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The Relationship between Environmental Rights and Aboriginal Rights: A Balanced and Synergistic Approach

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Introduction

Though environmental rights were first recognized in international law in 1972, the same concepts of environmental rights and responsibilities have been fundamental components of indigenous law since time immemorial. Canada is one of only 16 countries that have yet to recognize the right to a healthy environment in its laws. In his most recent book, David Boyd argues that recognition of environmental rights will 'mark an important step toward reconciliation with Aboriginal people'.[1]This short paper will explore this argument by considering the relationship between environmental rights and Aboriginal law. It looks at the importance of environmental rights and responsibilities in indigenous legal traditions, the current status of environmental rights in Canadian aboriginal law, and the possible overlap between recognizing environmental rights and fulfilling obligations under Aboriginal law.

[1]David R Boyd. *The Right to a Healthy Environment: Revitalizing Canada's Constitution*. UBC Press: Vancouver, 2012. [Boyd]

It is important to note the distinction between Aboriginal law and indigenous law at the outset of this paper. Aboriginal law refers to the recognition of a unique system of laws relating to Indigenous people *within* the Canadian legal system. Indigenous law, on the other hand, refers to the distinct legal traditions of each Aboriginal community that preceded the formation of Canada. Indigenous law is not well known in Canadian society because it has largely been ignored or diminished as a legitimate source of law in the Canadian legal system.[2]The first section of this paper will explore environmental rights in indigenous laws across Canada. The second section will look at whether environmental rights have already been incorporated in Aboriginal law.

Environmental Rights in Indigenous Law

Indigenous people across Canada have special environmental interests rooted in a spiritual connection to the natural world. In the creation story of many Aboriginal communities, the Creator placed humans on the earth to be stewards of the natural world. The Earth itself is seen as a sentient being which humans were meant to respect, care for and protect. This creates corresponding rights and obligations for both humans and nature that have developed into indigenous legal traditions. Each Aboriginal community has a distinct set of legal traditions that govern how their societies function. Common to most of these legal systems is the idea of a living Earth, with a set of rights and responsibilities governing the relationships between humans and the natural worlds.

[2] John Borrows, *Canada's Indigenous Constitution*(Toronto: University of Toronto Press Incorporated, 2010). [Borrows]

For example, the Mi'kmaq people who live in the Atlantic provinces were taught that the spark of life (*mntu*) exists in all living things.Mi'kmaq legal traditions are based on the concept that all life forms should be respected because they possess the same sparks of life.[3]In Mi'kmaq law, animals, plants, insects and rocks all have a legal personality. Mi'kmaq legal traditions are shaped by 'ecological considerations mediated through their experiences, knowledge, spiritual understanding or interpretation and relationship to a local ecological order.'[4] In this local ecological order, humans have a responsibility to live harmoniously with the rest of the natural world and to prevent it from being harmed. By protecting the natural world on behalf of other species, the Mi'kmaq people also maintained a clean environment that maintained their own health. Therefore, implicit in their legal traditions is the right to live in a healthy environment with unpolluted air, water, and land.

The above example demonstrates how environmental rights were a fundamental component of Indigenous legal traditions, even if they were not written down. More recently, environmental rights have also been explicitly recognized in modern indigenous legal systems. For example,the Labrador Inuit's Charterstates:

2.4.20 Every Labrador Inuk has the right to an environment that is not harmful to his or her health or well-being and to have the environment protected for

[3] Royal Commission on Aboriginal Peoples, *The Final Report of the Royal Commission on Aboriginal Peoples,* vol 1, *Looking Forward, Looking Back* (Ottawa: Supply and Services, 1996), 47-49.
[4] Kiera L. Ladner, 'Governing within an Ecological Context: Creating an AlterNative Understanding of Blackfoot Governance' (2003) 70 *Studies in Political Economy* 125 at 150.

the benefit of present and future generations through reasonable Inuit laws and other measures that:

(a) prevent pollution and ecological degradation;
(b) promote conservation; and
(c) secure ecologically sustainable development and use of renewable and non-renewable resources while promoting justifiable economic and social development of Labrador Inuit,

and every Labrador Inuk has a responsibility to use and enjoy Nunatsiavut and its environment and renewable and non-renewable resources with care and respect, without waste or greed and as a steward for future generations of Labrador Inuit.[5]

This Charter provision recognizes a substantive right to live in an environment that is not harmful to his or her health. It also recognizes the responsibility of individual citizens to act as stewards and to treat the natural world with care and respect. It incorporates the idea of intergenerational equity, which highlights the importance of protecting the environment for the benefit of future generations. The Labrador Charter shows how integral environmental rights can be in Canadian indigenous legal traditions. It also provides an example of a sample provision as a model that can be used by other jurisdictions when drafting substantive environmental rights.

The above examples demonstrate how the discussion of environmental rights currently taking place across Canada could be seen as an appropriation of long-standing indigenous legal traditions. Concepts of environmental rights and responsibilities are already core aspects of indigenous legal traditions and it is important to give credit where it is due. It is also important to acknowledge that the Canadian population can benefit from learning about indigenous legal traditions and incorporating them into the Canadian legal system. This must be done respectfully,

[5] *The Labrador Inuit Constitution,* Nunatsiavut Constitution Act, 2004, Sch A.

with consent and guidance from Aboriginal communities to avoid continuing a long legacy of colonialism.

Restorative justice is an example of how indigenous legal traditions have provided inspirational guidance for the Canadian criminal justice system. Restorative justice provides an alternative method of sentencing offenders using principles of restoration, rather than retribution or punishment. It takes place within Aboriginal communities for Aboriginal offenders and has also been used to help young offenders reintegrate into society. In Anishinabek law, when a community was concerned with the behavior of one of their members, they came together to discuss the specific circumstances and decide on the individual's fate. Often this would mean that the 'victim' and the 'accused' sat around the same circle working towards an outcome that was agreed upon by all.[6]Evidence from the United Kingdom shows that the use of restorative justice results in lower rates of recidivism, fewer repeat offenders, and a greater sense of victim justice.[7]

The Canadian public has a lot to gain from enshrining environmental rights into their law. This requires a respect for indigenous legal traditions that have recognized the importance of maintaining strongenvironmental rights and responsibilities for thousands of years. Unfortunately, these rights have yet to be

[6] Borrows *supra* at note 2, page 81.
[7] Lawrence W Sherman and Heather Strang, *Restorative Justice: The Evidence,* The Smith Institute, online: < http://www.restorativejustice.org/10fulltext/restorative-justice-the-evidence>

protected in Canada, partly because the Canadian legal system has yet to incorporate indigenous legal traditions in any meaningful way.[8]

It is a tragic irony that despite the importance of environmental rights in their communities and theirdeep connection to the natural world, Indigenous peoples bear a disproportionate share of environmental burdens compared to non-indigenous Canadians. Toxic waste sites, polluting industries, and major resource developments are often placed close to First Nations communities. These examples of environmental racism are rooted in colonialism and European ethnocentrism, which both enforce the idea that these groups can be taken advantage of because they have a weaker political voice.[9]

A pulp mill dumping wastewater into Boat Harbour next to Pictou Landing First Nation is one example of environmental injustice in Nova Scotia. Boat Harbour, once a favoured fishing estuary and swimming location, is now devoid of visible life and filled with toxic contaminants. Members of Pictou Landing First Nation bear a double burden. They experience the environmental impacts from this wastewater as any other community would. However, they also experience cultural and spiritual suffering associated with the destruction of the natural world. According to the community, they feel the wounds of the Earth as if they were inflicted on themselves because they have failed the Creator in their role of stewards of the land.

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[8] Borrows *supra* at note 2.
[9]Gilby and Stuart, *Variations on a Theme: Environmental Racism and the Adverse Effects of Natural Resource Extraction on the Aboriginal Peoples of Canada*. LLM Thesis, 1996.

Canada's Indigenous people have special environmental interests rooted in a spiritual connection to the natural world that creates corresponding rights and obligations for both humans and nature that have developed into indigenous legal traditions. These environmental rights have yet to be incorporated into the Canadian legal system, which remains impervious to the benefits of indigenous legal traditions. As a result, Aboriginal communities across Canada bear a disproportionately high burden of pollution and are left without a clear legal avenue for preserving their healthy communities.

Environmental rights in Canadian Aboriginal Law

Environmental rights have yet to be explicitly recognized as Aboriginal rights in Canadian law. This does not mean that a right to a healthy environment or a right to conservation are not Aboriginal rights. It just means that these rights have yet to be proven in the Canadian legal system. Aboriginal communities must go through an expensive legal process to have their rights affirmed by the Canadian legal system which usually only occurs when a right has been violated in a concrete way.

Aboriginal rights are *sui generis*. They are unique rights that are 'granted as a result of Aboriginal peoples' own occupation of and relationship with their traditional territories as well as their ongoing social structures and political and legal systems'.[10] Each distinct Aboriginal society will have different Aboriginal rights owing to their unique relationship to the land. In general, these rights include rights

[10] University of British Columbia, *Aboriginal Rights,* Indigenous Foundations, online: <http://indigenousfoundations.arts.ubc.ca/home/land-rights/aboriginal-rights.html>

to subsistence resources and activities, the rights to the land, the right to self-determination, and the right to practice one's own culture and customs.

Aboriginal rights were formally recognized by the Canadian government in 1982 when it enshrined them in section 35 of the Canadian Constitution Act.[11] Over the past 30 years, the courts have defined and clarified what these rights mean from a legal perspective. In order to have an activity recognized as an Aboriginal right, Aboriginal groups must prove that the practice, custom or tradition was integral to their distinctive culture prior to contact with Europeans.[12] They must also establish the continuity of this right by demonstrating how it continues to be exercised in modern times. This test, known as the Van Der Peet test, has been used to establish a wide-range of rights including rights to hunt, fish, and trap, and a right to maintain a commercial fishery.

The approach taken by Canadian courts when interpreting Aboriginal rights remains rooted in non-Aboriginal foundations and has yet to meaningfully incorporate Indigenous perspectives.[13]The rigid and narrow recognition of Aboriginal rights has prevented Aboriginal communities from establishing Aboriginal rights to broader, holistic environmental protection. Thus far, the courts have been willing to recognize a right to fish or hunt but have yet to explicitly recognize a right to conserve the water bodies or forests that support the

[11]*Constitution Act,* 1982, Schedule B to the Canada Act 1982 (UK), c 11.
[12]R v Van Der Peet [1996] 2 SCR 507.
[13] Borrows *supra* at note 2, page 260.

speciesthat are hunted and fished. Nor have the courts recognized a right to live in a healthy environment.

Linda Collins argues that Aboriginal peoples in Canada enjoy a right to conservation under section 35 as corollary to the right to hunt, fish, and trap.[14] Recognition of this right would force governments to consult with Aboriginal communities when determining appropriate levels and locations of logging, mining, and other resource developments to figure out their specific resource needs. This would not provide a complete right to a healthy environment, but it would give Aboriginal communities more say in protecting their local ecological networks.

It is also possible to argue that an Aboriginal community's spiritual beliefs and practices as they relate to the Earth should be protected as an Aboriginal right under section 35(1). This would require extending the narrow interpretation of Aboriginal rights beyond a right to fish or hunt, to protecting a right to practice an indigenous legal tradition. Protecting Indigenous spiritual beliefs would implicitly recognize a right to live in a healthy environment because of the fundamental importance of environmental rights and responsibilities in Indigenous laws. However, given the restrictive approach taken by Canadian courts when applying the Van Der Peet test, it is unlikely that spiritual beliefs and practices will be protected as an Aboriginal right in the near future. It would be difficult to prove that a particular spiritual practice was integral to a distinctive Aboriginal culture at the

[14]Lynda M. Collins and Meghan Murth, "Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap" (2010) 47 Alta L Rev 959 – 991.

time of contact. Similarly, it would be hard to prove that these spiritual beliefsremain in the same form today. Spiritual beliefs change with the ecosystems to which they are connected. Thus far, the Canadian legal system remains fixated with freezing Aboriginal rights by reference to the time of European contact and has not yet incorporated the idea that Aboriginal culture may have evolved since then.[15]

In response to the narrow interpretation of Aboriginal rights under section 35, lawyers have turned to the Canadian Charter of Rights and Freedoms to try to protect a right to a healthy environment. Ecojustice is currently arguing a case on behalf of the Ron Plain and Ada Lockridge, two members of the Aamjiwnaang First Nation located in the Chemical Valley of Sarnia, Ontario.[16]Ecojustice argues that the Canadian Charter of Rights and Freedoms' section 7 "right to life, liberty and security of the person" implicitly includes a right to a healthy environment. If successful, this case will establish an implicit right to a healthy environment under section 7 of the Charter.

Some believe that the Indigenous spiritual belief in the living Earth could be recognized as a religious freedom and protected under section 2(a) of the Canadian Charter. Protecting Indigenous spirituality as a religious freedom faces considerable hurdles. Ecological beliefs might not be considered 'religious' beliefs, infringement of these spiritual beliefs might be considered trivial, and an infringement might be found to be 'demonstrably justifiable in a free and democratic society' under section

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[15] Borrows, *supra* at note 2, page 262.
[16]Justin Duncan. *Chemical Valley Charter Challenge,* online: Ecojustice <http://www.ecojustice.ca/cases/chemical-valley-charter-challenge-1>

1 of the Charter.[17] Using section 2(a) to protect Indigenous spiritual practices is a possible avenue to protect environmental rights in the Constitution, but it would require an expensive legal challenge and a healthy dose of judicial creativity.

Canada remains one of the few countries that do not recognize a right to a healthy environment for its citizens. The foregoing examples show that, despite the importance of environmental rights to Indigenous communities,the protection of environmental rights is limited even under Aboriginal law. Most communities have established a right to subsistence resources such as fishing, hunting, trapping, and gathering. These rights prevent the government from restricting access to these important resources. However, broader environmental rights like a right to conservation or the protection of Indigenous spiritual beliefs have yet to be recognized in Aboriginal Law. Though there remain some unexplored legal avenues, a comprehensive protection of environmental rights under Aboriginal law remains unlikely in the foreseeable future.

Recognizing Environmental Rights and Fulfilling Obligations under Aboriginal Law

This final section explores the practical outcome of recognizing environmental rights in the Maritimes. It assumes that each province has already adopted a robust set of environmental rights. How would recognizing environmental rights affect Aboriginal communities in the Maritimes?

Substantive Rights

[17] Borrows, *supra* at note 2.

The discussion of environmental rights in the Canadian context begins with a substantive right to a healthy environment. This right provides a tangible human right to live in a healthy, ecologically balanced environment. In essence, this right should serve to protect, restore, and conserve the natural environment for the benefit of present and future generations. An example of a substantive right to a healthy environment is:

"*Every person has the right to a healthy environment in Nova Scotia [New Brunswick, Prince Edward Island], including a right to unpolluted air, clean water and uncontaminated land."*[18]

As discussed above, the right to live in a healthy environment already exists as a component of indigenous legal traditions. However, this right is not currently protected in Canada because the Canadian legal system has yet to incorporate indigenous legal traditions in a meaningful way.

Mi'kmaq communities across the Atlantic region bear a disproportionate amount of environmental degradation because landfills, toxic waste sites, and other polluting industries have been placed closer to their communities than to non-aboriginal communities. There are few legal options to address this environmental degradation and injustice. Communities could attempt to show that the government has violated an Aboriginal or Treaty right under section 35 of the Constitution. In an adversarial legal system, this approach is time-consuming and costly with no guarantee of a positive outcome. These cases often come down to evidentiary issues that arise when trying toprove the existence of a right and a harm caused by government. A substantive right to a healthy environment would provide

[18] Boyd *supra* at note 1.

Mi'kmaqcommunities with a legal avenue to protect their communities, outside of the restrictions of Aboriginal law.

Procedural Rights

In addition to the substantive right to a healthy environment, robust environmental rights provisions include procedural rights to ensure the public can participate in the environmental protection process. They focus on the right to environmental information, the right to participate in environmental decision-making, and the right of access to justice when one objects to decisions.[19]

Procedural environmental rights overlap with the Crown's duty to consult with Aboriginal communities, which is protected under section 35(1) of the Constitution. The Crown has a duty to consult with Aboriginal communities when they have real or constructive knowledge of a project or decision that has the potential to adversely impact an Aboriginal right.[20] This duty to consult is triggered even if an Aboriginal community has yet to prove a right in the court system. It is rooted in the honour of the Crown to uphold and respect its fiduciary duties to Aboriginal peoples.

The scope of consultation activities required to discharge the duty to consult will depend on the strength of the Aboriginal right claim and the seriousness of the potential infringement caused by the government decision. At the very least,

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[19]Margot Venton, *Restoring the Balance: Recognizing Environmental Rights in British Columbia*, 2009. online: Ecojustice <http://www.ecojustice.ca/publications/reports/restoring-the-balance/attachment>

[20]*Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73.

consultation requires good faith dealings between the Crown and each First Nation that might be affected by a project.[21]

There are some notable overlaps between procedural environmental rights and the Crown's consultation obligations to Aboriginal communities under section 35 of the Constitution. It is important to note that the duty to consult is distinct from procedural environmental rights in that it is owed only to Aboriginal communities and is subject to specific Aboriginal law doctrines. This discussion does not mean to suggest that recognizing procedural environmental rights will be enough to discharge the consultation obligations of the Crown. Sometimes the duty to consult requires the Crown to accommodate Aboriginal interests by substantially addressing their concerns in a meaningful way.[22] In these situations, procedural rights will not go far enough in discharging the Crown's consultation obligations. This section is intended to demonstrate how a more robust set of environmental rights aligns with the principles behind the Crown's consultation obligations under Aboriginal law.

An ideal set of environmental rights would include a right to environmental information. This provision would allow citizens to access environmental information on their own initiative. A more proactive approach would require governments to regularly publish environmental reports that inform the public about the health of their environment. At a minimum, the duty to consult requires the sharing of information with First Nations communities with enough time for

[21] *Infra*
[22] Mikisew Cree First Nation v Canada (Minister of Heritage), [2005] 3 SCR 388, 2005 SCC 69.

them to reflect, analyze and respond to the information provided. This information must demonstrate how a particular project or decision will adversely impact the rights of the First Nation. The Crown must be proactive and thorough in its information sharing with First Nations communities.

The right to public participation in environmental decision-making is also a necessary component of Crown consultation with First Nations communities. Consultation requires the Crown to engage with First Nations communities, receive their interests, and address their concerns. As an environmental right, meaningful public participation includes the right to comment on proposed government initiatives, the right to request a review of existing policies, regulations and programs, and the right to propose new environmental initiatives. Environmental rights provisions that address public participation may go beyond what is required of Crown consultation. It could allow First Nations communities to propose new environmental initiatives and request reviews of existing policies.

The environmental rights of First Nations communities have not been sufficiently protected under Aboriginal law. As a result, Mi'kmaq communities bear a disproportionate burden of environmental harm without any meaningful legal avenues to protect their local environments. Recognizing a robust set of environmental rights in the Maritimes would give Mi'kmaq communities more opportunity to challenge government decisions that affect their right to live in a healthy environment. In some cases, procedural environmental rights would allow Mi'kmaq communities to participate in environmental decision-making in a more proactive way than through their involvement in Crown consultation.

Conclusion

While environmental rights were first recognized in international law in 1972, the same concepts of environmental rights and responsibilities have been fundamental components of indigenous law since time immemorial. Canada is one of only 16 countries that has yet to recognize the right to a healthy environment in its Constitution. Nor has the Canadian legal system recognized Indigenous legal traditions rooted in holistic environmental protection through the protection of Aboriginal rights under section 35. It is a tragic irony that despite the importance of environmental rights in Aboriginal communities and their deep connection to the natural world, Indigenous peoples bear a disproportionate share of environmental burdens compared to non-indigenous Canadians. Substantive and procedural environmental rights, if enacted,would give Mi'kmaq communities new legal avenues to address environmental injustices in the Maritimes. It remains to be seen whether, as Boyd argues, the recognition of environmental rights will 'mark an important step toward reconciliation with Aboriginal people'.[23]As long as environmental rights are incorporated respectfully, with consent and guidance from Indigenous communities, the relationship between environmental rights and Aboriginal rights has the potential to be synergistic and balanced.

[23]Boyd *supra* at note 1.