WHY SHOULD ABORIGINAL PEOPLES EXERCISE GOVERNANCE OVER ENVIRONMENTAL ISSUES?

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Does the Canadian Constitution encompass governance by aboriginal peoples?

Canadian environmental law makers often assume that governance is exclusively distributed between the federal and provincial levels of government.[1] The *Constitution Act, 1867* does not define "environment" as a specific "head" of power. The Supreme Court of Canada has confirmed that each order of government has a role to play.[2] Does this include aboriginal peoples? I will argue in this article that environmental aboriginal rights must include rights of governance and that aboriginal peoples' governance must be included in our constitutional conception of "government" in Canada.[3]

There is also a recent trend to transfer regulatory responsibility from federal and

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[1] K. McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95 at 117 [hereinafter "Envisaging Constitutional Space"]. See also K. McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask L. Rev. 431 at para. 18, online: QL(SASL) [hereinafter "Aboriginal Title and the Division of Powers"] – the Crown has lacked the "prerogative power to abrogate or derogate from property or other legal rights" since the Magna Carta.

[2] *R.* v. *Hydro-Quebec*, [1997] 3 S.C.R. 213.

[3] C.C. Cheng, "Touring the Museum: A Comment on *R.* v. *VanderPeet*" (1997) 55(2) U.T. Fac. L. Rev 419 at paras. 11-12. The author cogently argues that there is room for sovereign authority to be shared by three levels of government, one of which is Aboriginal, and whose sovereign authority is inherent, not delegated from another level. He shows that this approach, which requires a recognition of self-government rights as well, is necessary in order to avoid an approach whereby "Aboriginality" is reduced to a system of recognizing fishing and hunting rights based on "cultural curiosities." See also J. Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47 U.T.L.J. 417 [hereinafter "Living Between Water and Rocks"].

provincial governments to "private" entities, some of which are industry based.[4] Assertion by aboriginal peoples of positive rights to control activities that affect aboriginal rights, aboriginal title lands, aboriginal fishing and hunting lands, or even reservation lands may conflict with these new regulatory regimes. In other cases, activities will affect aboriginal peoples because of detrimental impacts on their environment and should be subject to full environmental assessments even under provincial or federal legislation. However, many projects are now escaping such scrutiny.[5]

So far, the Supreme Court of Canada has not articulated an approach that accords full rights of governance to aboriginal peoples, even as to aboriginal and treaty rights matters. The Court's concern was articulated in *Nikal* when Cory, J. stated that "[t]he government must ultimately be able to determine and direct the way in which these rights [of aboriginal peoples and of others] should interact."[6] The implication in the statement is that "the government" is a body, separate from the aboriginal peoples, for example, the "federal" or "provincial" government. In contrast, an approach that recognizes aboriginal peoples as having constitutionally recognized rights of governance, and aboriginal peoples as another level of government would avoid the "conflicting rights" paradigm that the Supreme Court of Canada seems to fear. The courts' involvement then would be to arbitrate the rightful jurisdictional "spheres" of each level of government, including aboriginal peoples', as a body of last resort.[7]

The Supreme Court's decision in *Reference re Secession of Quebec* provided a useful model from which to consider a constitutional conception of governance in Canada that allows for federal, provincial and aboriginal government. In that case, the Court said that,

> [t]he principle of federalism recognizes the diversity of the component parts of

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[4] Examples include the recent devolvement of authority to the Technical Safety Standards Authority in Ontario, revisions to the *Aggregates Resources Act*, R.S.O. 1990, c. A.8 in Ontario, delegation of MNR resource management to non-governmental agencies such as resource associations in Ontario, and the recent federal passage in late 2001 of Bill C-27, the *Nuclear Fuel Waste Act*.

[5] For example, under Ontario's revised *Environmental Assessment Act*, R.S.O. 1990, c. A.8, many matters are no longer being referred for hearing before the Environmental Assessment Board, thus denying aboriginal peoples the opportunity to attend and bring their perspective regarding the subject projects.

[6] *R.* v. *Nikal*, [1996] S.C.J. No. 47 at para. 92, online: QL(SCJ), 1 S.C.R. 1013 [hereinafter *Nikal* cited to S.C.J.].

[7] Cheng, *supra* note 3 at paras. 25, 26, 32.

> Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity . . . The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.[8]

This conception of governance is equally applicable to the role of aboriginal peoples' governance over environmental rights. As in the *Secession* case, the Canadian constitution, thus viewed, allows for the "pursuit of collective goals" by many diverse groups within Canada.

Aboriginal peoples must also see their level of government reflected in Canada's constitutional understanding. The Court itself stated that,

> [a] political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.[9]

Some have argued that self-government is protected and recognized by section 35 of the *Canadian Charter of Rights and Freedoms* — not *created* by section 35.[10]

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[8] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61 at paras. 58, 66, online: QL(SCJ), 2 S.C.R. 217 [hereinafter *Quebec Secession*].

[9] *Ibid.* at para. 67.

[10] B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar. Rev. 261 at 270, 280-281 [hereinafter "First Nations and the Constitution"]. See also J. Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C.L. Rev. 1 at 13, 25; K. McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms" (1996) 34 Osgoode Hall L.J. 61 at 65-66; M.E. Turpel, "Indigenous Peoples' Rights to Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 Cornell Int'l L.J. 579 at 593. Similarly, from an international perspective, Jennifer McIver argues that aboriginal peoples in the Arctic states must be included with equal status to states in environmental decision making in the Arctic Council: J. McIver, "Environmental Protection, Indigenous Rights and the Arctic Council: Rock, Paper, Scissors on the Ice?" (1997) Geo. Int'l Envtl. L. Rev. 147 at 167 (citing J.P. Kastrup, "The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective" (1997) 32 Tex. Int'l. L.J. 97 at 111.) See also J. Borrows, "With or Without You: First Nations Law (In Canada)" (1996) 41 McGill

Professor Kent McNeil has also argued that:

> In Canada, parliamentary sovereignty therefore has to be redefined so that legislative jurisdiction is divided among the federal, provincial, and Aboriginal governments. The rule of law must also be redefined to include Aboriginal laws, as well as the common law and federal and provincial legislation.[11]

However, because of the Supreme Court's jurisprudence, claims to a right of governance might have to be articulated in very specific terms. In *Pamajewon*, Lamer, C.J. stated that,

> [a]boriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right . . . [to] allow the Court to consider the appellants' claim at the appropriate level of specificity . . .[12]

It is consistent with section 35 that aboriginal peoples have rights of governance over their environmental rights. The section recognizes existing rights and as some commentators argue, aboriginal peoples' pre-existing rights of governance are recognized by the section. A model for a workable conception of government was articulated by the Supreme Court of Canada in the *Quebec Secession* case. As that case demonstrated, "government" is not limited by our constitution nor by other law to one level or body alone. There is room for aboriginal environmental governance in Canada.

What aspects of environmental decision making would fall within the "sphere" of governance by aboriginal peoples?

The answer to this question is likely to vary as the scope of self-government desired or exercised by aboriginal peoples will not be identical from nation to nation. As noted, in *Pamajewon* as well as in *Delgamuukw*, the Court has indicated that the

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L.J. 629 at 642, 652-653 [hereinafter "With or Without You"].

[11] "Envisaging Constitutional Space," *supra* note 1 at 133-134.

[12] *R.* v. *Pamajewon*, [1996] S.C.J. No. 20 at para. 27, online: QL(SCJ), 2 S.C.R. 821 [hereinafter *Pamajewon* cited to S.C.J.]. For a critical review of *Pamajewon* and the Court's statement that an aboriginal right of self-government must meet the same tests as any other aboriginal right, see B.W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R.* v. *Pamajewon*" (1997) 42 McGill L.J. 1011 at 1031, 1033 [hereinafter "Permafrost Rights"].

right to self-government cannot be framed in excessively general terms. In *Delgamuukw*, the Court indicated that self-government may potentially take many different forms. It referred to the Report of the Royal Commission on Aboriginal Peoples which included "different models of self-government."[13] Differences among the models included territory, citizenship, jurisdiction, internal government organization and other matters.[14]

A particular right of self-government may arise from establishment of an environmental aboriginal right which in turn might imply a right of governance as to the scope of that right. Another approach would see aboriginal peoples exercising environmental governance by rule making about activities on the aboriginal peoples' "own" lands (aboriginal title or reserve lands) and about members' activities. Another possibility is to insist that neighbouring or other orders of government require persons under their jurisdiction to comply with rules to avoid specified impacts on aboriginal peoples. Canadian common law courts could enforce decisions that aboriginal peoples have made about allowable impacts on the environment of their "own" lands.[15]

The manifestation of the right of environmental governance is conceivable even on lands that are not the aboriginal peoples' "own" lands for all purposes, but upon which other aboriginal or treaty rights are exercisable.[16]

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[13] *Delgamuukw, infra* note 14 at para. 171.

[14] *Pamajewon, supra* note 12 at para. 27; *Delgamuukw* v. *British Columbia,* [1997] S.C.J. No. 108 at paras. 170-171, online: QL(SCJ), 3 S.C.R. 1010 [hereinafter *Delgamuukw* cited to S.C.J.].

[15] But see *Attorney General of B.C.* v. *Vale,* [1987] 2 C.N.L.R. 36 (B.C.C.A.) per McLachlin JA, in which the Court upheld an interim injunction requiring the defendant bands to deal with the fisheries in accordance with the *Fisheries Act* rather than in accordance with by-laws which they had passed and had been approved (not disallowed) by the federal Minister. The Court's ruling was based on a "balance of convenience" test. However, section 35 was not expressly considered in the decision. There was an issue as to whether the subject waters were within the reserve boundaries. The Court was also apparently concerned because the by-laws permitted band members to take unlimited quantities of fish and prohibited others from fishing in those waters, and because of the potential commercial aspects of the use. Similarly, in *Nikal, supra* note 6 at para. 25, the Supreme Court of Canada based its analysis on the validity of Band by-laws that provided that Gitkasan-Wet'suwet'en persons were permitted to fish in Band waters at any time and by any means. In considering the validity of the by-law, the Court analysed whether "an exclusive right to fish in the Bulkley River at Moricetown was granted to the band" as a distinct issue from any aboriginal rights protected by section 35.

[16] See also C. Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77 Can. Bar Rev. 36 at 56: "...freeing rights from the land could push self-government beyond territorial boundaries. For example, jurisdiction over Aboriginal peoples by Aboriginal governments could be based on membership in a Nation, rather than residence within designated territorial boundaries. This

Various environmental aboriginal rights may be accompanied by differing levels of control over the land. Aboriginal peoples may have a greater degree of control over the land on which they have proven an environmental right to be more significant to the culture than one that, although also proven to be an aboriginal right, is of less significance to the culture.[17] Similarly, environmental aboriginal rights may have differing levels of connection to the land and therefore require differing levels of control over that land to protect and exercise those rights. In addition, the level of control perceived by the aboriginal peoples to be necessary for the protection and exercise of their environmental aboriginal rights will likely differ with the proposed uses by the Crown and others.

Uses by the Crown or third parties that are not incompatible with the environmental aboriginal rights may provoke little perceived need for control. On the other hand, aboriginal peoples will see that they must assert control to save their environmental aboriginal rights where the proposed uses will interfere with those rights. As a result, the control aboriginal peoples choose to assert may vary with the threat to the right. Possibilities include a range from access and land use control to emissions control to resource control. A proposed land use or resource licence from the Crown, for example, that will necessarily eliminate the environmental aboriginal right cannot coexist with the right. The aboriginal peoples may then require a form of total control or veto over those lands. In other circumstances, uses could coexist, such as in some hunting and fishing or parks situations. In those cases, the aboriginal peoples may not find it necessary to assert total control over the resource or lands in question, and co-management or coexistence may suffice.

However, in cases where aboriginal peoples find the suggested Crown activity to be compatible with their environmental aboriginal rights, they must ensure that the permitted Crown activity does not transform itself over time by Crown decisions into an incompatible use. Will the Crown gradually assume "rights" to other uses

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development is particularly important for some Metis peoples who have a difficult time meeting the existing tests for proving Aboriginal title and other Aboriginal peoples who have had their title extinguished prior to 1982." See also K. McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36 Alta. L. Rev. 117 at 120 [hereinafter "What's the Connection?"]. See also *Delgamuukw, supra* note 14.

[17] This suggestion is to be distinguished from the situation that prevails upon proof of aboriginal title; in that case, the connection to the land that demonstrated aboriginal title is not a constraint upon future use of the land by the aboriginal peoples who hold aboriginal title other than to ensure the continued connection to the land by those aboriginal peoples.

that may interfere with the environmental aboriginal rights?[18]

Aboriginal peoples may therefore find it expedient to assert a description of all of the territory over which they have a right to exercise environmental aboriginal rights, and to communicate this to the other levels of government. Like the permission given by a landowner to an "adverse possessor," this assertion may be invaluable at a future time if the Crown attempts an incompatible use. This strategy might also answer to suggestions of "nonuse" in the future in case the Court allows lack of use to defeat a claim.[19] With continuation of practices, governance and law making, this strategy may also help to prove "continuity" of the environmental aboriginal rights as required by the Court, and may defend an argument of "justified infringement."

A related issue is the difference between site-specific aboriginal rights and non-site-specific aboriginal rights. The latter do not depend upon occupation or use of specific lands. One concern with the latter characterization is that Crown actions might incrementally remove or reduce the opportunities for the exercise of non-site-specific environmental aboriginal rights. At what point could aboriginal peoples insist on protection of all further opportunities for the exercise of those aboriginal rights? Furthermore, aboriginal peoples should also have the right to decide which opportunities among the many available are most suited for their purposes, or to combine the environmental aboriginal right with customary, traditional or social significance in the choice of opportunity.[20]

A view of some aboriginal rights as not site-specific may be an erroneous view of the connection of the aboriginal peoples to the land over which they exercise

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[18] See, for example, *Mikisew Cree First Nation* v. *Canada(Minister of Canadian Heritage)*, [2001] F.C.J. No. 1877 at para. 115, online: QL(FCJ) where Hansen, J. held that use of land as a park was not inconsistent with treaty rights, but a further proposal to build a winter road was: "I accept the Minister's assertion that the winter road proposal was adopted, not for mere convenience purposes, but to fulfill the legislative objective of meeting regional transportation needs. However, I am persuaded by the applicant's argument that this purpose is not sufficiently 'compelling and substantial' to justify the infringement of constitutionally protected treaty rights. For example, the objective is not aimed at safe-guarding s. 35(1) rights by conserving or managing a natural resource as noted in Sparrow to be a valid legislative objective. It is not aimed at preventing harm to the local population or to aboriginal peoples themselves."

[19] "What's the Connection?", *supra* note 16 at 128.

[20] *R.* v. *Sparrow*, [1990] S.C.J. No. 49 at para. 70, online: QL(SCJ), 1 S.C.R. 1075 [hereinafter *Sparrow* cited to S.C.J.] per Dickson J.: "Third, does the regulation deny to the holders of the right their preferred means of exercising that right?"

those aboriginal rights.[21] Environmental aboriginal rights might be even more connected to the landscape than non-environmental aboriginal rights. Such rights may not require all of the incidents of "ownership" as conceived of in the British common law tradition, such as: exclusivity, permanent occupation, and some record or method of determining "ownership." Even where these incidents are absent, exercise of these environmental rights may nevertheless require an integrated appreciation of the functioning of the landscape. Use in one area impacts on other areas. The common law normally supports the idea that an "owner" (including the Crown and its licensees) can use the land in any way desired, subject to relatively few restrictions.[22] This will oblige aboriginal peoples asserting environmental aboriginal rights on that land to assert a consequently higher level of control over those lands. Failure to assert such control may mean that otherwise, they cannot protect their environmental aboriginal rights on those lands and the ecosystem functions that accompany those rights.

Can aboriginal environmental and governance rights be infringed?

Constitutional and jurisdictional spheres of each order of government (federal, provincial and aboriginal peoples) may dictate that each respect both the limits on governance of each and the rights of the members of each. Provincial governments have constitutional and fiduciary limitations on decision making. Their decisions may affect aboriginal or treaty rights to certain lands. They therefore do not have the option of disregarding these rights and must seek a method of accommodating those rights while pursuing their provincial objectives.[23] The exercise of governance as to environmental aboriginal rights could provide concrete manifestations of the rights that provincial and federal governments must accommodate. It might also increase the likelihood that these governments seriously attempt to accommodate these rights.[24]

Canadian constitutional authority for governance is not placed in only one location. Our constitutional documents, constitutional laws, principles and conventions allocate that authority among federal and provincial legislative and

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[21] "What's the Connection?", *supra* note 16 at 127.

[22] M. Walters, "Ecological Unity and Political Fragmentation: the Implication of the Brundtland Report for the Canadian Constitutional Order" (1991) 29 Alta. L. Rev. 420 at 426.

[23] *Makivik Corp.* v. *Canada (Minister of Canadian Heritage)*, [1999] 1 F.C. 38, [1998] F.C.J. No. 1114(T.D.), online: QL(FCJ).

[24] "With or Without You," *supra* note 10 at 639.

executive branches, the judiciary, and, I argue, aboriginal peoples. "Sovereign power" therefore should be understood as the combination or collection of all of these sources of authority. It is not the sole property of only one branch and one order of government, the federal government. Nor is it even exclusive to the federal and provincial governments together.[25]

Professor Noel Lyon has described as a preferred vision, responsibilities of three orders of government, federal, provincial, and First Nations, all exercising constitutional responsibilities for sustainable development. He saw these responsibilities as founded on public trust doctrines, based on the language of our constitutional documents, rather than on governmental competitions for power.[26] With this approach, there would have been no need for the "restraint" on the federal government that the Supreme Court used as an excuse to develop the justification test. There was no constitutional authority after 1982 to extinguish aboriginal peoples' section 35 guaranteed aboriginal and treaty rights. Therefore, there was no need to "restrain" the Crown and create an infringement test.

Under the existing state of the case law, the Supreme Court of Canada allows the possibility of an infringement of section 35 guaranteed aboriginal rights, subject to the justification tests. Federal legislation may interfere with an existing aboriginal right (including aboriginal title), for a "valid legislative objective," if: consistent with the "special trust relationship and responsibility of the government vis-á-vis aboriginal peoples"; with "as little infringement as possible in order to effect the desired result"; and, with "fair compensation" and "consultation" with the affected aboriginal group.[27] Infringement that meets these tests is a "justified" limitation on the exercise by aboriginal peoples of environmental aboriginal rights.

The Supreme Court, in *Gladstone* and *Delgamuukw*, elaborated upon the

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[25] "First Nations and the Constitution," *supra* note 10 at 281. See also "Envisaging Constitutional Space," *supra* note 1 at 119. See also M. Asch, "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity" (1992) 30 Alta. L. Rev. (No. 2) 465 at 482; Asch argues that any constitutional theory that provides that aboriginal sovereignty may have been unilaterally extinguished is "abhorrent" on the world stage and inconsistent with international principles.

[26] N. Lyon, "Canadian Law Meets the Seventh Generation" (1993) 19 Queen's L.J. 350 at 355. See also "First Nations and the Constitution," *supra* note 10. See also R.O. Brooks, "A New Agenda for Modern Environmental Law" (1991) 6 J. Envtl. L. & Litig. 1 at 14, for a discussion on the need for a conception of environmental law grounded in multiple trust obligations.

[27] *Sparrow*, *supra* note 20; *R.* v. *Marshall*, [1999] S.C.J. No. 66 at para. 32, online: QL(SCJ), 3 S.C.R. 533.

circumstances in which the Crown can prove justification for an infringement. In *Gladstone*, the Court adapted the justification test from *Sparrow* to accord with the "context." The context was that the Court viewed the right (as they described it, not as the applicant first nation described it) as "without internal limitation."

Professor Kent McNeil has characterized the broad list of infringing circumstances in *Gladstone* as analogous to a mere test of "public interest."[28] The additional possible circumstances cited by the Court in *Gladstone* included: "objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon and participation in, the fishery by non-aboriginal groups."[29]

It should be noted that these additional circumstances are not constitutionally protected rights. Nor are they necessary for "reconciliation" of sovereignty with preexisting aboriginal peoples. Nevertheless, these comments raise a significant possibility that other levels of government may frame infringing legislation in the "economic balancing" terms mentioned by the Court.[30]

The range of activities envisaged by the Chief Justice's opinion in *Delgamuukw* as potential justified infringements is astounding. It appears to encompass almost *all* of the activities that the Crown might want to engage in on aboriginal title lands. The only activity that the Chief Justice expressly listed in *Delgamuukw* as potentially not a justifiable purpose for infringement of constitutionally protected section 35 rights was "for relatively unimportant reasons, such as sports fishing without a significant economic component."[31] The Chief Justice seemed to indicate that the Court will only preclude "unimportant" activities in favour of the constitutionally protected aboriginal and treaty rights. Similarly, once there is "a significant economic component" even for "unimportant" activities, the Crown purpose may achieve sufficient status to infringe section 35 rights. There may be significant underlying differences in some of the world views and value systems of aboriginal peoples, particularly those that support environmental aboriginal rights. This

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[28] K. McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?" (1997) 8 Constitutional Forum 33 at 35 [hereinafter "Infringements"].

[29] *Ibid.* at 36; *R.* v. *Gladstone* [1996] S.C.J. No. 79 at para. 75, online: QL(SCJ), 2 S.C.R. 723, Lamer C.J.C. [hereinafter *Gladstone* cited to S.C.J.].

[30] For a more complete criticism of this aspect of *Gladstone* and *Van der Peet*, see "Infringements," *supra* note 28 at 39.

[31] *Delgamuukw*, *supra* note 14 at para. 161.

approach by the Court may accord a right of infringement to the government whenever its economically driven value system is contradictory to the environment-supporting value system of aboriginal peoples claiming environmental aboriginal rights. This is contrary to the purpose of entrenching "existing aboriginal and treaty rights" in the constitution. The irony of this approach is especially obvious when one considers that the Court to date has generally denied constitutional protection to property rights, for example under section 7 of the *Canadian Charter of Rights and Freedoms*. However, the Court is apparently according non-constitutionally protected Crown economic interests a priority over aboriginal peoples' constitutionally protected rights by way of "justified infringement."[32]

This range of activities would almost certainly have serious impacts upon the uses that aboriginal peoples could make of their aboriginal title lands. Such activities would also seriously impact upon the traditional activities that may constitute environmental aboriginal rights and could even amount to *de facto* extinguishment of aboriginal title and aboriginal rights.[33]

There is a concern that even where aboriginal peoples' articulation of their rights is more consistent with conservation of environmental resources than the competing infringing proposal, that the Court will not accord those environmental rights the kind of priority that is articulated when the non-aboriginal government is pursuing a conservation objective, as was the case in *Sparrow*. For example, in *Nikal*, the Court stated that the aboriginal right to fish had to be balanced against the need to conserve the fishery stock, but over-looked at that point the accepted evidence that there was no conservation issue during the year in question.[34] Therefore, the Court, in effect, found that an abstract need for conservation measures by non-aboriginal government outweighed the Band's right to manage the fishery pursuant to its aboriginal right to fish.[35] A better approach would recognize the right

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[32] See also K. McNeil, "Defining Aboriginal rights in the 90's: Has the Supreme Court Finally got it Right?" (Twelfth Annual Robarts Lecture, York University, 25 March 1998) [unpublished] [hereinafter "Defining Aboriginal Rights in the 90's"].

[33] See also *ibid.* at 16: "However, in the decisions since *Sparrow* the Supreme Court has watered down the protection accorded to Aboriginal rights to such an extent that, in my opinion, their constitutional status has been seriously undermined."

[34] *Supra* note 6 at para. 94.

[35] Similarly, see the opinion of Binnie, J. in *R.* v. *Marshall*, [1999] S.C.J. No. 55 at para. 7, online: QL(SCJ) 3 S.C.R. 456: "In my view, the treaty rights are limited to securing "necessaries" (which I construe in the modern context, as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. The rights thus construed, however, are, in my opinion, treaty rights

of management to accompany the section 35 protected rights, and to allow the Band to act accordingly. Only when a situation arose where the Band's management actions were proven to be inconsistent with valid conservation objectives should the Court interfere to give paramountcy to the conservation measures of the other government, and only after according aboriginal peoples the relevant priority rights to the fishery and after complying with the other requirements for infringement that the Court has established. In most cases, however, Band management should recognize and address conservation issues and thus such jurisdictional conflicts would be minimized.

It should not be problematic to have more than one jurisdiction with environmental responsibility. Environmental issues are already addressed in Canada by three levels of government.[36] Mark Walters has noted that the challenges of sustainability and the reality of ecological interconnectedness demand a new vision of the role of the Constitution in environmental management:

> In a federal state, then, there must be a decentralization of power over the environment such that each level of government can ensure that the resource and environmental issues related to each of its traditional spheres of constitutional jurisdiction are taken into account in the course of policy formation.[37]

He stated that this institutional recommendation apparently meets little constitutional resistance in Canada. He was speaking only of the federal and provincial governments in this context. Adding aboriginal peoples' governments to this statement would be apt and would provide a means of understanding the role of

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within the meaning of s. 35 of the Constitution Act, 1982, and are subject to regulations that can be justified under the *Badger* test (*R.* v. *Badger*, [1996] 1 S.C.R 771)." See also the Court's further comments in *R.* v. *Marshall*, [1999] S.C.J. No. 66 at para. 29, online: QL(SCJ), 3 S.C.R. 533: "The regulatory device of a closed season is at least in part directed at conservation of the resource. Conservation has always been recognized to be a justification of paramount importance to limit the exercise of treaty and aboriginal rights in the decisions of this Court cited in the majority decision of September 17, 1999, including *Sparrow*, supra, and *Badger*, supra. As acknowledged by the Native Council of Nova Scotia in opposition to the Coalition's motion, "[c]onservation is clearly a first priority and the Aboriginal peoples accept this." Conservation, where necessary, may require the complete shutdown of a hunt or a fishery for aboriginal and non-aboriginal alike."

[36] Walters, *supra* note 22 at 421. See also *114957 Canada Ltd. (Spraytech)*. v. *Hudson(Town of)* [2001] S.C.J. No. 42 at paras. 31, 39, online: QL(SCJ), in which the Court affirmed the benefits of environmental governance at federal, provincial and local levels, in addition to recognition of international agreements and norms.

[37] Walters, *supra* note 22 at 424.

aboriginal governance in environmental matters as little different from other levels of government, each within its "traditional sphere."

If Chief Justice Lamer's comments in *Delgamuukw* prove predictive of the Courts' approach, the responsiveness of governments to resource development proposals raises concerns that aboriginal peoples' section 35 rights will prove of little benefit, whether environmental or otherwise. However, the environmental rights might be the most at risk, given the similarity between the Chief Justice's list and one report's list as to what constitutes the scope of environmental management:

> the scope of environmental management is virtually endless, touching upon, among other matters, pollution control, land use control, control of mining, lumber, wildlife, fish, agriculture, transportation, electric power, water management, housing, and urban planning.[38]

The prerequisite obligations of "consultation" and "compensation" may be far too inadequate given the extent of impacts and infringements that such projects can cause.[39] However, the Chief Justice did go on to say that the failure to consult may itself be a breach of section 35 rights. The type of consultation will vary with the seriousness of the breach at issue: for minor breaches, it may be no more than a duty to discuss "important decisions that will be taken," but even

> . . . *in these rare cases* when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. *Some cases may even require the full consent of an Aboriginal nation,* particularly when provinces enact hunting

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[38] *Ibid.* at 425, citing: Canada, Parliament, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Final Report* (Ottawa: Queen's Printer, 1972) at 90-92.

[39] For a description of the pressures of resource development and the perspectives of those advocating development, see M. Mirande, "Sustainable Natural Resource Development, Legal Dispute, and Indigenous Peoples: Problem Solving Across Cultures" (1997) 11 Tul. Envt'l. L.J. 33; T.S. O'Connor, "'We are Part of Nature': Indigenous Peoples' Rights as a Basis for Environmental Protection in the Amazon Basin" (1994) 5 Colo. J. Int'l Envt'l. L. & Pol'y 193 at 195. Similar concerns pertain in Ontario and other provinces, for example, arising from the Ministry of Ontario's "Living Legacy" Strategy announced March 31, 1999, in which land use allocations across much of Ontario's most productive Crown land were made with very limited, if any, consultation with aboriginal peoples in Ontario. See Canadian Environmental Law Association Brief # 373, "The Lands for Life Proposals - A Preliminary Analysis," May, 1999.

and fishing regulations in relation to Aboriginal lands [emphasis added].[40]

The Courts may be willing to give real meaning to the duty to consult. This was recently demonstrated in *Makivik*, a 1999 Federal Court decision.[41]

Should aboriginal peoples exercise governance over environmental rights and how?

I would suggest that *Delgamuukw* and *Makivik* provide further support for the suggestion that aboriginal peoples exercise governance now over environmental aboriginal rights they want to protect. Management activities as well as codification, recording or documentation of applicable aboriginal principles governing those rights will help in proving the seriousness of any breach of those rights, and in a manner "cognizable" to the Court. The risk remains, however, that the Court would consider the applicable remedy to be compensation, while allowing the activity that infringes the section 35 rights to proceed.[42]

For those situations in which aboriginal peoples have constitutional priority to the exercise of an environmental aboriginal right over non-aboriginal access to a resource, (such as in some food fisheries),[43] that priority interest might logically imply the right to manage and control the resource. Then, inconsistent management or control by the provincial or federal government may be a breach of the aboriginal right. A right to manage or control a resource or the environment or habitat of a resource may be proven as an aboriginal right or as reasonably incidental to an aboriginal right. It would seem that inconsistent management by another government might infringe that right while compatible management might not infringe the aboriginal right. In the latter case, "co-management" of the resource may be a practical or politically desirable approach to a situation of resource or environmental conflict between aboriginal peoples and federal or provincial

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[40] *Delgamuukw*, *supra* note 14 at para. 168.

[41] *Makivik Corp.* v. *Canada* (Minister of Canadian Heritage), [1998] F.C.J. No. 1114 (T.D.), online: QL(FCJ) at para. 128.

[42] *Delgamuukw*, *supra* note 14 at para. 169. See also "Defining Aboriginal Rights in the 90's," *supra* note 32 at 20, where Kent McNeil points out that normally government powers of expropriation, even for non-constitutionally protected private property, are limited to expropriation for *public* purposes; whereas the list of infringing activities that the Chief Justice envisages would be largely for private economic purposes.

[43] M.D. Walters, "Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada" (1998) 23 Queen's L.J. 301 at 303.

government. It may even be constitutionally mandated if the other level of government desires to remain involved in management of the resource or environment.[44]

However, this possibility was reduced by the Court in *Gladstone*, where Lamer C.J. qualified the "doctrine of priority" by saying that it merely

> . . . requires the government to demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users.[45]

Lamer assumed that it is the [federal] government who has the right of "allocation." There is no recognition at all that the "priority interest" itself may involve management (and therefore allocation).[46] His statement appears to have been based on an assumption that an aboriginal commercial fishery would be unlimited,[47] or at least limited only by "the external constraints of the demand of the market and the availability of the resource...the aboriginal right in this case is, unlike the right at issue in Sparrow, without internal limitation."[48] The Chief Justice appears to have disregarded or failed to appreciate any notion of limitation by the Heiltsuk Band itself, based upon their traditional management principles.

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[44] *Ibid.* at 368; R. Kapashesit & M. Klippenstein, "Aboriginal Group Rights and Environmental Protection"(1991) 36 McGill L.J. 925 at 935 as to co-management; McIver, *supra* note 10 at 168: "The continued denial by Arctic States of the rights of indigenous peoples to true power-sharing, in the sense of actual co-management of resources and a genuinely equal voice in decision-making structures, is a risky strategy in light of the current status of indigenous rights to territorial sovereignty and the fine balance in which the Arctic ecosystem subsists."

[45] *Gladstone*, *supra* note 29 at para. 62. See also "Infringements," *supra* note 28 at 38.

[46] For a more extensive discussion of aboriginal group rights to environmental management, see Kapashesit & Klippenstein, *supra* note 44 at 935. For a discussion as to the range of management systems available for conservation objectives, including co-management and the Court's failure to appreciate these options, see R. Kyle, "Aboriginal Fishing Rights: The Supreme Court of Canada in the Post-*Sparrow* Era"(1997) 31 U.B.C. L. Rev. 293 at 312.

[47] Madam Justice McLachlin similarly criticized the Chief Justice in *Van der Peet* for "having defined the right at issue in such a way that it possesses no internal limits" (and then, she pointed out, compensating for this by "adopting a large view of justification which cuts back the right on the ground that this is required for reconciliation and social harmony."); *R.* v. *Van der Peet*, [1996] S.C.J. No. 77 at para. 302, online: QL(SCJ), 2 S.C.R. 507.

[48] *Gladstone*, *supra* note 29 at para. 57.

The Chief Justice also made an assumption that the right could be exclusive, and this would be unacceptable. It is not clear why, even if a right was "exclusive," on occasion, for instance in times of shortages, this would be unacceptable. The Chief Justice appeared to place "ordinary common law rights" (of others to fish) on a par with constitutionally protected section 35 rights.[49] In any event, there is much room for exercise of a constitutionally protected aboriginal right that includes a commercial fishery before reaching a point of excluding all others. This raises the issue of joint jurisdictional possibilities, such as co-management, that the Court failed to consider.[50]

Future cases should include evidence as to care taking and management of the resource and the accompanying environment, and be framed so as to claim those activities as aboriginal or treaty rights. This may be more suitable in litigation dealing with the validity (as recognized by the Canadian common law courts) of positive assertions of environmental aboriginal rights. The fact that many of these cases have arisen in *Fisheries Act* prosecutions may be part of the reason for the Court to take what I would suggest is a very narrow view of the aboriginal rights in question.[51]

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[49] *Ibid.* at para. 67.

[50] See *Delgamuukw*, *supra* note 14 at para. 158, where Lamer C.J. did consider the possibility, to be determined in future cases, of joint aboriginal title, but this is a different possibility than that of joint aboriginal/Crown governance jurisdiction over environmental resources. At para. 169, he also recognized the possibility of "shared, non-exclusive, site-specific rights" as among different bands, in accord "with the general principle that the common law should develop to recognize Aboriginal rights (and title, when necessary) as they were recognized by either de facto practice or by the Aboriginal system of governance." One example is in "First Nations/ Province to Co-Manage Resources" (1994) 23 Saskatchewan Indian (No. 6) 10, describing the Renewable Resources and Environmental Management Protocol Agreement. The article explained some of the fundamental differences in the First Nations' approach to wildlife and resource management that would be brought to the co-management process, including "the total use of any animal taken by hunting... the close link between the spiritual and practical aspects of the hunt." It also described many similarities in the two cultures' approaches including conservation of the species for future generations, and similar specific rules including "protection of female animals during foaling season; protection of endangered species; respect for private land; interrelated ecology... no commercial sale of big game products for profit; and individual and public safety."

[51] As to authors who share the view that the Court has taken a "narrow view," see Kyle, *supra* note 46 at 310; Bell, *supra* note 16 at 53; "What's the Connection?", *supra* note 16. As to the difficulty of the Courts in determining the content of section 35 rights in prosecutions, see Dickson, C.J.C. in *Sparrow*, *supra* note 20 at para. 13: "While the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right...."

When governance by two orders of government (aboriginal and non-aboriginal) cannot coexist, the courts could resolve the conflict on constitutional principles, as with federal-provincial conflicts.[52]

Environmental aboriginal and treaty rights must be capable of exercise. It is important that aboriginal peoples assert and protect the right to continued development and evolution of environmental and aboriginal treaty rights. One mechanism may be through decisions to exercise governance over environmental aboriginal and treaty rights. Aboriginal peoples should plan for resistance of infringement of these rights by the Crown.

In addition, aboriginal peoples may want to assert requirements that provincial and federal levels of government must act to protect these section 35 environmental rights. This may include rules requiring non-aboriginal persons or persons off-reserve to abide by measures that are protective of the environment on those lands, such as in the American case of *Albuquerque*.[53] Another possibility is the adoption of standards or impact measures off-reserve that are the same as those developed by aboriginal peoples on-reserve. Other possibilities include ensuring that federal and provincial governments respect priority rights where environmental resources to which aboriginal peoples are entitled are nonexclusive or shared with non-aboriginal peoples. Where aboriginal peoples can persuade another level of government who shares jurisdiction to cooperate, co-management provides at least a theoretical possibility of avoiding conflicts in governance decisions.

Aboriginal peoples should consider exercise of their law making authority with respect to environmental protection. This may consist of discovery, interpretation and perhaps codification of traditional aboriginal laws.[54] For example, in a land use planning case study, Professor John Borrows showed one way in which traditional

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[52] P. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 98.

[53] *Albuquerque (City of)* v. *Browner*, 865 F. Supp. 733 (D. N.M. 1993). See also *R.* v. *Lewis*, [1996] S.C.J. No. 46 at para. 71, online: QL(SCJ), 1 S.C.R. 921, in which Iacobucci, J. stated that, considering the *Indian Act* in its entirety, "...[I]t is clear that Parliament never intended that a by-law passed by the Band Council should have an extra-territorial effect...." Therefore, other approaches to ensure compliance by persons off-reserve would be necessary. One such approach is by recognizing aboriginal rights, including self-government rights, as inherent, and not dependant upon the will of the Crown as discussed by Cheng, *supra* note 3 at para. 11.

[54] J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291 at 296 [hereinafter "A Genealogy of Law"]; "Living Between Water and Rocks," *supra* note 3 at 452, 464.

aboriginal laws may be interpreted to derive applicable environmental law principles such as designing to scale; habitat restoration; monitoring; enhancement; and prevention of resource loss.[55]

It may also be possible to codify,[56] amend and enact new environmental laws according to the continuing traditions and laws of the aboriginal peoples in question.[57] Rebecca Tsosie described some of the requirements for enacting customs as law. These include that the community norms or customs be considered by the community members to be binding on them and that there be an "appropriate incentive structure."[58]

As Professor Borrows has argued, aboriginal peoples' laws "along with other laws should be accepted as *legal standards* through which North American practices can be measured."[59]

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[55] "Living Between Water and Rocks," *supra* note 3 at 463.

[56] However, it is well to keep in mind Chang's caution: "An essential difference between the contemporary Western approach to the environment and that of the Hawaiian is that understanding is experiential in the Hawaiian context. Thus, rules, treaties and language do not guide conduct...a written code cannot guide proper action because it fails to produce the necessary state of mind."; W.B.C. Chang, "The 'Wasteland' in the Western Exploitation of 'Race' and the Environment" (1992) 63 U. Colo. L. Rev. (1992) 849 at 858 [hereinafter "The Wasteland"].

[57] See J.M. Grijalva, "Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters" (1995) 71 N.Dak. L Rev. 433 [hereinafter "Tribal Governmental Regulation"]. See also Kapashesit & Klippenstein, *supra* note 44 at 957 as to examples of aboriginal peoples who have codified environmental management practices. And see S.B. Zellmer, "Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereighty Come First" (1998) 43 S.D.L. Rev. 381 at 411-12 as to useful suggestions for incorporation of governmental fiduciary duties with aboriginal environmental management, including "government to government consultation. . . early notification and involvement, information exchange, deference to tribal management plans, a preference for cooperative agreements, encouragement of federal assistance to tribes for development of management plans and agreement and acknowledgment that tribes are the 'appropriate governmental entities' to manage tribal lands and resources' among other initiatives, all as found in executive order." See also "With or Without You," *supra* note 10 at 654, as to the accessibility of First Nations law.

[58] R. Tsosie, "Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge" (1996) 21 Vt. L. Rev. 225 at 244 [hereinafter "Tribal Environmental Policy"].

[59] "Living Between Water and Rocks," *supra* note 3 at 454 (Emphasis added). See also G. Valencia-Weber, "Tribal Courts: Custom and Innovative Law" (1994) 24 N. Mex. L. Rev. 225 at 249 in which she discussed the use of custom and its application in tribal courts, advocated for the exercise of judicial decision making by tribes and expressed the advantages of adding codification to customary law by way of judicial recognition of custom, use of custom in written decisions, publication of decisions, providing the benefits of "precedent, predictability and notice to those subject to the law."

Environmental governance by aboriginal peoples may be essential for the protection of environmental aboriginal and treaty rights as recognized by section 35 of the *Canadian Charter of Rights and Freedoms*. There are also the Court's requirements for "evidence" that is "cognizable" to the courts[60] and for proof that the rights are continuing.

Another option is to take further steps of governance, for example, to regulate a resource, members of the first nation, or the reserve's geographical environment, in contemporary form. For example, a resolution or a law could be passed. Additional consideration would be required as to whether such laws should be passed under the authority of the *Indian Act,* where applicable. When a bylaw passed under the auspices of the *Indian Act* is in question, the Court will adjudge the authority of the first nation to pass that bylaw in accordance with the expressed authority of the *Indian Act,* and in accordance with the procedural requirements of the *Indian Act.* This approach is analogous to a delegated authority approach as to the source of the aboriginal peoples' right to make laws as to their aboriginal and treaty rights. Aboriginal peoples may prefer to find the foundation for their rights to make such laws in their existing rights. They may also prefer to base such governance rights on the fact that such governance is the necessary mechanism by which to enjoy and protect those rights. The source of the authority then, would be either inherent, or by way of treaty interpretation principles, or possibly both, rather than by way of federal legislation.

Aboriginal peoples may also want to consider the option of enforcing the laws, rules and principles they enact or that exist in their culture. Assuming that jurisdiction over members and the governance structure are not contested, enforcement can include internal enforcement over resources found on their own lands (reserve or aboriginal title); or over their members. Internal enforcement by aboriginal peoples over members may or may not be "court-like." External enforcement could be by way of co-management agreements, or by cross-appointment with other levels of government. Canadian common law courts should be prepared to uphold these arrangements on constitutional grounds. Whether to access common law courts will always be a difficult decision based on numerous factors. These include the constitution of the court, expense, time, availability of evidence, the jurisprudence, and the possibility of a failure by the courts to recognize the rights in question.

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[60] *Delgamuukw*, *supra* note 14 at paras. 83-85.

Aboriginal peoples should exercise governance over aboriginal environmental rights. Aboriginal peoples may recognize preexisting duties and obligations as caretakers as a fundamental principle.[61] Aboriginal peoples may also perceive a need to continue their law making traditions.[62] Other reasons include the possibility of the need for future proof and defence of these principles in non-aboriginal Courts under section 35 of the Constitution, the need to assert the existence of a body of law to avoid the perception of a legislative or regulatory "gap" that other governments would seek to fill in the future,[63] and the importance of the exercise of the inherent rights of sovereignty and self government by aboriginal peoples.[64]

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[61] See "The 'Wasteland," *supra* note 56 and Justice R.D. Austin, "Native People of America and the Environment" (1995) 14 Stan. Env. L.J. ix.

[62] See "Permafrost Rights," *supra* note 12 at 56; "A Genealogy of Law," *supra* note 54; "With or Without You," *supra* note 10; and "Living Between Water and Rocks," *supra* note 3.

[63] "Tribal Governmental Regulation," *supra* note 57 at 471; Zellmer, *supra* note 57 at 406: "If the tribes failed to assert a position, other interests, including environmentalists, industry, and the states, would likely adopt and advocate their own contradictory positions on reauthorization without tribal input." See also Kapashesit & Klippenstein, *supra* note 44 at 961 as to further arguments in support of positive law making by aboriginal peoples and the use of an existing body of law to resist the filling of a regulatory "gap" by another order of government. Also see "Envisaging Constitutional Space," *supra* note 1 at 125.

[64] See "Aboriginal Title and the Division of Powers," *supra* note 1, and "Envisaging Constitutional Space," *supra* note 1; and B. Slattery, "Varieties of Aboriginal Rights" (1998) 6 CanadaWatch 71.