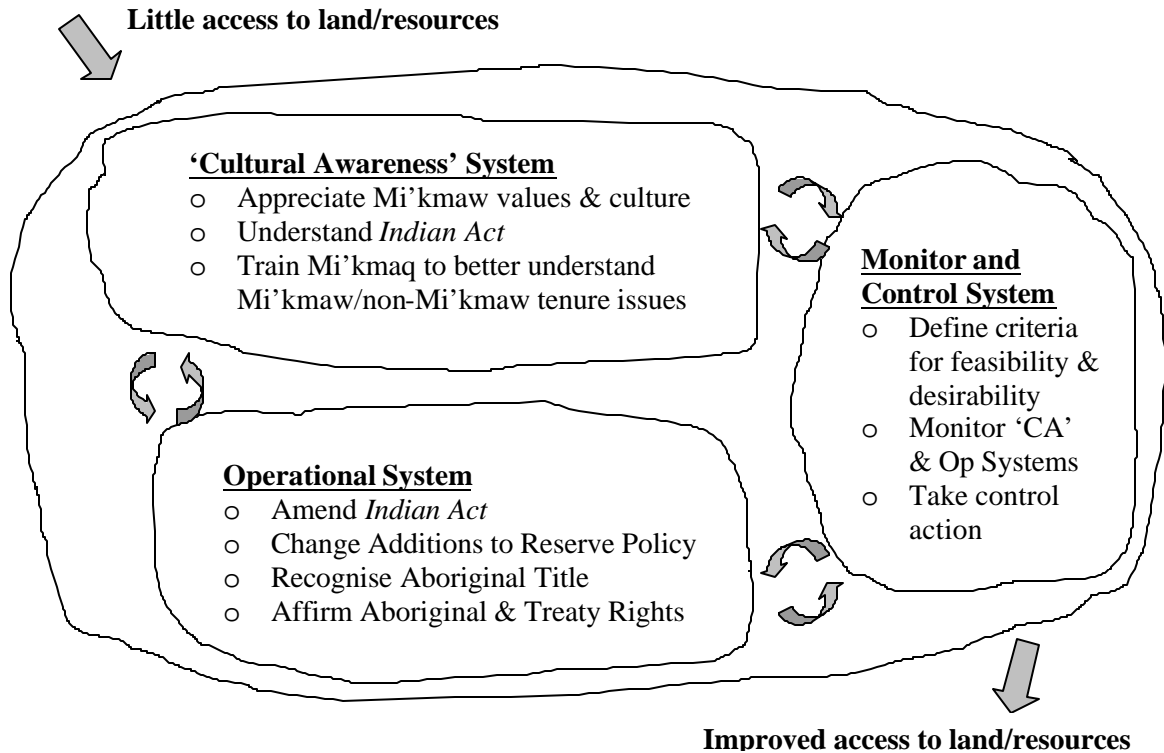
transformation morally correct?) and  $E_5$  for elegance (is this an aesthetically pleasing transformation?). It should also be noted that since meeting the criteria of effectiveness requires knowledge of the goals or/and aspirations of the system owner (as identified in Section 4.4), this analysis prevents the modelling from being restricted to the system level only, and promotes the modeller's thinking to extend over more than one level [Checkland, 1999]. In this way it not only attempts to alleviate or minimise the problem of tenure eurocentricity, but also inherently incorporates the existence of tenure pluralism, tenure dualism, legal pluralism and tenure continuum in its analysis.

#### ***4.7 Building Conceptual Models of Selected Relevant Systems***

Section 4.5 identified the problematic land tenure tasks and issues that currently exist for the Mi'kmaq of mainland Nova Scotia. Section 4.6 selected and defined relevant land tenure practices or human activity systems that could be modelled in order to better understand and demonstrate the problematic issues and tasks identified in Section 4.5. Section 4.7 will now develop conceptual models of the systems of relevant land tenure practices that were selected in Section 4.6.

The systems selected and defined in section 4.6 can be modelled conceptually as shown in Figures 4.8 to 4.10, to illustrate each of the activities discussed above and their dependencies or lack of dependencies on each other. It should be stressed that the conceptual models depicted in Figures 4.8 to 4.10 are not models of a real Mi'kmaw land tenure system, in the classic way that models have tended to be used in conventional engineering research. Each model is instead a conceptual or intellectual device that provides a structure for exploring and debating the problematic land tenure situation being addressed. The model in effect provides accounts of concepts of land tenure

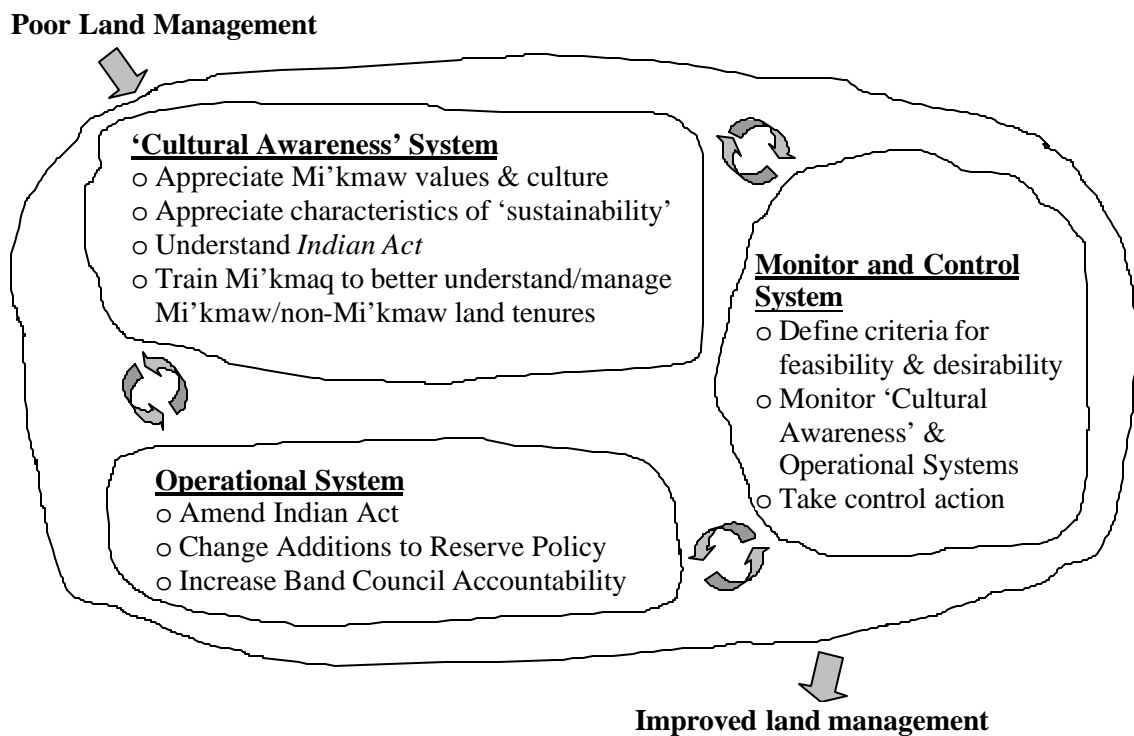
activity, based on declared world views that can be used to stimulate questions and debates about the real problematic situation and the desirable changes to it [Checkland, 1999].



**Figure 4.8 : Conceptual Model of System to Improve Access to Land/Resources**

Figure 4.8 above shows the conceptual model for the **main issues-based system** – the system to ‘increase access to land & resources’. Each activity within each of the two major systems (Cultural Awareness and Operational Systems) will itself require the development of a local system to deal with the activity. Each local system in turn may also entail the establishment of more than one sub-systems to deal with the activity – e.g. in the Operational System, the activity or system to deal with affirming Aboriginal Rights and Treaty Rights will require, where relevant, separate systems to deal separately with Aboriginal rights and Treaty rights. The Monitor & Control Systems will also require

different systems to deal with the activities of defining the criteria for measuring the performance of each sub-system in the Cultural Awareness and Operational Systems; of monitoring the various systems and sub-systems, and of taking action to control or provide feedback to each system or sub-system as required. Clearly then, Figure 4.8 depicts a generalised model that in practice is further broken down into more detailed models as required.



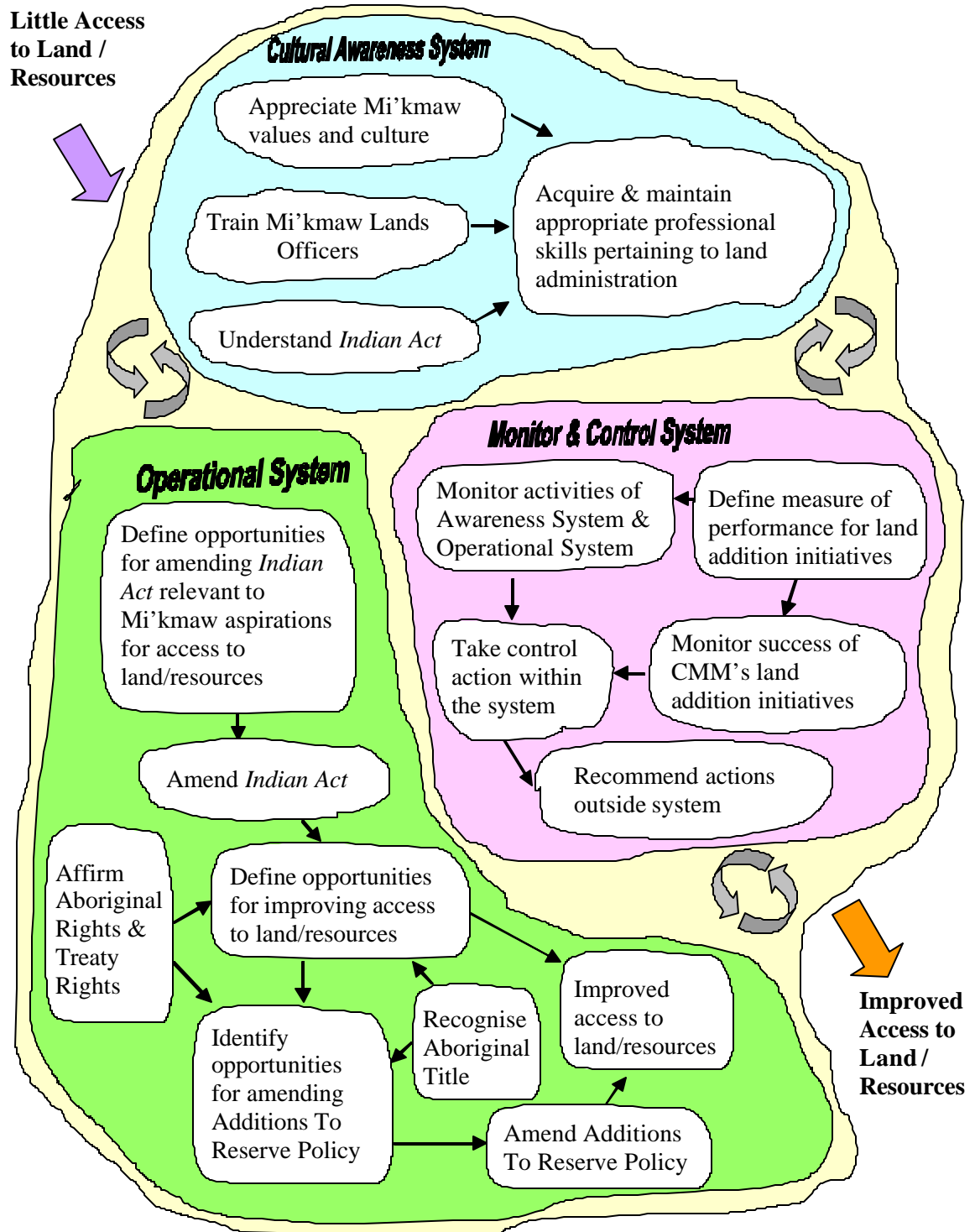
**Figure 4.9 : Conceptual Model of System to Improve Management of Mi'kmaw Land Tenure**

Figure 4.9 above shows the **main primary-task system** – the system to 'improve land management system'. As in Figure 4.8, each of three major systems depicted (Cultural Awareness System, Operational System, and Monitor and Control System) will be further broken down into more detailed sub-systems to deal with the activities as required. It should be noted that while the activities for the systems depicted in Figures 4.8 and 4.9

may be similar – e.g. both systems deal with changing the Additions to Reserve policy; or with training Mi'kmaw lands officers to better understand Aboriginal and non-Aboriginal land tenure concepts and issues – the specific goals and corresponding mechanisms used in each of the systems vary. For instance, in terms of their specific goals, Figure 4.8 is concerned with dealing with issues and mechanisms for improving access to land, while Figure 4.9 is concerned with dealing with the tasks and mechanisms for improving the management of the Mi'kmaw land tenure system. Thus in terms of the mechanisms for changing the *Additions to Reserve* policy, the system to improve access to land/resources in Figure 4.8 will be concerned at an implementation level, with changing or improving mechanisms for meeting the requirements of the *Additions to Reserve* policy, in order to gain access to land and resources more efficiently and efficaciously. The system to improve the management of Mi'kmaw land tenure however will be concerned at a higher policy-making level, with changing or improving mechanisms to streamline the policy and thus avoid existing bureaucratic hurdles that hamper the efficient implementation of the policy.

It should also be noted that both these systems are dependent on other systems at an upper level, as depicted in Figure 4.7. According to these models, three levels are therefore in place for the Mi'kmaq – the upper and wider systems level include subsystems 1, 2, 3, 5, 6 and 9 of Figure 4.7. At a lower level are the two main systems 4 and 7. Below main system 7 is another level that contains subsystem 8. Figures 4.7 to 4.9 thus demonstrate the existence of plural tenures at different levels in a community. The different levels also allow the dual private/public nature of land tenures to be inherently addressed.





**Figure 4.10 : Detailed Conceptual Model of System to Increase Access to Land and Resources for the Mi'kmaw of Mainland Nova Scotia**

Figures 4.7 to 4.9 also foster the incorporation and appreciation of Mi'kmaw worldviews, values, norms, aspirations and culture, which helps to alleviate the problem of eurocentricity that has long pervaded land tenure and land administration systems. The inherent cyclical nature of the models depicted in Figures 4.8 to 4.10 also means that the continuum of tenures is inherently incorporated into the models and thus does not become the issue that current simplistic models raise (as discussed in Chapter 2). Figure 4.10 in the previous page depicts a more detailed conceptual model of the issues relating to improving access to land and resources, by expanding on Figure 4.8.

#### ***4.8 Comparing conceptual land tenure models with existing land tenure situations***

Section 4.8 completes the operational analysis of the Mi'kmaw land tenure situation by comparing the conceptual land tenure models developed in section 4.7 with the Mi'kmaw land tenure situation as it exists in reality. Models allow us to have a structured and coherent debate about a problematic situation in order to improve it. The debate is structured using models that are based on a range of worldviews to question the various perceptions that may exist of the problematic situation [Checkland and Scholes, 1990]. In this thesis, the models are used as a source with which to question and debate perceptions about Mi'kmaw land tenure in the real world. These debates may be conducted using any method that is appropriate to the particular situation. For instance, it may be carried out by the participants of a workshop or meeting, or in one-to-one interviews, or through dialogues spread out over a period of time [Checkland, 1999].

Three popular ways of comparing the conceptual models with real world problematic situations have been developed in soft systems engineering. These include: formal

questioning; scenario writing based on 'operating' the models; and simulating or modelling the real world in the same structure as the conceptual models [Checkland and Scholes, 1999]. The first method – formal questioning – is the most popular method and will therefore be used in this research. It is used to develop questions to query the real situation, such as:

- does the conceptual activity, or relationship, exist in some form?
- how is it done and by whom?
- is it a source of concern or is it regarded as well done?

In this research, responses to the formal questions above were obtained either directly, through informal interviews of officers of the Confederacy of Mainland Mi'kmaq, and of First Nations and land management or land administration consultants in other communities in Canada; or indirectly, from the literature. A sample of the results of using the formal questioning method for this study of the Mi'kmaw land tenure system are tabulated in Table 4.1 on the next page.

Table 4.1 shows that to date, although all activities actually existed in some form in the real world, no single activity could be regarded as having the potential of being well done, since none of them were judged to be simultaneously efficacious, efficient and effective at any one time. While all conceptual activities were efficacious in that they worked in real life, Activity 1 (amending the *Indian Act*) was nevertheless a concern, since there was a possibility that the Activity might not work successfully in reality.

Table 4.1 also shows that the efficiency and effectiveness of each activity was questionable, and was therefore a source of concern in terms of how efficient they were

in using minimal resources to produce the required output; and how effective they were in allowing the community goals to be reached.

**Table 4.1 : Comparing Conceptual Model of Mi'kmaw Land Tenure with Reality**

Activity in Conceptual Model	Does Activity exist in the real world?	How is Activity done and by whom?	Is Activity well done <sup>(1)</sup> or a source of concern?
1) amend <i>Indian Act</i>	Yes – ongoing	Done in parliament – by legislature (e.g. FNLMA); or by INAC changing policy – e.g. INAC's s. 53/60 policies for land administration in Indian reserves	E <sub>1</sub> : yes; E <sub>2</sub> : no; E <sub>3</sub> : no ~ a source of concern since E <sub>2</sub> and E <sub>3</sub> are no ~ E <sub>1</sub> can be no as well
2) replace <i>Indian Act</i>	Yes – partially	Through research, negotiation – by researchers In parliament – by legislature	E <sub>1</sub> : yes; E <sub>2</sub> : no; E <sub>3</sub> : no ~ a source of concern since E <sub>2</sub> and E <sub>3</sub> are no
3) change <i>ATR</i> policy	Yes – ongoing	Through research & workshops by e.g., joint INAC/AFN initiative	E <sub>1</sub> : yes; E <sub>2</sub> : no; E <sub>3</sub> : no ~ a source of concern since E <sub>2</sub> and E <sub>3</sub> are no
4) increase access to land and resources	Yes – ongoing throughout Canada	Through resolution of aboriginal title or land claim settlements e.g. Nisga'a treaty rights	E <sub>1</sub> : yes; E <sub>2</sub> : no/yes; E <sub>3</sub> : yes ~ a source of concern since E <sub>2</sub> may be no or yes
5) recognize treaty rights, Aboriginal rights & aboriginal title	Yes – ongoing in Nova Scotia and other parts of Canada	Treaty rights through Specific claims resolutions – by First Nations & INAC; Aboriginal rights and title issues by Consensus through Tripartite forum, and through litigation	E <sub>1</sub> : yes; E <sub>2</sub> : no/yes; E <sub>3</sub> : yes ~ a source of concern since E <sub>2</sub> may be either no or yes
'6) train Mi'kmaq to understand Mik'maw & non-Mi'kmaw tenures	Yes – through INAC and LSD officers	Through INAC/LAB for Land Managers	E <sub>1</sub> : yes; E <sub>2</sub> : no/yes; E <sub>3</sub> : ? ~ a concern since E <sub>2</sub> and E <sub>3</sub> are unknown
7) improve land management by Mi'kmaw communities	Yes – through CMM in Nova Scotia	Though FNLMA and self-governance programs – e.g. Lheidli T'enneh and Sechelt	E <sub>1</sub> : yes; E <sub>2</sub> : ?; E <sub>3</sub> : ? ~ a concern since E <sub>2</sub> and E <sub>3</sub> are yet unknown
<sup>(1)</sup> Notes – Criteria for evaluating Activities: E <sub>1</sub> : Efficacy – measured by asking 'does activity work?' (yes/no/partially); E <sub>2</sub> : Efficiency – measured by asking 'were minimal resources used to produce required output?' (yes/no) E <sub>3</sub> : Effectiveness – measured by asking 'does activity permit goal to be reached?' (yes/no/partially)			

Rows labelled (4) and (7) in Column 3 of Table 4.1 also shows that the land tenure reform models of two First Nations in British Columbia, those of the Nisga'a and the Lheidli T'enneh, may be of use in assisting with the detailed identification and analysis of desirable land tenure reforms for the Mi'kmaq. For instance, the reforms could

provide ideas of how the efficiency and effectiveness of the activities could be improved upon. Chapter 5 will discuss the two land tenure models.

In summary then, the comparison of the conceptual models with their existing situations revealed that while each of the activity or subsystem existed in reality, they did not always function efficaciously, efficiently and effectively in the real world. The activities therefore were a concern in that some improvement or reform was needed, before each activity could be conclusively deemed to be 'well done'. The main concerns centred on the efficiency of the activities in terms of the resources available, allocated and used to produce the output required; and on the effectiveness of the activities in terms of their overall impact on the goals, aspirations, values and culture of the Mi'kmaw. These concerns are addressed in more detail in the next section, by identifying changes to the Mi'kmaw land tenure systems that would be culturally feasible and systemically desirable for the Mi'kmaq.

#### ***4.9 Evaluating the Feasibility and Desirability of Land Tenure Reforms***

In accordance with the framework developed in Chapter 3 and shown in Figures 3.6 and 3.7, Section 4.2 set the context of this study of Mi'kmaw land tenure systems by reviewing the historical background and describing the players, ethics and reporting considerations of the study. Sections 4.3 and 4.4 analysed the cultural aspects of the Mi'kmaw land tenure situation in order to be able to appreciate the study situation and thus facilitate the selection of reforms that would be culturally feasible to the Mi'kmaq. Sections 4.5 to 4.8 identified the issues and analysed the operational aspects of the study in order to be able to identify land tenure options or conceptual models of relevant

activity systems that would be systemically desirable for the Mi'kmaq. This section, Section 4.9, will evaluate the proposed options or conceptual models developed in Section 4.7, using the criteria of cultural feasibility and systemic desirability (see Figure 3.9).

A transformation or reform that is culturally feasible is one that is meaningful within the culture in question as judged by the values or standards of the culture in question – for instance, in terms of the worldview of the culture. A transformation or reform that is systemically desirable is one that is relevant to the overall systems and subsystems that make up the perceived land tenure system as a whole. Table 4.2 depicts the evaluation of the cultural feasibility and systemic desirability of the activities in the conceptual models.

Table 4.2 on the next page, depicts seven of the nine activities identified in Section 4.6.2 (and depicted in the conceptual models in Figure 4.7) that may be culturally feasible and systemically desirable for the Mi'kmaq of mainland Nova Scotia. Reforming each of the individual activity systems does not impact negatively on the system as a whole and is therefore relevant to the perceived problematic land tenure situation. It is therefore concluded that it is systemically desirable to reform the Mi'kmaw land tenure system based on the above seven activities, in order to improve the ecological, economical and social sustainability of the Mi'kmaw.

**Table 4.2 : Assessing Desirability/Feasibility of Activities in Conceptual Model**

How?	Culturally Feasible? <sup>(1)</sup>	Systemically Desirable? <sup>(1)</sup>	Possible Action
1) amend <i>Indian Act</i>	Yes	Yes	Consult with CMM, Bands and INAC, then decide on amendments to be made
2) replace <i>Indian Act</i>	Suspend judgement for time being, given mixed feelings of Mi'kmaq towards replacing <i>Indian Act</i>	Yes	Consult with CMM and Bands; identify all reports and assess for 'desirability'
3) change <i>ATR</i> policy	Yes	Yes	Consult with AFN/INAC to ascertain current status of AFN/INAC joint initiative on <i>ATR</i> policy
4) increase access to land and resources	Yes – promotes cultural survival and hence ecological biodiversity	Yes	Need clarification of resources used and goals of Mi'kmaw
5) recognize treaty rights, Aboriginal rights & aboriginal title	Yes	Yes	Need clarification of status of recognition of treaty and aboriginal rights; and of aboriginal title
6) train Mi'kmaq to understand Mi'kmaq & non-Mi'kmaq tenures	Yes	Yes	Consult with CMM, Band Councils; get approvals and make arrangements for identified training
7) improve land management by Mi'kmaw communities	Yes – to ensure sensitivity towards Mi'kmaw concerns	Yes	Needs clarification on how concerns over accountability, and incorporation of Mi'kmaw views, values, norms can be accommodated
<sup>(1)</sup> <b>Notes – Criteria for evaluating Desirability &amp; Feasibility of Activities:</b> <b>Cultural Feasibility</b> – measured by asking 'is transformation meaningful within culture i.e. in terms of the worldview, values, roles and norms of the culture?' (yes/no); <b>Systemic Desirability</b> – measured by asking 'is transformation relevant to the perceived land tenure system as a whole?' (yes/no)			

In terms of cultural feasibility, all activities with the exception of Activity 2 (replace *Indian Act*) were seen to be meaningful in terms of the cultural worldviews, values, roles and norms of the Mi'kmaq. However current worldviews and attitudes of some Mi'kmaw, particularly the Mi'kmaw elders, indicated that the issue of replacing the *Indian Act* should be suspended at present, until further consultation has been completed with the Mi'kmaw nation [Nichols and Rakai, 1999]. It was therefore concluded that

with the exception of Activity 2, the other six activities identified in Section 4.6.2 are culturally feasible for the Mi'kmaq.

The fourth column in Table 4.2 depicts the possible action that may be taken by the Mi'kmaq, for each activity. An important note to note here is that each of the activities tabulated in Table 4.2 is an option, and can therefore not be expected to be undertaken by the Confederacy of Mainland Mi'kmaq, unless the Confederacy chooses to do so. A second important point to note is that, as noted in section 4.8, each activity is very generally described in this chapter, and in reality, needs to be broken down further into more details, for more useful evaluations.

#### ***4.10 Concluding Remarks***

The primary objective of this chapter was to use the conceptual neutral framework developed in Chapter 3 to describe and analyse the traditional and contemporary land tenure systems of the Mi'kmaq of mainland Nova Scotia, in order to be able to identify suitable land tenure reform models or options for them. The chapter therefore describes traditional and current Mi'kmaw land tenure arrangements, using the framework developed in Chapter 3. Conceptual models of issues identified were then developed and compared with the relevant problematic land tenure situations that are perceived to exist in mainland Nova Scotia. The comparisons highlighted the need to improve the efficiency and effectiveness of existing land tenure activity systems. The comparative analysis of the models with reality was then followed by the identification of desirable reforms to be made to the land tenure systems of the Mi'kmaw of mainland Nova Scotia.



The desirable reforms that were identified were of two main types – that of increasing access to land and resources; and that of improving the management and administration of Mi'kmaw land tenure systems. The two main reforms involved reforming up to nine activities or systems/subsystems of land tenure. These included amending the *Indian Act*; replacing the *Indian Act*; changing the *Additions to Reserve* (ATR) policy; increasing access to land and resources; recognizing aboriginal title and affirming the existence of aboriginal rights and treaty rights; training the Mi'kmaq in Mi'kmaw and Canadian concepts of land tenure and land management; improving land management and land administration systems in Mi'kmaw communities and defining Mi'kmaw cultural values, norms, goals and aspirations.

Table 4.2 revealed that replacing the *Indian Act* should be suspended for the time being, as it was viewed with some misgivings by some members of the Mi'kmaw society [Nichols and Rakai, 1999]. The evaluation of the proposed reform activities in Table 4.2 thus concluded that except for the second activity of replacing the *Indian Act* with some other legislation, all activities were culturally feasible and systemically desirable. However the comparative analysis in Table 4.1 showed that the individual activities were NOT simultaneously efficacious, efficient and effective, and therefore could only be desirable systemically, after measures to successfully address the efficiency ( $E_2$ ) and effectiveness ( $E_3$ ) of activity systems were made.

The comparative analysis further identified the land tenure reform models of two First Nations in British Columbia, those of the Nisga'a and the Lheidli T'enneh, that may be of use in assisting with the detailed identification and analysis of desirable land tenure reforms for the Mi'kmaq. Chapter 5 will discuss the two land tenure models.

## Chapter 5: Comparative Analysis and Evaluation of Aboriginal Land Tenure Systems in British Columbia

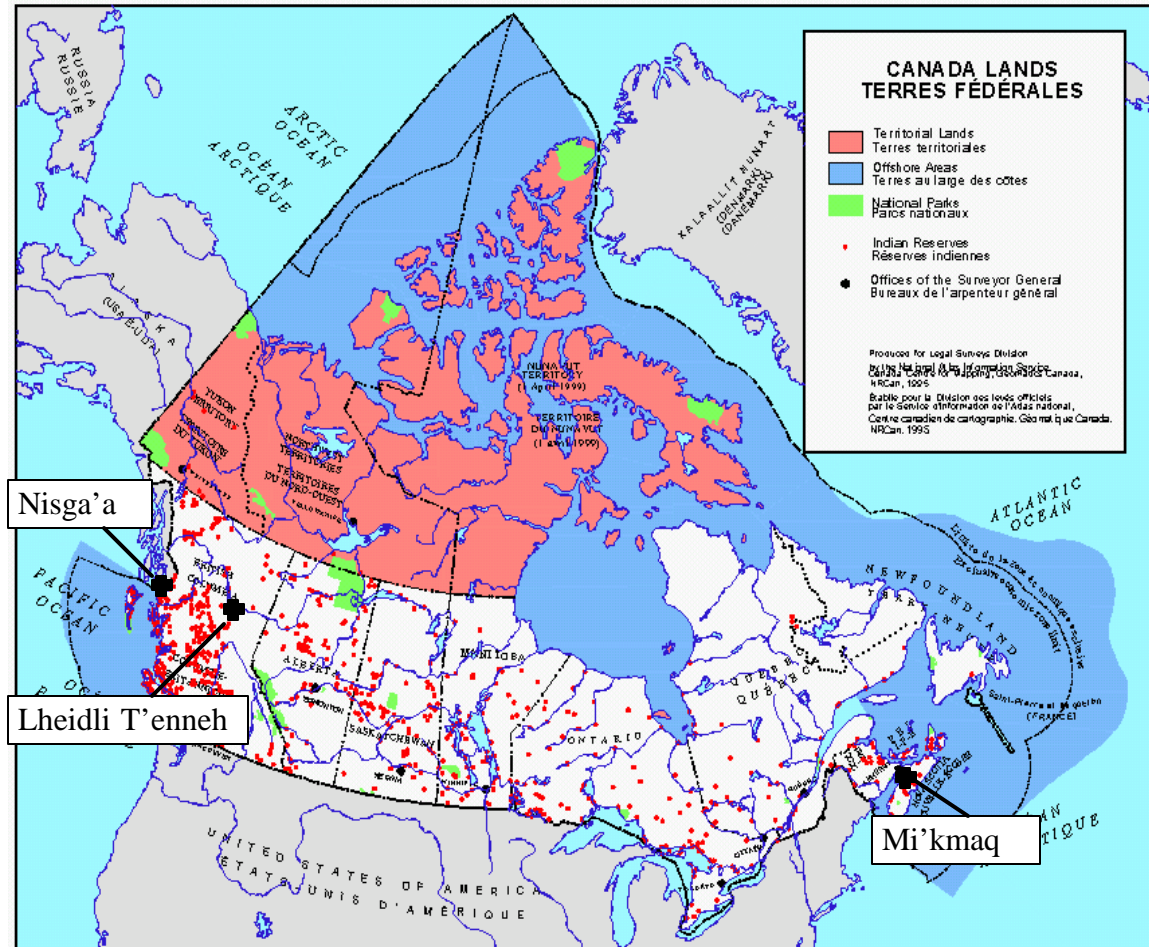
### 5.1 Introduction

The purpose of this chapter is to fulfil Objective 3 of this research, namely to demonstrate that the comparators and conceptual framework developed in Chapter 3 can be used to describe, analyze, model, compare and evaluate the cross-cultural land tenure systems of selected Aboriginal peoples in the provinces of British Columbia on Canada's west coast and Nova Scotia on Canada's east coast. In addition to the Mi'kmaq, who were studied in Chapter 4, two First Nations are studied in this Chapter – the **Nisga'a** and the **Lheidli T'enneh** Nations of British Columbia (see Figure 5.1 on the next page). These two First Nations communities in British Columbia were selected for several general and specific reasons.

From a general perspective they were selected for two reasons: firstly, they share with Nova Scotia, a common legacy of not having signed treaties involving the surrender of land with their British colonizers. Secondly, both British Columbia and Nova Scotia are maritime provinces, being bounded on their seaward side by the Pacific Ocean and by the Atlantic Ocean respectively, and both provinces are based economically on their forestry and fisheries industries. They thus share similar resource-based issues relating to fishing rights and logging rights.

From a specific perspective, each First Nation was selected based on the land reforms that each is involved with. The Nisga'a Nation is studied because it represents a community that is implementing land reform initiatives as a result of land claim settlements involving aboriginal title. The Lheidli T'enneh Nation is studied to provide

the Mi'kmaq with a model of a First Nation operating under the *First Nations Land Management Act* [1999].

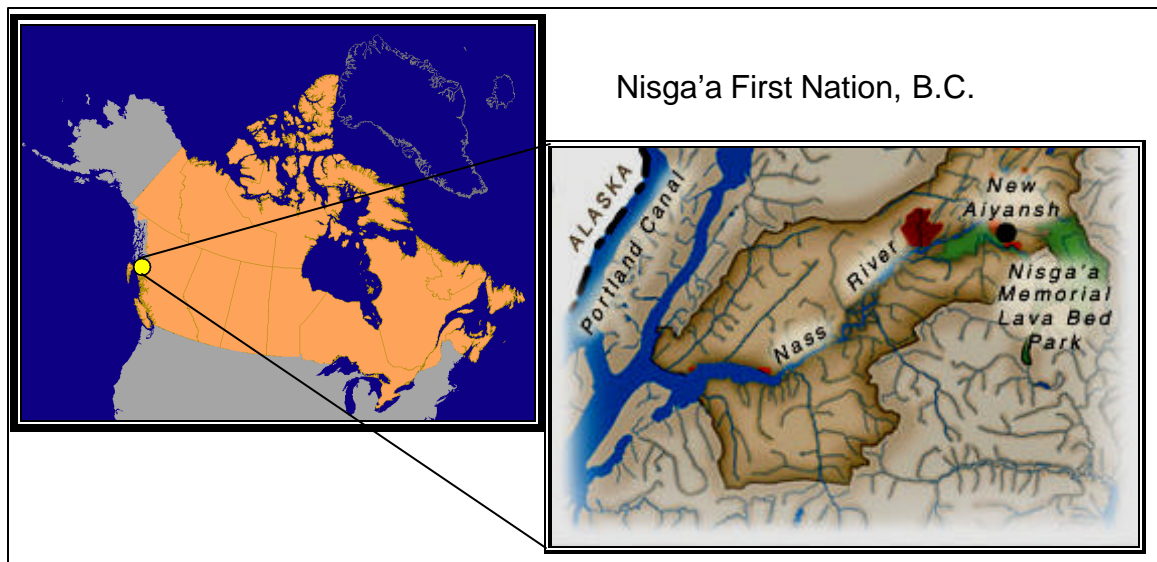


**Figure 5.1 : Map showing First Nation Communities studied in Canada**  
[Source: Legal Surveys Division, NRCan, 1995]

Therefore, in accordance with the conceptual framework developed in Chapter 3, the chapter will begin with a cultural analysis of the land tenure situation within the Nisga'a and Lheidli T'enneh First Nation reserves. This cultural analysis entails brief descriptions of the worldviews, values, goals & aspirations; concepts of land and land tenure; and institutions of their communities. The descriptions are followed by a review of the land tenure arrangements and reforms carried out in each First Nation community

and any issues arising from it. An analysis of the land tenure reform models adopted by each of the First Nations is then carried out, by using the conceptual Mi'kmaw land tenure models developed in Chapter 4 to evaluate how the Nisga'a and Lheidli T'enneh land tenure reform models have dealt with the issues affecting the Mi'kmaq. This will allow us to identify ideas and/or lessons that may be useful for designing or developing land tenure models for the Mi'kmaq of mainland Nova Scotia. Finally the Nisga'a and Lheidli T'enneh land tenure models are evaluated in terms of their systemic desirability and cultural feasibility for the Mi'kmaq.

## ***5.2 The Nisga'a Nation: Using Aboriginal Title and Land Claims Settlement as a Mechanism for Land Reform***



**Figure 5.2 : Locality Map of the Nisga'a Nation**

[Source: Nisga'a, 2002]

As part of compensation for aboriginal title over territories that the Nisga'a have lived on for over 10,000 years, the Nisga'a successfully negotiated a self-government agreement in 1998 with the federal government and with the provincial government of British Columbia. The Nisga'a Nation is therefore studied to identify lessons that may be learnt

from land reform initiatives taken as a result of land claim settlements concerning aboriginal title and self-determination.

The Nisga'a live in the remote Nass River valley, in northwestern British Columbia (see Figure 5.2). Approximately 2500 of the 5500 Nisga'a live in the Nass Valley, with about 100 non-Aboriginal residents. Forestry is the dominant economic activity in the Nass Valley, supported by fishing, eco-tourism, pine mushroom harvesting and service industries [INAC, 2002]. Thus in addition to those Nisga'a that still hunt, fish and trap, there are also Nisga'a lawyers, administrators, politicians, priests, teachers, linguists, loggers, carvers, dancers, nurses, architects, technicians and business people [Calder, 1993].

### 5.2.1 World Views, Goals and Aspirations

Nisga'a world views can be seen in the following quotation [Nisga'a, 2002]:

*We believe that the Creator - through His messenger Txeemsim - brought the life-giving sun to a bleak twilight world of hunger, deprivation and war.*

*Txeemsim taught people how to inhabit the land and interact with animals without disrupting the cycle of life. This Nisga'a hero also taught people how to build houses to survive long winters, to defend the land, and to organize themselves into a coherent, moral society.*

*Above all, Txeemsim taught us to respect the land and its creatures, core values of Nisga'a life today.*

The aspirations of the Nisga'a are also articulated in the following quotation [Nisga'a, 2002]:

*The Nisga'a have held the land of the Nass River in sacred trust from God since time immemorial. All Nisga'a culture and identity is woven inextricably into this Land. This is the story of their struggle to have this reality acknowledged by others and so have a meaningful and God given place in Canada.*

In terms of their land claims and Aboriginal title, the goals of the Nisga'a included [Nisga'a, 2002]:

- *to preserve and enhance Nisga'a self-determination, culture survival, and well being for generations to come;*
- *to provide the basis for the survival of the Nisga'a as an economically self-reliant and sustainable distinct society within Canada*
- *to establish certainty concerning Nisga'a lands and resources*

Clearly, like other First Nations and citizens of Canada, the Nisga'a would like to retain their culture and traditions and develop a future that is culturally, ecologically and economically sustainable.

## **5.2.2 Land Tenure Concepts and Institutions**

The Nisga'a Tribal Council was formed in 1955 by uniting the four clans (the Wolf, Eagle, Raven and Killerwhale clans) and their respective communities: Gingolx (Kincolith), Lakazap (Greenville), Gitwinksihlkw (Canyon City) and Gitlakdamiks (New Aiyansh), with the prime purpose of resolving their land claims [Nisga'a, 2002]. All members of the tribe share the right to the resources of the land for their livelihood.

Under the *Ayuunkhl Nisga'a* – the ancient code of laws and customs that establishes and defines Nisga'a institutions and code of conduct, every Nisga'a belongs to a *wilp* or *house*. Each *wilp* owns its songs, crests, dances, stories and territory. There are about 60 *wilps* that own and manage 40 *ango'oskws* (family territories) comprising Nisga'a land. The Nisga'a are a matrilineal society, in which rights to land are transferred through the female line, in a ceremony known as the 'Settlement Feast' or *potlatch* (may also be spelt as *potlash* in the literature). The *potlatch* (or *potlash*) has been described as a formal oral registration of title and ownership, similar to a deed in a land registry office [McKay, 1993].

The Nisga'a concept of land ownership is that land is owned collectively by the tribe as a whole. Thus the Nisga'a Nation collectively exercises ownership over their territory, with ownership being vested in the chiefs of each of the four clans [Nisga'a, 2002]. On the death of a Chief of a particular clan, the Chief's successor is selected from the members of the clan to receive his title and take over the responsibilities as new head of the clan. A *potlatch* (settlement feast) is held so that the clan can pass on title to the territory "owned" by a Chief to the next in line. In recognition of a clan chief's permanent office, every mountain, every valley, and every waterway owned and occupied since time immemorial by a specific clan within the 6,500 square miles of Nisga'a Territory, is cited. Other ranking Chiefs must be present to witness, to participate, and to approve of the investiture. In the public ceremony, all individual holdings of land are reaffirmed to the Chiefs in front of religious leaders, who also serve as witnesses to the event. The new chief thus assumes 'ownership' of the land and its resources, which is shared with other clan members [Nisga'a, 2002].

The *potlatch* therefore continues to serve as a perpetual public assertion of title to the individual tracts of land within the Nisga'a collective traditional territory. While the *potlatch* tradition is very costly for the Chief and the clan, it is carried on because it is their traditional way of asserting their ownership of the land [Nisga'a, 2002]:

*Many years ago the white man tried to eradicate the potlatch system by making its practice into a criminal offence. Many Nisga'a and other native people went to jail because the government sought to destroy it. The destruction of the potlatch to our nation is very similar to the destruction of the land title's office to the white man. Whereas the non-Indian relies upon written proof of title in order to tell what land belongs to what person, the Nisga'a rely upon our oral proof of title and the witnesses to the settlement feast. It was not and will not be stamped out because it is essential to our being, essential to our tie to the land.*

### 5.2.3 Land Tenure Reforms

On August 4, 1998, the governments of Canada, British Columbia and the Nisga'a Nation signed the *Nisga'a Final Agreement*, the first modern treaty in British Columbia in over 100 years, in the Nisga'a village of Gitlakdamix (New Aiyansh). The treaty recognizes Nisga'a Lands and has provisions for self-government. It became effective after being ratified by the governments of Canada, British Columbia and the Nisga'a Nation on May 11, 2000. With the ratification came the end of the application of the *Indian Act* to the Nisga'a (except for the purpose of Indian registration), and the installation of legal authority for the Nisga'a to control and conduct their own affairs, for the first time in modern history. Guided by their culture and the wisdom of their elders, the Nisga'a are now entrusted with the care and protection of their territory and its inhabitants [INAC, 2001a].

The treaty represents a hard-fought compromise. The Nisga'a released their claim to ownership of 90% of their ancestral lands, and over time will give up their exemptions from income and sales taxation on current Indian reserves [Berger, 1998]. Compensation of \$190 million in cash will be paid to them over 15 years, and they are also entitled to forestry, fishery and wildlife resources under the treaty provisions. [Berger, 1998].

All land owned (in fee simple) by the Nisga'a fall into three categories [INAC, 2001b]:

- **Nisga'a Lands** – 1992 sq.km ≈ comprises former Indian reserves (62 sq. km) and provincial Crown land (1930 sq.km); includes ownership of minerals and forest resources, but excludes rights to water;
- **Category A Lands** – 25 sq. km ≈ includes 16 uninhabited Indian reserves outside of Nisga'a Lands; includes ownership of mineral rights; and



- **Category B Lands** – 2.5 sq. km ~~≈~~ includes 15 economic development sites on Crown land outside of Nisga'a Lands; excludes mineral rights

See Figure 5.3 on the next page, which shows the location of the three categories of lands. Nisga'a Lands cannot be alienated to non-Nisga'a, although they can be alienated internally, between Nisga'a Band members. Nisga'a Lands comprise a single tract of land that is approximately 1,992 sq. km<sup>33</sup>, of which 1930 sq. km was former provincial Crown land and approximately 62 sq. km was former Indian reserves [INAC, 2001b].

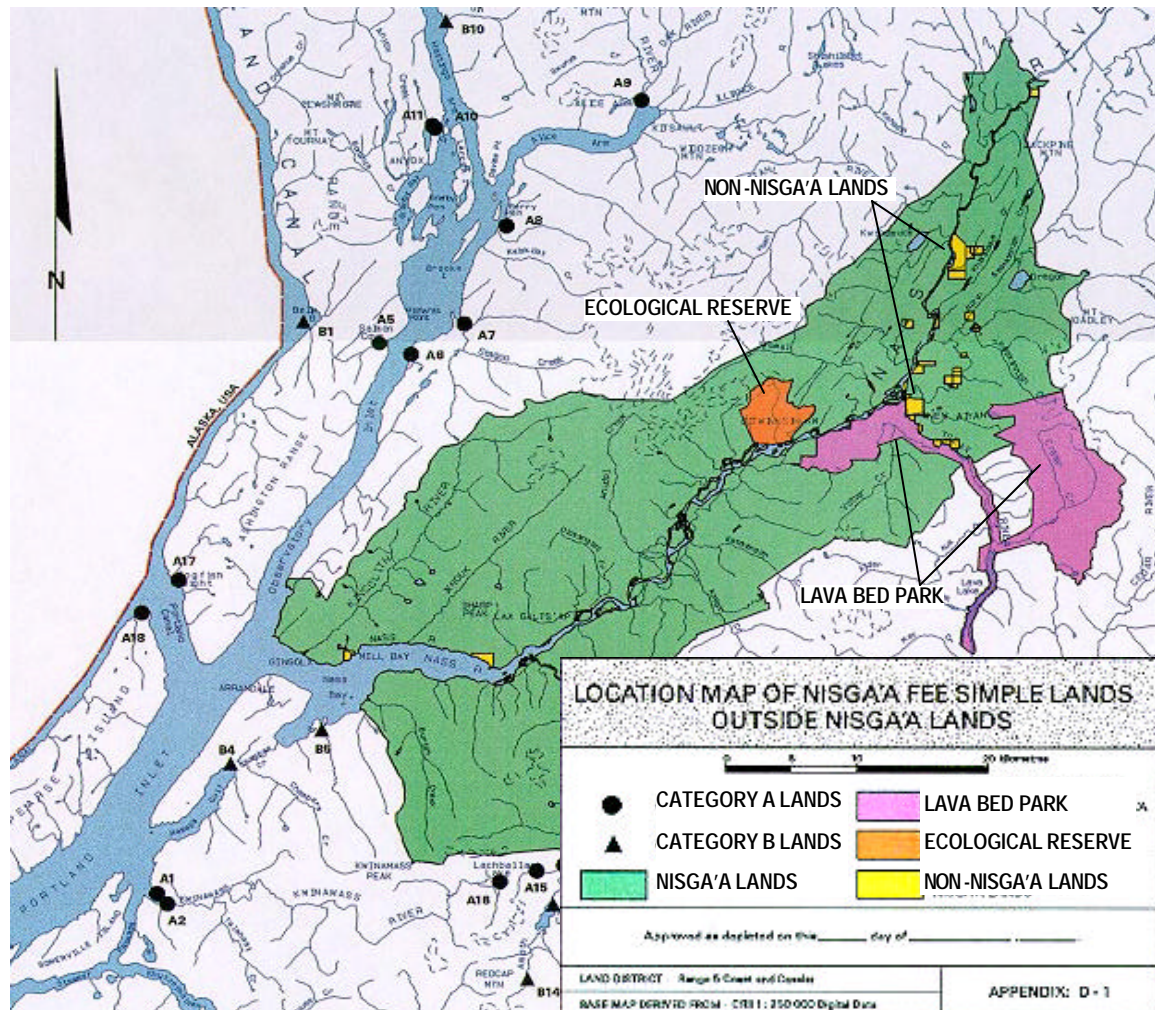
Category A Lands, which includes ownership of mineral rights, total 25 sq. km and includes the 16 uninhabited *Indian Act* reserves located outside of the Nisga'a Lands. Category B Lands, which do not include mineral rights, make up 2.5 sq. km and include 15 economic development sites on Crown land outside of the Nisga'a Lands. The Nisga'a own Category A and Category B Lands, but do not have governmental jurisdiction over them, since they are located on provincial or federal lands and therefore fall under the jurisdiction of either of the two governments.

While the Nisga'a own the land, minerals and forest resources on Nisga'a Lands, ownership and regulation of water remains with the Crown. Under the Nisga'a Lisim (Nisga'a Government) laws, Nisga'a Lands are further classified into:

- Nisga'a Village Lands,
- Nisga'a Private Lands and
- Nisga'a Public Lands.

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<sup>33</sup> approximately 8% of their traditional Nisga'a territory - at least two ranches in B.C. are larger (Berger, 1999).



**Figure 5.3 : Map of Different Categories of Nisga'a Lands [INAC, 2001 d]**

The general public have access to Nisga'a Public Lands for non-commercial recreation, as well as general access through the Nisga'a Highway and Crown roads.

The *Nisga'a Land Act*, which is based on the province of British Columbia's *Land Act*, regulates those lands that are not part of an actual village site. However privately owned lands that existed at the time the treaty became effective were excluded from being Nisga'a Lands and are therefore not subject to the *Nisga'a Land Act*. 'Replacement interests' were granted by the Nisga'a Nation for structures such as communication towers, buildings and community housing facilities [INAC, 2001c]. Should the Nisga'a

buy private lands located within Nisga'a Lands, those lands may be added to Nisga'a Lands after obtaining agreement from Canada and British Columbia for the land addition.

#### **5.2.4 Analysis of Social and Political Systems that affected the Nisga'a Land Tenure**

The view of the Nisga'a was that their historic pre-European interests in land were given to them as a sacred trust from God and thus their aspiration was that their interests be acknowledged by all people [Nisga'a, 2002]. It was clear that their aspiration could only be achieved through the recognition of their aboriginal title to their traditional territories. In terms of the conceptual framework developed in Chapter 3, the Nisga'a effectively played multiple roles as the 'client', 'actor' and 'owner' in their decades of efforts to have their aboriginal title recognised. As the 'client' their chiefs and elders, which included renowned tribal chief Frank Calder, were instrumental in instigating and commissioning efforts to research and document evidence pertaining to having their aboriginal title being recognized and acknowledged. As the 'actor', the Nisga'a played the important role of providing oral evidence, supplemented where they existed by documentary evidence, to support their assertion of their aboriginal title. As the 'owner' of the problem, and hence one who could stop the assertion of aboriginal title at any time (due for instance to lack of funding, motivation), the Nisga'a leaders and elders again played important roles in building and maintaining the momentum for successfully achieving recognition of their aboriginal title to their territories.

The Nisga'a social and political systems are grounded in their cultural roles, norms and values, which are predominantly community-based systems. The Nisga'a Lisims Government, which was established under the Nisga'a Treaty plays a prominent role in

decisions concerning governance of people and administration of land and resources. At the same time the chiefs and elders continue to play an important role in distributing decision-making powers in social situations.

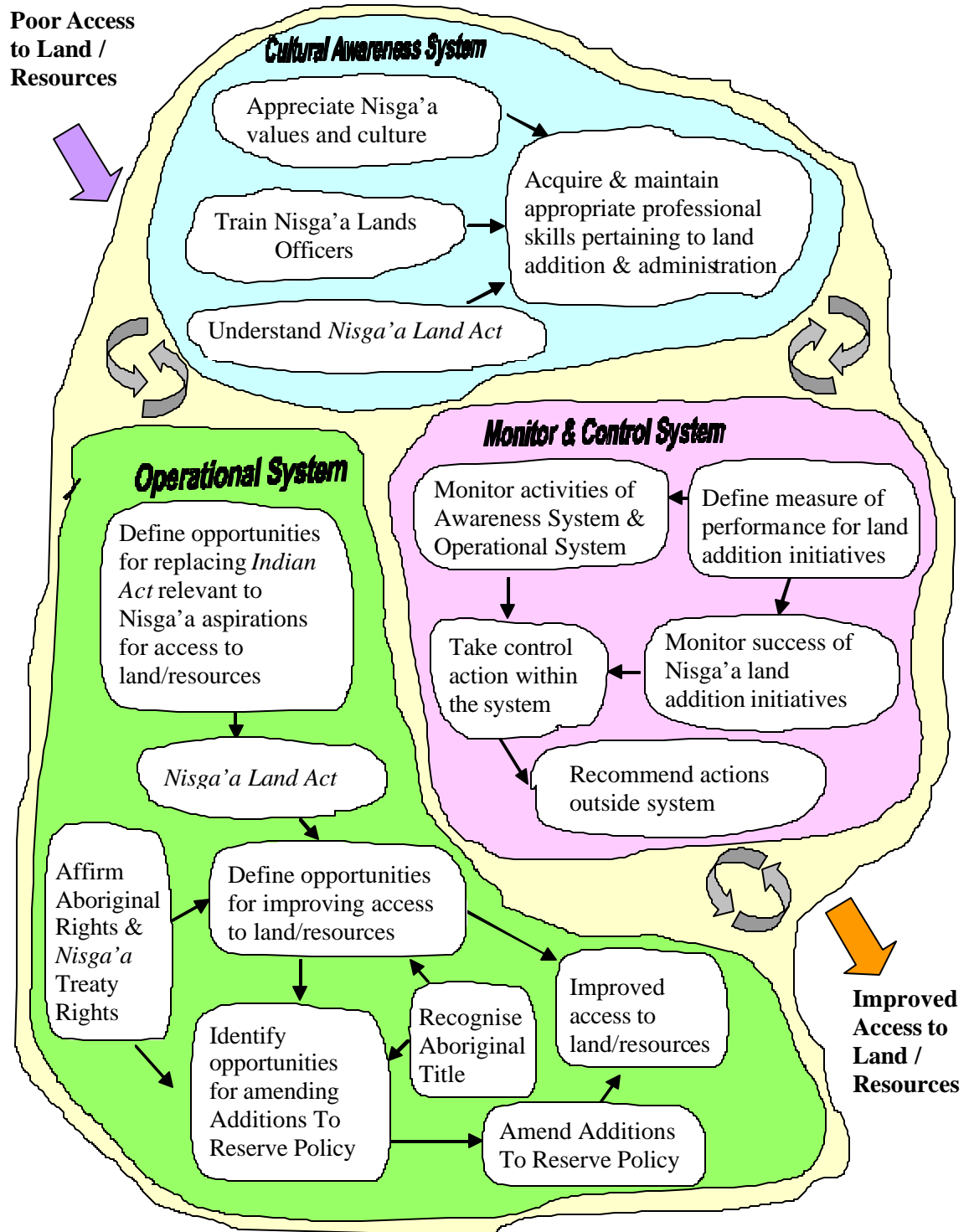
Guided by their cultures and traditional institutions of elders and chiefs, and by their desire to achieve economic prosperity, the Nisga'a have attempted to balance their goals by utilizing a combination of freehold and leasehold tenure in their lands. It should however be noted that they are required to eventually pay taxes themselves to the provincial and federal governments.

### **5.2.5 Analysis of Nisga'a Land Reform using Conceptual Mi'kmaw Reform Model**

Figure 5.4 on the next page maps the conceptual model of the system to increase Mi'kmaw access to land and resources (Figure 4.10) onto the Nisga'a situation. This includes replacing the *Indian Act* with the *Nisga'a Land Act* where relevant. As in Chapter 4, the method of formal questioning is used to assess the Nisga'a situation. This method entails using the conceptual Mi'kmaw-based model to query the Nisga'a situation with the following questions:

- does the conceptual activity exist in some form?
- how is the activity carried out and by whom?
- is the activity a source of concern or is it regarded as well done?

The results of using the formal questioning method to evaluate the Nisga'a land tenure system by comparing it with the conceptual Mi'kmaw model are tabulated in Table 5.1 (on page 167). Tabulated responses in Table 5.1 are derived largely from a synthesis and evaluation of the literature and of informal meetings/interviews held during the research period with various personnel involved with First Nations land management in Canada.



**Figure 5.4 : Mapping the Detailed Conceptual Model of a System to Increase Access to Mi'kmaw Land and Resources onto the Nisga'a Situation**

Table 5.1 showed that with the exception of Activity 1 – the activity to amend the *Indian Act* – all conceptual activities tended to be efficacious (E<sub>1</sub>) in that they were working in the reformed Nisga'a land tenure system. It should also be noted that while the recognition of Aboriginal title gave rise to the Nisga'a Treaty and the settlement of their land claims, the continued recognition of Aboriginal title is now a non-issue, since the Nisga'a now hold their lands in fee simple.

**Table 5.1 : Analysing Nisga'a Land Reform Initiatives Using Conceptual Mi'kmaw Reform Model**

Activity in Conceptual Model	Does Activity exist in the Nisga'a world?	How is Activity done and by whom in the Nisga'a situation?	Is Activity well done <sup>(*)</sup> or a source of concern?
1) Amend <i>Indian Act</i>	No	Not applicable	Not applicable
2) Replace <i>Indian Act</i> with <i>Nisga'a Land Act</i>	Yes	Research, negotiation – by researchers, Nisga'a Tribal Council In parliament – by legislature	E <sub>1</sub> : yes; E <sub>2</sub> : no; E <sub>3</sub> : yes ~ length of time to complete activity a source of concern
3) Change <i>ATR</i> policy	Yes – ongoing	Through research & workshops by joint INAC/AFN initiative	E <sub>1</sub> : yes; E <sub>2</sub> : no; E <sub>3</sub> : yes ~ time is a source of concern & funding
4) Increase access to land and resources	Yes	Under <i>Nisga'a Land Act</i>	E <sub>1</sub> : yes; E <sub>2</sub> : yes?; E <sub>3</sub> : yes ~ Activity well done
5) Recognize Treaty Rights, Aboriginal Rights & Aboriginal Title	- Yes for Treaty Rights and Aboriginal Rights; - Yes? for Aboriginal Title, but may be a non-issue	- Treaty rights of Nisga'a enshrined in Nisga'a Treaty ; - Aboriginal rights through negotiations and litigation - Aboriginal title n/a, as Nisga'a hold title to land in fee simple	E <sub>1</sub> : yes; E <sub>2</sub> : no; E <sub>3</sub> : yes ~ time to complete activity a major source of concern; and consequent funding
6) Train Nisga'a Lands Officers to understand Nisga'a & non-Nisga'a land tenure systems	Yes	through INAC, Lands Advisory Board (LAB) for Land Managers, & Legal Surveys Division (LSD)	E <sub>1</sub> : yes; E <sub>2</sub> : ?; E <sub>3</sub> : yes? ~ finding and retaining trained staff a concern
7) Improve land management by Nisga'a communities	Yes	through INAC, Dept of Indian Affairs and the Legal Surveys Division, Dept of Natural Resources	E <sub>1</sub> : yes; E <sub>2</sub> : ?; E <sub>3</sub> : yes? ~ finding, training and retaining staff a concern
<p><sup>(*)</sup> Notes – Criteria for evaluating Activities:  E<sub>1</sub>: Efficacy – measured by asking 'does activity work?' (yes/no/partially);  E<sub>2</sub>: Efficiency – measured by asking 'were minimal resources used to produce required output?' (yes/no)  E<sub>3</sub>: Effectiveness – measured by asking 'does activity permit goal to be reached?' (yes/no/partially)</p>			

The efficiency ( $E_2$ ) of each activity was found to be either inefficient or generally questionable, due largely to concerns with the overly long times taken to complete each activity, and the associated funding required to fund the activity. Table 5.1 also showed that in general the activities were effective ( $E_3$ ) in that they allowed the goals of the Nisga'a to be reached. However there were concerns with retaining trained staff, and its impact on the continued achievement of overall Nisga'a goals.

In summary then, the comparative analysis of each conceptual activity (or option) with what exists in reality showed that for the Nisga'a, the first activity of amending the Indian Act was not an option, since they chose to work with the second activity, viz. replacing the *Indian Act* with their own *Nisga'a Land Act*. This second activity however was marred by the extensive time taken (and ensuing costs) to complete their land settlement negotiations and enact their Land Act. While the remaining five activities (Activities 3, 4, 6, 7 and part of Activity 5) were efficacious, they all required some improvements concerning their efficiency or/and their effectiveness, before any of them could be deemed to be 'well done'. The conceptual activities in Table 5.1 are further addressed in the next section, in order to evaluate whether the Nisga'a reforms are culturally feasible and systemically desirable in terms of the Mi'kmaq requirements.

### **5.2.6 Evaluating Feasibility and Desirability of Nisga'a Land Reform for Mi'kmaq**

As noted in Chapter 4, a systemically desirable reform is defined in this thesis as one that is relevant to the overall systems and subsystems that make up the land tenure system as a whole; the relevance being measured by the degree to which the reform impacts negatively on the whole land tenure system. A culturally feasible reform is defined here

as being one that is meaningful within the culture in question as judged by the values, norms, and standards of the culture in question, i.e. in terms of the worldview of the culture. Table 5.2 depicts the evaluation of the systemic desirability and cultural feasibility of the activities in the conceptual model in the context of the Nisga'a land tenure reform.

With the exception of Activity (1), all Activities impacted positively on the overall Nisga'a land tenure system, and were thus deemed to be relevant to the various existing systems and sub-systems that together make up the Nisga'a land tenure system. The Nisga'a reform initiative is therefore seen as being systemically desirable when evaluated using the criteria set by the conceptual Mi'kmaw reform model.

As Table 5.2 shows, six of the seven reform activities identified in the conceptual Mi'kmaw models in Figure 4.7 (in Chapter 4) were reforms that were also culturally feasible for the Nisga'a. It was culturally feasible to reform the Nisga'a land tenure system based on six of the seven issues-based activities, in order to achieve the Nisga'a goals of establishing certainty in accessing Nisga'a lands and resources, and thus attaining ecological, economical and social sustainability. Unlike the Mi'kmaq, the Nisga'a chose to replace the *Indian Act* with their own legislation. Thus, while they retain their status as 'Indians' or 'First Nations', they no longer function under the *Indian Act* for land matters.



**Table 5.2 : Assessing Desirability/Feasibility Nisga'a Reform Model for Mi'kmaq**

<b>How?</b>	<b>Systemically Desirable for Nisga'a? <sup>(1)</sup></b>	<b>Culturally Feasible for Nisga'a? <sup>(1)</sup></b>	<b>Possible Action for Mi'kmaq</b>
1) amend <i>Indian Act</i>	Not applicable	Not applicable	Not applicable
2) replace <i>Indian Act</i>	Yes	Yes	Consult with CMM and Bands to review Nisga'a results; assess 'desirability' and 'feasibility' for Mi'kmaq, then decide
3) change <i>ATR</i> policy	Yes	Yes	Consult with AFN/INAC to ascertain current status of AFN/INAC joint initiative on <i>ATR</i> policy; assess impact for Mi'kmaq
4) increase access to land and resources	Yes	Yes	Need clarification of resources used by Nisga'a and goals of Mi'kmaq
5) recognize treaty rights, Aboriginal rights & aboriginal title	Yes	Yes	Need updated clarification of status of recognition of treaty and aboriginal rights; and of aboriginal title in Nova Scotia – also need to review terms of reference for Tripartite Forum for aboriginal title
6) train Nisga'a Lands Officers to understand Nisga'a & non-Nisga'a land tenure systems	Yes	Yes	Consult with CMM, Band Councils; get approvals for and make arrangements for identified training
7) improve land management by Nisga'a communities	Yes	Yes	Needs clarification on how concerns over accountability, and incorporation of Mi'kmaw views, values, norms can be accommodated
<p><sup>(1)</sup> <b>Notes – Criteria for evaluating Desirability &amp; Feasibility of Activities:</b>  <b>Systemic Desirability</b> – measured by asking 'is transformation relevant to the systems and subsystems that comprise the problematic land tenure system as a whole?' (yes/no);  <b>Cultural Feasibility</b> – measured by asking 'is transformation meaningful within Nisga'a culture e.g., in terms of the worldview, values, roles, norms of Nisga'a culture?' (yes/no)</p>			

### ***5.3 The Lheidli T'enneh Nation – using the First Nation Land Management Act to replace the Indian Act for Land Tenure Reform***

#### **The First Nations Land Management Initiative**

During 1994-1995, in response to the issue of not having any control over the use and management of their lands and resources, a group of 13 First Nations chiefs collaboratively developed a land management framework that would allow them to

manage their own lands and resources. The chiefs then proposed this framework to INAC. The 13 First Nations and INAC signed the *Framework Agreement on First Nation Land Management* (FAFNLM) in February 1996. The 13 First Nations that initiated the FAFNLM were later extended to include St. Mary's First Nation of New Brunswick. The 14 signatory First Nations are: Westbank, Musqueam, **Lheidli-Tenneh**, N'Quatqua, Squamish, Siksika, Muskoday, Cowessess, Opaskwayak Cree, Nipissing, Mississaugas of Scugog Island, Chippewas of Georgina Island, Chippewas of Mnjikaning and Saint Mary's. The Framework Agreement was brought into effect by the enactment of the *First Nations Land Management Act* (FNLMA) on June 17, 1999.

The *Framework Agreement on First Nation Land Management* (FAFNLM) offers First Nations the opportunity to be recognized as governments with their own law-making powers and control over their own lands [Canada, 1998]. It enables First Nations to opt out of the land management provisions of the *Indian Act* and pass their own laws to develop, conserve, protect, manage and use their lands. The overall objective is to make it easier for First Nations to use their lands to support community economic development.

The Lheidli T'enneh Nation, which was one of the original 13 signatories, represents a First Nation that is implementing reforms initiated under the *First Nations Land Management Act* [1999]. Lheidli T'enneh is therefore studied to provide the Mi'kmaq with a model of a First Nation operating under the *First Nations Land Management Act* [1999] or First Nations Land Management initiative (FNLMI initiative).

Since 1998, another 20 First Nations have been added to the original 14 First Nations [Lands Advisory Board, 2004]. These First Nations include: from British Columbia –

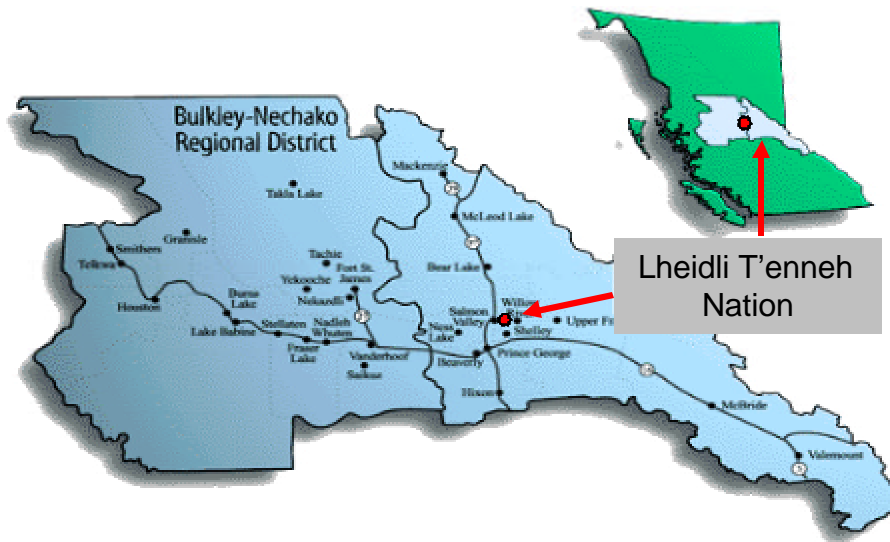
Beecher Bay, Tsawout, Tsawwassen, Songhees, Pavilion, Burrard, Sliammon, Osoyoos, Kitselas, and Skeetchesn; from Saskatchewan – Kinistin, and Whitecap Dakota Sioux; from Ontario – Tsekani (McLeod Lake), Garden River, Mississauga, Whitefish Lake, Dokis, Kettle and Stony Point, and Moose Deer Point; and from New Brunswick – Kingsclear [INAC, 2004]. Of these 34 FNLM signatories, 14 communities are now operating under their own land codes under the FNLM initiative, with the remaining 20 still developing their land codes [Lands Advisory Board, 2004].

Under the FNLM Framework Agreement, each First Nation is required to develop or draft its own land code and legislation, after first consulting with its members. Once drafted, the land code must then be ratified by the members of the First Nation through a referendum, before the federal government will pass the supporting federal legislation.

To date, about 50 First Nations have passed Band Council Resolutions (BCR) to adopt the FNLM initiative. An additional 50 to 60 First Nations have expressed interest in the FNLM initiative but have yet to obtain their Band Council Resolutions [Carisse, 2003].

The benefits of the FNLM initiative are that firstly, it gives participating First Nations the opportunity to develop their own modern and/or traditional tools to manage and protect their reserve lands and resources. Secondly, it enables First Nations to make timely business and administrative decisions and to accelerate progress in areas such as economic development, resource management, and land use planning. Thirdly, the FNLM model also enables First Nations to enact and enforce sound environmental management and protection laws [INAC, 2003].

### Lheidli T'enneh First Nation, British Columbia



**Figure 5.5 : Locality Map of the Lheidli T'enneh First Nation**

The Lheidli T'enneh First Nation (also known formerly as Lheit Liten or the Fort George Indian Band) is situated in the central eastern part of British Columbia, near Prince George – see Figure 5.5 above. There are about 300 band members, living on 4 reserves that cover an area of 685.6 ha.

As was common with First Nations across Canada, the land tenure system of the Lheidli T'enneh was historically managed and administered by DIAND (also known as INAC), under the *Indian Act*. They became one of the 14 First Nations to opt for their own system of land management and administration in 1996. They subsequently developed their *Lheidli T'enneh Land Code*, which was ratified by all members on 25<sup>th</sup> October 2000.

### 5.3.1 World Views, Goals and Aspirations

Like the Mi'kmaq, the traditions and cultural beliefs of the Lheidli T'enneh shape their wholistic, spiritual views of the inanimate and animate members of their world, and their place in it. Thus any tenure reforms implemented in their reserve in accordance with their Land Code is implemented in accordance with their culture, traditions and customs [Lheidli T'enneh, 2000]. The Lheidli T'enneh also hold the view that their aboriginal title and inherent right of self-government gives them the authority to govern their lands and resources, as stated in s.3 of their Land Code [Lheidli T'enneh, 2000].

As stated in the Preamble to their Land Code, their goal is “to establish a future that will ensure a high quality of life while flourishing with the environment; and their aspirations are “to move ahead as an organized, highly-motivated, determined and self-reliant nation” [Lheidli T'enneh, 2000]. The overall goal and aspirations of the Lheidli T'enneh is effectively one of social, ecological and economic sustainability for their members.

### 5.3.2 Land Tenure Concepts and Institutions

The Lheidli T'enneh view the natural resources on their reserve lands as being an intrinsic part of their land. In section 2.7 of their Land Code they thus define land to include all rights and resources in land as follows:

*(a) the water, beds underlying water, riparian rights, and renewable and non-renewable natural resources in and of that land, to the extent that these are under the jurisdiction of Canada or the First Nation; and*

*(b) all the interests and licenses granted to the First Nation by Her Majesty in right of Canada [as] listed in the Transfer Agreement.*

This means that each member has rights to the use and benefit of all resources (except for water) in and of their land. Elders continue to remain an important part of the decision-making institutions of the Lheidli T'enneh.

Those institutions established under the *Indian Act* (Chief, Band Council and Band members) and under traditional rules (elders) remain in force under the Land Code. The Land Code also allows for the establishment of a **Lands Authority**. The Lands Authority is responsible for assisting with the development of their land administration system; advising Council on all land matters, including laws and policies; organizing meetings of members to discuss land issues and making recommendations for resolving the issues to Council; and overseeing any community approvals required. The Lands Authority comprises five to seven elected members, of which one must be a Council Member. The Council makes laws concerning all aspects of its lands, after obtaining advice from the Land Authority and after obtaining the necessary community approvals from Band members 18 years and older, in accordance with their Land Code.

### 5.3.3 Land Tenure Reform Arrangements

Rights of residence attach to members and their families and any of their invitees, as well as to lessees and permittees. Rights of access attach to lessees and their invitees, permittees, as well as members and their families. All interests issued under the *Indian Act* (e.g. Certificates of Possession) remain in force under the *Land Code*. Lots are allocated to members by the Council, with certificates of interest being issued for each lot allocation. Members can freely transfer or assign an interest in land to another member.

While non-members of the reserve cannot hold a permanent interest in land or be allocated a lot, they can hold a lease, license or permit in the land. Leasehold interests

may be mortgaged for financing purposes for the term of the lease or not more than 25 years, with the written consent of the Council. In the event of a lessee defaulting on a mortgage, the Council can redeem the mortgage to prevent the bank from seizing the leased property. To be protected, each acquisition, use, transfer, assignment, distribution of interest in land is registered in the Lheidli T'enneh Land Register, with a duplicate copy being deposited in the Indian Lands Register (referred to as 'First Nations Land Register' in the Land Code). Expropriation of land parcels for community purposes<sup>34</sup> may be made, provided fair compensation is given for the expropriated interest and provided community approval by ratification vote has been obtained. A Dispute Resolution Panel is established under s. 40 of the Land Code, to resolve any land related dispute.

#### **5.3.4 Analysis of Social and Political Systems of the Lheidli T'enneh Nation**

One of the strengths of the Lheidli T'enneh reforms under the First Nations Land Management initiative is the fact that any tenure reform being implemented is done in accordance with their cultural beliefs and traditions. An interesting feature is the incorporation into their land code, of their working definition for land, which includes all resources and rights in land (except for water). Another strength of the Lheidli T'enneh FNLM reform lies in the continued importance of elders having an input into the self-government and land management and land administration process. It was noted that the

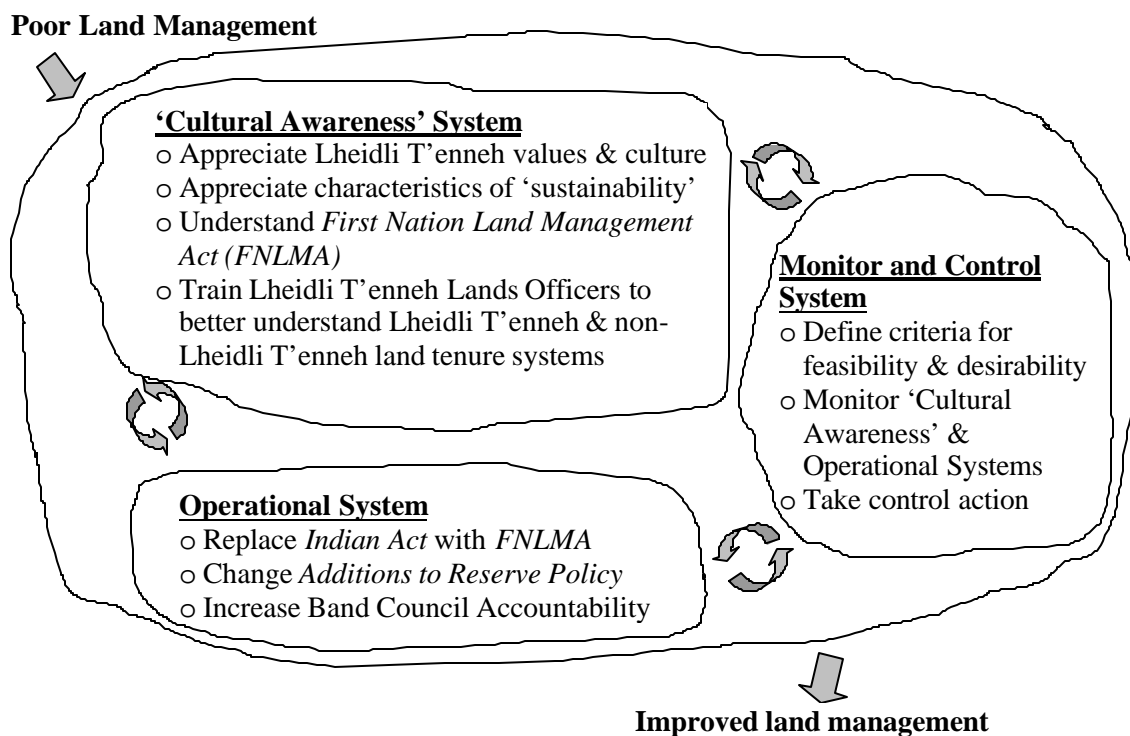
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<sup>34</sup> under s.15 of the Land Code, a community purpose includes but is not limited to a fire hall, sewage or water treatment facility, community center, public works, road, school, day-care facility, hospital, health-care facility and retirement homes.

elders played a key role in creating wider awareness of the benefits and processes involved in developing and ratifying the land code.

### 5.3.5 Analysis of Lheidli T'enneh Land Reform using Conceptual Mi'kmaw Reform Model

The Lheidli T'enneh land reform is evaluated by mapping the conceptual model of the system to improve Mi'kmaw land tenure management (Figure 4.9) onto the Lheidli T'enneh situation, as shown in Figure 5.6 below.



**Figure 5.6 : Mapping the Conceptual Model of a System to Improve Mi'kmaw Land Tenure Management onto the Lheidli T'enneh Situation**

As in Section 5.2.5, the method of formal questioning is then used to evaluate the Lheidli T'enneh land tenure reform using the conceptual Mi'kmaw model. The method involves using the following questions to query the Lheidli T'enneh situation:

- does the conceptual activity exist in some form?
- how is it done and by whom?



- is it a source of concern or is it regarded as well done?

The results of using the formal questioning method for this comparative study of the Lheidli T'enneh land tenure system are tabulated in Table 5.3 below.

**Table 5.3 : Analysing Lheidli T'enneh Land Reform Initiatives Using Conceptual Mi'kmaw Reform Model**

Activity in Conceptual Model	Does Conceptual Activity exist in reality?	How is Activity done and by whom in the Lheidli T'enneh land tenure system?	Is Activity well done <sup>(1)</sup> or a source of concern for the Mi'kmaq?
i) Amend <i>Indian Act</i>	Not applicable	Not applicable	Not applicable
ii) Replace <i>Indian Act</i> with Lheidli T'enneh Land Code	Yes	Done through research, negotiation – by Lheidli T'enneh land officers or researchers	E <sub>1</sub> : yes; E <sub>2</sub> : yes; E <sub>3</sub> : yes ~ time can be a source of concern, particularly for larger populations
iii) Change <i>ATR</i> policy	Yes – ongoing	Done through research & workshops by joint INAC/AFN initiative	E <sub>1</sub> : yes; E <sub>2</sub> : no; E <sub>3</sub> : yes ~ time can be a source of concern
iv) Increase access to land and resources	Yes – ongoing	Done through development of Lheidli T'enneh Land Code; and through resolution of aboriginal title or land claim settlements	E <sub>1</sub> : yes; E <sub>2</sub> : yes E <sub>3</sub> : yes ~ Activity is well done to date
v) Recognize treaty rights, Aboriginal rights & aboriginal title	Yes	Treaty rights done through Specific claims resolutions – by First Nations & INAC; Aboriginal rights/title issues done either by Consensus through negotiation, or through litigation	E <sub>1</sub> : yes; E <sub>2</sub> : yes/no; E <sub>3</sub> : yes ~ time to reach resolution can be a source of concern for recognizing Aboriginal title and Aboriginal rights; recognition of Treaty Rights sometimes efficient
vi) Train Lheidli T'enneh land officers	Yes	Done through INAC, Land Advisory Board, Legal Surveys Division for Land Managers	E <sub>1</sub> : yes; E <sub>2</sub> : ?; E <sub>3</sub> : yes ~ staff retention a concern
vii) Improve land management	Yes	Done through FNLMA initiative by Lands Officers & Band Council	E <sub>1</sub> : yes; E <sub>2</sub> : ?; E <sub>3</sub> : yes? ~ staff retention may be a concern
<sup>(1)</sup> Notes – Criteria for evaluating Activities: E <sub>1</sub> : Efficacy – measured by asking 'does activity work?' (yes/no/partially); E <sub>2</sub> : Efficiency – measured by asking 'were minimal resources used to produce required output?' (yes/no) E <sub>3</sub> : Effectiveness – measured by asking 'does activity permit goal to be reached?' (yes/no/partially)			

As in the case of the Nisga'a and the Mi'kmaq, the results above are derived from information collated from the literature, and from informal meetings, interviews and discussions with those involved with First Nations land tenure and land management in

Canada. Table 5.3 showed that with the exception of Activity (1), all conceptual activities were efficacious in that they worked in the Lheidli T'enneh situation. Similarly all the activities were deemed to be effective because they allowed the goals held by the Lheidli T'enneh to be achieved. However the efficiency of each activity was questionable. The areas of concern were in the unduly long time taken to complete an activity, and the associated costs of funding each activity. The above activities are further evaluated in the next section to see if they were feasible and desirable in terms of the culture and land tenure systems respectively of the Lheidli T'enneh Nation.

### **5.3.6 Evaluating the Feasibility and Desirability of the Lheidli T'enneh Land Reform**

Table 5.4 on the next page depicts the evaluation of the desirability and feasibility of the activities in the conceptual Mi'kmaw model in the context of the Lheidli T'enneh's FNLMA land reform model. As Table 5.4 shows, six of the seven activities identified in the conceptual Mi'kmaw model in Figure 4.7 (in Chapter 4) reflect the changes that were culturally feasible and systemically desirable for the Lheidli T'enneh Nation.

As previously noted, a land reform that is systemically desirable is one that is relevant to the operations or needs of the existing land tenure system or situation as a whole. With the exception of Activity 1 – amending the Indian Act – all activities were seen to be relevant to the various systems and subsystems that form the Lheidli T'enneh land tenure system. The Lheidli T'enneh FNLM initiative is therefore seen as being systemically desirable, when evaluated using the criteria set by the conceptual Mi'kmaw reform model.

**Table 5.4 : Assessing Desirability/Feasibility of Lheidli T'enneh Model for Mi'kmaq**

How?	Systemically Desirable for Lheidli T'enneh?	Culturally Feasible for Lheidli T'enneh?	Possible Action for Mi'kmaq
i) amend <i>Indian Act</i>	Not applicable	Not applicable	Further case studies required; Consult with CMM, Bands and INAC in order to decide on amendments to be made, if any
ii) replace <i>Indian Act</i>	Yes	Yes	Consult with CMM and Bands to review Lheidli T'enneh results, and assess for 'desirability' & 'feasibility'
iii) change <i>ATR</i> policy	Yes	Yes	Further research required; Consult with AFN/INAC to ascertain current status of AFN/INAC joint initiative on ATR policy and take action accordingly
iv) increase access to land and resources	Yes	Yes	Need clarification of resources used by Lheidli T'enneh and goals of Mi'kmaq
v) recognize treaty rights, Aboriginal rights & aboriginal title	Yes	Yes	Need clarification of status of recognition of treaty and aboriginal rights; and of aboriginal title in NS – also need to review terms of reference for Tripartite Forum for aboriginal title in Nova Scotia
vi) train Lheidli T'enneh officers	Yes	Yes	Consult with CMM, Band Councils; get approvals and make arrangements for identified training
vii) improve land management by Lheidli T'enneh communities	Yes	Yes	Needs clarification on how concerns over accountability, incorporation of Lheidli T'enneh views, values, norms have been accommodated
<p>Ⓞ <b>Notes – Criteria for evaluating Desirability &amp; Feasibility of Activities:</b></p> <p><b>Systemic Desirability</b> – measured by asking 'is transformation relevant to the systems and subsystems that comprise the Lheidli T'enneh land tenure system as a whole?' (yes/no);</p> <p><b>Cultural Feasibility</b> – measured by asking 'is transformation meaningful for the Lheidli T'enneh culture e.g., in terms of the worldview, values, roles, norms of the culture?' (yes/no)</p>			

A land reform that is culturally feasible is one that is meaningful in terms of the worldview of the people as judged by the cultural norms, roles and values of the people involved with and affected by the reform. It was culturally feasible to reform the Lheidli T'enneh land tenure system based on the 6 issues tabulated in Table 5.4, in order to

improve the ecological, economical and social sustainability of the Mi'kmaw. However Column 4, Row 7 of Table 5.4 also showed that there is a need to clarify how accountability and the incorporation of local world views, values and norms can be accommodated into the daily work of the Lheidli T'enneh lands officers.

#### ***5.4 Concluding Remarks***

This chapter has used the framework developed in Chapter 3 to describe, model, compare and analyze pertinent aspects of the land tenure systems of the Mi'kmaq, Nisga'a and Lheidli T'enneh – selected Aboriginal communities in Canada's maritime provinces of Nova Scotia and British Columbia. In doing so, the chapter has contributed towards achieving the third objective of this dissertation, which was to use the comparators and conceptual analytical framework developed in Chapter 3 to analyse, model, compare and evaluate the land tenure systems of Aboriginal peoples in Canada's provinces of Nova Scotia and British Columbia.

It was found that in incorporating the cultural aspects of a land tenure situation, the conceptual framework allows the land tenure systems to be described, modelled, analysed and compared from an ethnocentrically equitable or neutral perspective. It was also found that the conceptual models developed for the Mi'kmaq could be transplanted and adapted for use for the Nisga'a and Lheidli T'enneh communities. This is probably due to the similar resource-based issues that the communities share (e.g., with respect to fisheries, forestry). It was therefore concluded that the framework was useful for developing land tenure models that are culturally feasible and systemically desirable for the communities. It was also concluded that the framework was useful for developing land tenure models that incorporate activities that are efficacious and effective. Political

and economic considerations however tended to make it difficult to develop models based on efficiently run activities.

## **Chapter 6: Summary and Conclusions**

Chapter 6 summarises the research conducted for this dissertation, which investigates the modelling and analysis of Aboriginal land tenure systems. It begins with a summary of the research and its findings, which are drawn from Chapters 2 to 5. The summary is followed by an evaluation of the research, which includes an evaluation of the strengths, limitations and resultant recommendations of this study for further research. Chapter 6 then continues with a discussion of possible research contributions and concludes this dissertation with some closing remarks on the neutral analytical framework developed in this research.

### ***6.1 Summary of Research and Research Findings***

#### **6.1.1 Overview of Research**

The goal of this dissertation was to identify or design land tenure models appropriate to the needs of the Aboriginal community studied. To this end the research developed comparative design criteria and a neutral analytical framework for analysing, modelling and comparing Aboriginal land tenure systems. To minimise the biases traditionally associated with a eurocentric view of tenure, a move towards a neutral view was fostered by promoting the Aboriginal community's perspective. The comparative design criteria and neutral analytical framework were then used to identify and design land tenure models for the Mi'kmaq of mainland Nova Scotia. The major conclusion of this research is that the research goal can be achieved by developing a framework that incorporates the cultural worldviews, values, goals and aspirations of the community; and rigorously analyses, models and compares the land tenure systems of the Aboriginal group.

The following three objectives were used to achieve the above goal:

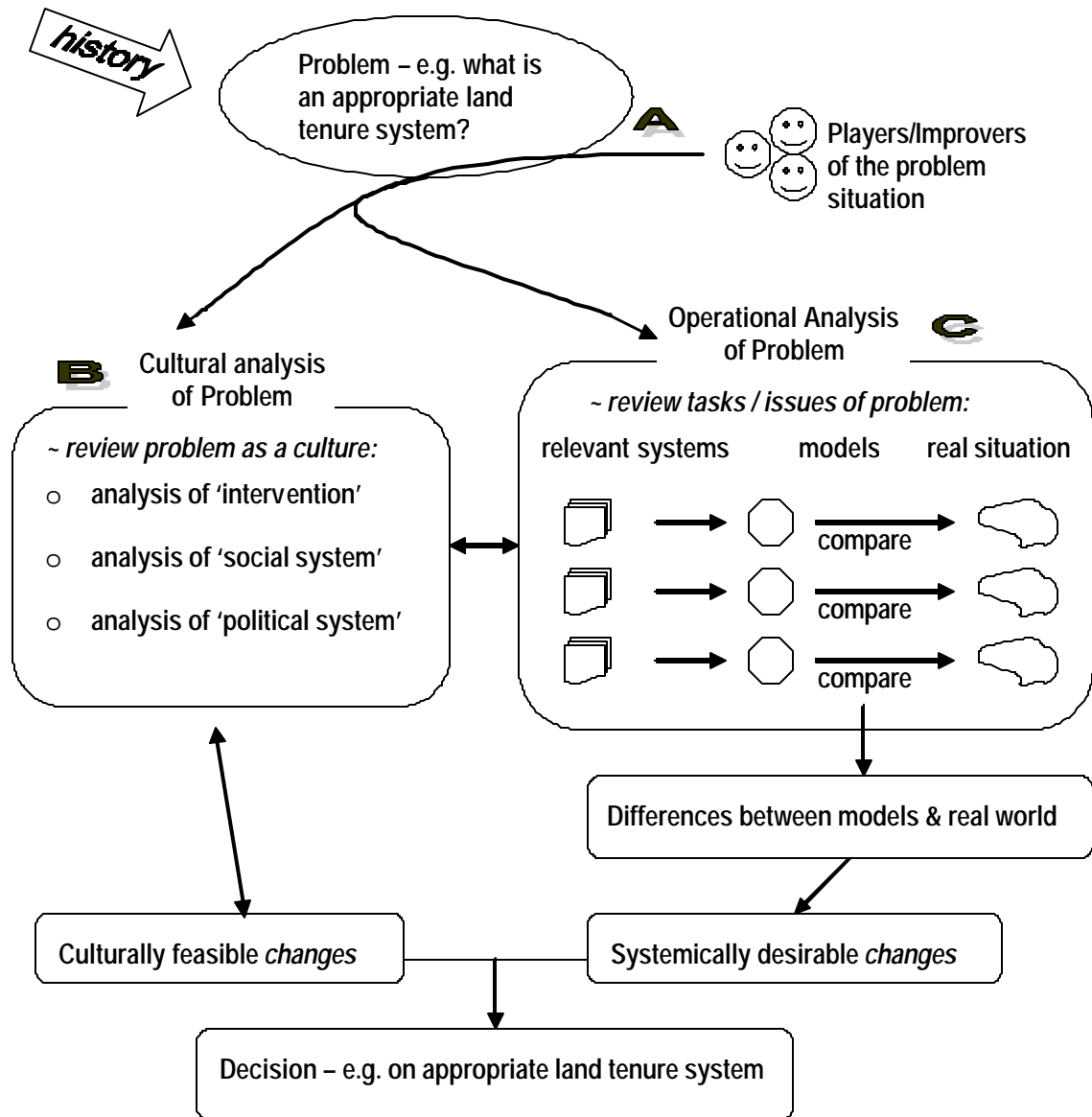
1. to develop design criteria (comparators) for describing and comparing Aboriginal land tenure systems from a neutral or ethnocentrically equitable perspective
2. to design and develop a conceptual analytical framework for analysing, modelling, comparing and evaluating Aboriginal land tenure systems from a neutral or ethnocentrically equitable perspective
3. to use the comparators and conceptual analytical framework to analyze, model, compare and evaluate the land tenure systems of Aboriginal peoples in Canada

To achieve Objective 1, the following attributes were developed as ethnocentrically neutral comparators for cross-cultural comparative analysis:

- **worldviews, values, goals of community** – to appreciate the overall goals of a community;
- **concepts of land** – to understand the community's perceptions of land and tenure;
- **institutions affecting land tenure** – to appreciate the players, the external and internal forces that impact on them, and the resulting issues involved;
- **land tenure arrangements** – to identify the land tenure patterns of the community concerned

To achieve Objective 2, a conceptual neutral framework for describing, analyzing, modelling, comparing and evaluating land tenure systems of different Aboriginal groups from a neutral or ethnocentrically equitable perspective was designed and developed in Chapter 3. The neutral framework consists of three main phases (see Figure 3.7, which has been reinserted into the following page). The first phase (Phase 'A' in Figure 3.7) deals with the preliminary work that is normally required for any study. This includes learning and reflecting upon the different historical accounts of land tenure issues in order to obtain a more wide-reaching, balanced historical perspective and to learn from

past mistakes. It also involves reviewing the people or ‘players’ that will be involved with improving the problematic land tenure systems, and other ethical and logistical considerations relating to launching and conducting the study.



**Figure 3.7 : Conceptual Framework for Comparative Land Tenure Studies**  
[adapted from Checkland & Scholes, 1990]

The second phase of the framework (Phase ‘B’ in Figure 3.7) deals with obtaining an appreciation of the problematic land tenure situation, by analysing the cultural aspects of



the land tenure system. This entails using the neutral comparators to describe and analyse Aboriginal land tenure systems from the cultural perspective of the subject Aboriginal group. This allows three aspects of the land tenure system to be analysed:

- firstly, the roles of key players in the ‘intervention’ of the problematic land tenure system;
- secondly, the structure and processes of the ‘social system’ under which the land tenure functions; and
- thirdly, the ‘political system’ that influences the power-based aspects of relationships with land and people.

The third phase of the framework (Phase ‘C’ in Figure 3.7) deals with logically analysing the operational aspects of the problematic land tenure situation. This entails:

- developing conceptual logical models of relevant land tenure activities that illuminate the problematic tasks and issues identified in the second phase;
- analysing the relevant tenure activities by comparing their conceptual models with the problematic land tenure situation as it exists in real life. The comparisons involved evaluating the efficacy, efficiency and effectiveness of the respective activities, to help identify weaknesses in the activities that needed to be improved upon or rectified.
- evaluating the activities to identify changes to be made to the existing land tenure systems that are systemically desirable and culturally feasible for the subject community.
- deciding on the land tenure model that is most appropriate for their needs and aspirations.

To achieve Objective 3, the comparators and neutral framework were used in Chapters 4 and 5 to analyse, model, compare and evaluate the land tenure systems of the Mi’kmaq of mainland Nova Scotia, with the Nisga’a and the Lheidli T’enneh Nations of British Columbia. The Nisga’a was of interest for the Mi’kmaq because its reform was based on

achieving recognition of aboriginal title – a long-standing concern of the Mi'kmaq – and subsequent self-governance, which completely replaced the *Indian Act* with their new *Nisga'a Lisim* law. The Lheidli T'enneh was of interest for the Mi'kmaq because its reform was based on managing and controlling its own land and resources as a result of replacing the *Indian Act* with their own Land Code, under the *First Nations Land Management Act* (1999) – an initiative which has raised some interest within some Mi'kmaw Bands. These models were thus used as comparative case studies to assist with the identification and evaluation of desirable land tenure reform models for the Mi'kmaq.

### 6.1.2 Research Findings

The study provided the Confederacy of Mainland Mi'kmaq with a detailed study of historical and contemporary Mi'kmaw land tenure systems, and with a multi-disciplinary strategy for resolving land tenure problems. This multi-disciplinary strategy culminated in the **conceptual neutral framework** that was developed in Chapter 3, which integrated the ideas advanced by scholars in anthropology, cadastral surveying/geomatics engineering, and soft systems engineering, to deal with the problems associated with the eurocentricity, dualism, pluralism and continuum of tenures. To minimize the problems of tenure eurocentricity, the cultural attributes of concepts, worldviews, values, goals, institutions, and arrangements were used as ethnocentrically equitable or **neutral comparators** for cross-cultural comparative analysis of tenure systems.

The four problems of tenure eurocentricity, tenure dualism, tenure pluralism and tenure continuum were all further addressed by using a **systems approach** in the framework. For instance, by first analyzing the cultural aspects of a community's land tenure system, it was possible to address in Chapter 4, the eurocentric and dualistic tenure issues

affecting the Mi'kmaq. By using Checkland's [1981] **soft systems methodology** to model and analyse the functional or operational aspects of the land tenure system, it was possible to study at different levels, the dualistic public and private characteristics of land tenure and the existence of plural interests in a continuum.

The study also provided the Confederacy of Mainland Mi'kmaq with models containing options for reforming their land tenure system. The **land tenure reform models** developed for the Mi'kmaq were found to be of two main types – an issues-based reform model, that of increasing access to land and resources; and a task management-based reform model, that of improving the management and administration of Mi'kmaw land tenure systems. The two main models involved incorporating most of the following optional activities or systems/subsystems of Mi'kmaw land tenure:

1. amending the *Indian Act*;
2. replacing the *Indian Act*;
3. changing the *Additions to Reserve* (ATR) policy;
4. increasing access to land and resources;
5. recognizing aboriginal title and affirming the existence of aboriginal rights and treaty rights;
6. training the Mi'kmaq in Mi'kmaw and non-Mi'kmaw/Canadian worldviews, values and concepts of land tenure;
7. improving the land management and land administration systems in Mi'kmaw communities;
8. increasing Band Council accountability; and
9. defining Mi'kmaw cultural values, norms, goals and aspirations

Chapters 4 and 5 were used to test the models, using the following three criteria to compare each conceptually modelled activity with its existence in reality:

- efficacy (“does it work?”),
- efficiency (“does it produce optimum output with a minimum use of resources?”),

- effectiveness (“does it meet the long term goals?”)

The criteria were found to be generally useful indicators of the relevance of the conceptually modelled activity or activity systems for the communities studied. It can thus be concluded that the framework was successful in identifying or developing land tenure models that incorporate activities that are efficacious and effective. The framework also highlighted the constraints caused by political and economic considerations, in developing efficient models for the Mi’kmaq. This suggests that refinements to the framework, such as incorporating dispute resolution mechanisms into the framework is needed, to facilitate the development of efficient land tenure reform activities or activity systems.

The neutral framework was also used to evaluate the systemic desirability and cultural feasibility of the activities in the two main land tenure reform models that were developed for the Mi’kmaq. The activities were deemed to be **culturally feasible** if they were meaningful for the Mi’kmaq in terms of meeting the needs of their cultural-based worldviews, values, norms, and standards. This was evaluated through a yes/no response that reflected the degree to which their goals and aspirations were met by the activities. It was found that replacing the *Indian Act* should be suspended for the time being, as it was viewed with some misgivings by some members of the Mi’kmaq society [Nichols and Rakai, 1999]. The remaining activities were however found to be culturally feasible for the Mi’kmaq.

The activities (or activity systems) were deemed to be **systemically desirable** if they were relevant to the successful operation of the Mi’kmaq land tenure system as a whole. This was evaluated through a yes/no response that reflected the extent to which the

system or sub-system hindered the overall running of the system as a whole. It was found that no activity hindered or impacted negatively on the overall operations of the system as a whole, and thus all activities were deemed to be systemically desirable for the Mi'kmaq.

The framework was also found to be useful for evaluating the land tenure systems of the Nisga'a and Lheidli T'enneh Nations, and consequently identifying the appropriateness of those land tenure systems for the Mi'kmaq. Given the concerns with inefficient activities in both the Nisga'a and Lheidli T'enneh systems, it was concluded that while both systems were not systemically desirable in terms of their efficiency, they were predominantly systemically desirable, in terms of their efficacy and effectiveness.

It was also concluded that for the Mi'kmaq, the Nisga'a reform was not culturally feasible, given the reluctance of the Mi'kmaq to completely replace and move away from the *Indian Act*. Alternatively, the Lheidli T'enneh model offered a system that was culturally feasible and predominantly systemically desirable for the Mi'kmaq. Given the increased number of First Nations now operating under the First Nations Land Management (FNLN) initiative, further research needs to be addressed towards initiating reforms under the *First Nations Land Management Act* more efficiently.

## ***6.2 Evaluation of Research***

### **6.2.1 Research Strengths**

A strength of the neutral framework is that it is not intended to be prescriptive and therefore does not provide prescriptive ready-made “answers” (e.g., what land tenure models are best for a First Nation) to a community. Rather, the framework provides guidelines or a set of principles to help First Nations to obtain answers for themselves. In

this way the framework provides an organic way of analyzing and administering land tenure, in that it allows a First Nation to change its administrative processes as the worldviews, roles, values, objectives and norms of its members change. It is clear then that a major benefit of the framework is that it is **problem-oriented**, and thus its strength lies in its ability to lend itself to diverse problem situations – this helps to make it intuitive, flexible and organic and thus promotes innovative methods for addressing problematic land tenure situations.

A second strength of the framework which was not specifically highlighted in Chapters 4 and 5, but which is an inherent characteristic of the framework, is its reliance on the **participation** of members of the community for its success. In the context of Aboriginal communities, this is an important consideration since many of their decisions tend to be made by consensus. In summary then, the strengths of this framework are that by incorporating a soft systems methodology approach, it espouses the important considerations of history, culture, logical operations and a participatory approach for cross-cultural land tenure studies. Secondly, it is problem-oriented, flexible and organic and thus promotes innovative ways of addressing land tenure problems.

## **6.2.2 Research Limitations and Recommendations for Further Research**

A limitation of the neutral framework developed in this research lies in the difficulty of **ascertaining what is truly representative** of a community's worldviews and values, given the reality of varying worldviews, values, goals and aspirations across its members. Communities or societies are not always internally coherent or consistent, and are often divided in their differing notions of worldviews, concepts, values and aspirations. What the framework strives to do is to help the community to arrive at a definition through

**consensus**, of what is representative of its worldviews, concepts, values, goals and aspirations, at a particular time and place. In addition, as previously noted, further refinement of the framework to include **dispute resolution mechanisms** may also help to alleviate the problem and so minimise the limitation in the framework.

Another limitation of this research lies in the difficulty of **repeating its findings**, due to the nature of the research on complex relationships involving humans. Since this research deals with the dynamic relationships of humans in land tenure situations, the research is aligned with the social sciences domain rather than with the conventional natural sciences domain. The benefit of conventional scientific enquiries which tend to involve non-human subjects and phenomena, is that research findings are repeatable and can therefore be readily repeated and rigorously evaluated by researchers around the world. A research such as this that involves an examination of human relationships and their continuously varying perceptions of the world means that any research findings will not be readily repeatable, as required by conventional scientific enquiries. One way of overcoming this limitation is to place emphasis on the **retraceability of the research process** itself, rather than on the repeatability of the research findings. It is therefore recommended that further research be done on the issues of retracing the research process itself. This will require the researcher to clarify the epistemology of the research upfront, particularly with respect to its methods and validation, and so allow other researchers to retrace the research and assess the findings of the research independently.

The research was also limited by the **scarcity of data** acquired on the functional or operational aspects of land tenure – e.g., empirical data on land use, land acquisitions, land transfer and land distributions is not documented in the research. This resulted in

the research being predominantly based on secondary evidence derived from the available literature, rather than on empirical or primary oral evidence derived from a wide sector of the communities studied. This was due partly to the inherent constraint placed by the Confederacy of Mainland Mi'kmaq (CMM) on the research, that no interviews be conducted by the researcher, due to language interpretation problems and due to the recent completion of traditional land use interviews in the region by CMM researchers. It is therefore recommended that future research be conducted on incorporating empirical data on the existing operational aspects of land tenure (e.g. actual land use arrangements existing at the time of research) into the framework. This will provide a more complete portrayal and understanding of the Mi'kmaw land tenure arrangements.

This research has developed a conceptual neutral framework. As such conceptual models were developed to analyse the problems. However, available modern technologies such as advanced positioning, mapping, communication and computing technologies, and particularly advancements in spatio-temporal databases, GIS, GPS and artificial intelligence methods, offer the means to **simulate the conceptual models**, both interactively and in real time. Further research to simulate the conceptual models is therefore recommended.

The **rigour** introduced by the use of **formal questions** to compare and evaluate each conceptually modelled activity system with its existing land tenure situation, allows for some degree of controlled comparisons to take place. However, the method was not addressed in great depth in this dissertation and thus is currently rather loose, in that the criteria and overall evaluation methods used need to be further investigated and made more rigorous. It is therefore recommended that further research be conducted on



improving the rigour of the method of formal questions, and to investigate other methods, including computer simulation methods as discussed in the preceding paragraph, for rigorously comparing and evaluating the conceptual models with their existing problematic land tenure situation.

There is a demand by First Nations and other Aboriginal peoples around the world, for information on the **lessons that can be learnt** from the local knowledge and experiences of other Aboriginal communities with respect to land tenure, land management and land administration. Advancements in modern communications and computing technologies (such as the internet, wireless communications and web-GIS) make this readily possible. Since it involves the sharing and dissemination of local knowledge (also known as traditional knowledge), participatory techniques and intellectual property rights issues will also need to be addressed. It is therefore recommended that further research be conducted on intellectual property rights issues and on the use of local/traditional knowledge, GIS, the internet, wireless communications, artificial intelligence methods and participatory techniques, to document, analyse, model, compare and share the ‘lessons’ that may be learnt from other communities.

Land Administration has been defined in Chapter 2 as follows:

*Land Administration is a mechanism for implementing policies concerning the management of land tenure in a community. This includes operational arrangements for acquiring, using, transferring and distributing interests in land. Such operational attributes are defined, monitored and enforced by the cultural attributes of the community, which include their worldviews, values, concepts of land, goals, and institutions.*

The above definition highlights the importance of considering both **operational** (functional) aspects and **cultural** aspects of land tenure, when attempting to implement

land tenure policies in an Aboriginal community. To date, with the exception of literature in the cadastral studies stream of geomatics engineering (e.g., McLaughlin, 1971; Barnes, 1985; Dale, 1990; Nichols, 1993; Ezigbalike et al., 1995; Rakai & Williamson, 1995; Barry, 1999; Sevatdal, 1999; Williamson & Ting, 2001; Zevenbergen, 2002), much of the geomatics engineering literature has addressed the operational aspects of land tenure and land administration, focussing mainly on using technology to improve deficiencies in documenting and managing such operational arrangements. The **neglect of the cultural aspects** of land tenure and land administration, has meant that despite wonderful improvements in measurements, communications and computer technologies for documenting and managing information on operational aspects of land tenure, **land administration systems continue to be largely unsuccessful at meeting the diverse needs of Aboriginal communities**. This research has consequently concentrated on developing a conceptual analytical framework that emphasized the cultural attributes of land tenure and land administration. However since much of the cadastral studies literature dealing with cultural aspects of land tenure and land administration have been directed towards the institutional issues, with little on the world views, values, concepts of the communities involved, it is recommended that further research be done on the issues of documenting and even of codifying the cultural aspects of land tenure and land administration.

### **6.3 Research Contributions**

Denman and Prodano [1972] noted over thirty years ago that there is a need to first understand and resolve land tenure problems before developing any systematic land use or resource use policies. While the need has been recognized by anthropologists and

other social scientists, other disciplines, including cadastral surveying or geomatics engineering, have failed to recognize and respond to this need for various reasons. In the case of the cadastral surveying/geomatics engineering discipline, this has been due largely to its emphasis on technology (e.g. on global positioning systems, geographic information systems, remote sensing and digital mapping systems) and their impact on the operational aspects of land administration. While some emphasis has been placed in the land administration arena, on addressing the institutional aspects of land tenure (e.g., McLaughlin, 1975; Dale, 1990; Ezigbalike & Benwell, 1994; Nichols, 1993; Rakai and Williamson, 1995; Delville, 1999; Sevataldal, 1999; Barry, 1999; Williamson and Ting, 2001; Zevenbergen, 2002), little attention has been devoted to understanding the impact of underlying worldviews, values, goals and aspirations of the subject community on land tenure; and on its implications for land administration and land management. More thought has therefore been placed on reforming land tenure by improving land administration operations through the use of institutional reforms and new technologies, rather than trying to first understand land tenure as a step towards improving land administration. The need professed by Denman and Prodano [1972] over thirty years ago thus still persists today, despite the abundant literature on the topic by anthropologists and other related disciplines in the social sciences. This thesis has attempted to address the need by using a multi-disciplinary approach to develop a neutral land tenure framework that can assist stakeholders (policy makers, land administrators and Aboriginal communities) to better understand the underlying worldviews, perceptions, values and aspirations of each other concerning their land tenure systems. In this way, the neutral land tenure framework fosters an improved understanding of cross-cultural or

Aboriginal land tenure systems and their problems, which should help facilitate the determination and development of more effective and appropriate land tenure policies and land administration systems.

The novelty of this research is that it integrates ideas from anthropology, geomatics engineering and soft systems engineering, to develop an ethnocentrically equitable or neutral framework that treats all components as an essential part of the total system, and which also relies for its success, on the participation of key players to be involved in any reform. The latter characteristics permit the four underlying land tenure problems discussed in this research to be addressed. These problems were those of a bias of current land administrations towards eurocentric concepts of land and land tenure systems (tenure eurocentricity); of the dual nature of land as a public and private good at any one time (tenure duality); of the existence of various tenure systems at different hierarchical levels (tenure pluralism) and along different stages of complexity along a continuum (tenure continuum).

It was found that by incorporating the cultural aspects of a land tenure situation, the conceptual neutral framework allows the land tenure systems to be described, modelled, analysed and compared from an ethnocentrically equitable or neutral perspective. Interestingly it was also found (in Chapter 5), that the conceptual models developed for the Mi'kmaq could be transplanted and adapted for use by the Nisga'a and Lheidli T'enneh communities. This is probably due to the similar resource-based issues that the communities share (e.g., with respect to fisheries, forestry). It was therefore concluded that the framework is useful for developing land tenure models that are culturally feasible and systemically desirable for similar Aboriginal communities.

However use of the framework is not limited to Aboriginal peoples only, or to Canada only. The framework was applied in this research to Aboriginal peoples as a result of the author's interest in Aboriginal land tenures, and as a result of research that was conducted by the author for the Mi'kmaq of mainland Nova Scotia between 1998 and 2003. It should also be noted that the research initially included the Aboriginal peoples of Australia and New Zealand, as well as other Aboriginal peoples in Canada. However constraints of time and the logistics of acquiring in-depth information and participation from afar, led to this dissertation being focussed on the three selected communities reported on in this thesis. Thus while the inherent flexibility of the framework makes it very suitable for Aboriginal communities with their own unique cultures and traditions, the framework can also be used by any jurisdiction or organization wishing to reform its land tenure system. The framework is therefore potentially useful for evaluating the land tenure reform needs and issues in any jurisdiction, irrespective of whether it includes Aboriginal peoples or not; and for subsequently designing and implementing reforms to meet those needs.

The framework is also potentially useful for evaluating, designing and implementing reforms to meet the land management and land administration needs and issues in any jurisdiction. Since land administration reform was not addressed in this research, further research on using the framework to help analyse, design, implement and evaluate land administration reforms is needed.

Land tenure is a multidisciplinary area. This research has demonstrated the multidisciplinary nature of land tenure by drawing from the disciplines of anthropology, soft systems engineering and cadastral surveying/geomatics engineering to develop the

underlying concepts and analytical framework for this dissertation,. More importantly, it is hoped that this research has demonstrated the contribution that the surveying/geomatics engineering discipline, which utilises invaluable skills from both engineering and the social sciences in its' daily interactions with people and technology, can provide towards furthering knowledge and skills in these important areas of land tenure, land management and land administration.

#### ***6.4 Concluding Remarks***

The neutral analytical framework, with its emphasis on both cultural and operational aspects of land tenure, and its reliance on consensual decision-making through public participation, is an innovative alternative to the contemporary frameworks that exist to analyse cross-cultural land tenure systems. The framework has the advantage of promoting culturally feasible and systemically desirable land tenure models for the wide-ranging and dynamic needs of the diverse Aboriginal communities in Canada and worldwide. However further research into more rigorous examination and testing of the neutral framework is recommended. In attempting to develop a rigorous process for using and testing the neutral analytical framework, this dissertation has provided an initial contribution to the process. The next step may be the implementation of a reformed land tenure system for the Mi'kmaq of mainland Nova Scotia. Should this occur, further research on applying the analytical land tenure framework towards this purpose will be needed.

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