

**MOLESTED AND DISTURBED:
ENVIRONMENTAL PROTECTION
BY
ABORIGINAL PEOPLES THROUGH
SECTION 35
OF THE CONSTITUTION ACT, 1982**

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And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories, as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds . . .
(Royal Proclamation of 1763.)

ABSTRACT

The author reviews the jurisprudence and academic commentary as to the protection provided by section 35 of the *Constitution Act*, 1982, with a view to determining whether aboriginal peoples in Canada can use section 35 as an environmental protection tool. She concludes that section 35 offers promising potential for environmental protection in specific circumstances. The author recommends that aboriginal peoples consider exercise of environmental governance. This recommendation arises out of the conclusion that there are existing environmental aboriginal and treaty rights. Environmental governance would also help with the recognition and protection of those rights under section 35.

SECTION 35, CONSTITUTION ACT, 1982

Section 35 of the *Constitution Act*, 1982 provides:

- (1)The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2)In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada.
- (3)For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4)Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

TABLE OF CONTENTS

| | |
|--|----|
| A. INTRODUCTION: | 4 |
| 1. Definition of the Rights..... | 4 |
| 2. Can Environmental Activity or Protection be Characterized as an Aboriginal or Treaty Right? | 4 |
| 3. The Existing Environmental Governance Paradigm..... | 6 |
| B. WHOSE RIGHTS ARE ENVIRONMENTAL ABORIGINAL AND ENVIRONMENTAL TREATY RIGHTS?..... | 10 |
| C. HOW ARE ENVIRONMENTAL ABORIGINAL RIGHTS ESTABLISHED? | 12 |
| 1. “Integral to the Culture”..... | 13 |
| (i) The Test..... | 13 |
| (ii) Criticisms of the “Integral to the Culture” Test..... | 14 |
| (iii) How to Prove “Integral to the Culture”? | 16 |
| 2. “Existing” | 19 |
| (i) Unextinguished | 19 |
| (ii) Continuing | 20 |
| D. ABORIGINAL TITLE RIGHTS AND ENVIRONMENTAL PROTECTION | 21 |
| E. HOW CAN ENVIRONMENTAL TREATY RIGHTS BE EXERCISED? | 24 |
| (i) Interpretation of Treaties | 25 |
| (ii) Infringement of Treaty Rights | 28 |
| F. HOW CAN ENVIRONMENTAL RIGHTS BE PROTECTED AND ASSERTED?..... | 30 |
| 1. How Environmental Aboriginal and Treaty Rights Could be Asserted..... | 30 |
| 2. Development and Evolution of Environmental Aboriginal and Treaty Rights | 31 |
| 3. Environmental Governance | 33 |
| 4. How can Aboriginal Peoples Resist Infringement of Environmental Aboriginal and Treaty Rights?..... | 38 |
| (i) The Infringement Test | 38 |
| (ii) Priority Interests | 45 |
| (iii) Co-Management and Joint Jurisdiction..... | 47 |
| G. WHAT ROLE DOES THE PROVINCIAL GOVERNMENT HAVE AS TO ENVIRONMENTAL ABORIGINAL AND TREATY RIGHTS? | 48 |
| 1. Fiduciary Duties..... | 49 |
| 2. Provincial Infringement | 49 |
| 3. “Lands Taken Up” | 54 |
| H. ENFORCEMENT OF ENVIRONMENTAL ABORIGINAL AND TREATY RIGHTS | 55 |
| I. CONCLUSION..... | 57 |
| Appendix: Statutory References..... | 62 |
| Section 88, <i>Indian Act</i> | 62 |
| Appendix - Constitutional Entrenchment of Environmental Rights..... | 63 |
| Appendix 1 | 63 |
| Appendix 2 | 64 |
| List of Authorities..... | 67 |

A. INTRODUCTION:

1. Definition of the Rights

Seventeen years after the Constitution Act, 1982, introduced section 35, "recognizing and affirming" the "existing aboriginal and treaty rights" of the aboriginal peoples of Canada, there is now a body of case law and academic literature as to the meaning of and the protection offered by that section. That body of commentary will be considered in answering the question whether aboriginal peoples can use section 35 as an environmental protection tool. In doing so, I will consider environmental rights protected as "aboriginal rights," and those protected as "treaty rights." I will style them as "environmental aboriginal rights" and "environmental treaty rights" respectively.

In this paper, I define "environmental rights" to be rights of environmental protection. Section 35 may protect environmental rights directly, for example as a direct right of water quality protection. It may also protect environmental rights indirectly when they are "reasonably incidental" to another aboriginal or treaty right. An example is where a right to fish implies water quality and habitat supportive of the fishery. Another question is whether the environmental right is a right to carry out or control environmental protection matter or whether it is only a right to require other levels of government to do so.

The kinds of rights that could be considered "environmental rights" are many and likely to vary with the varied ecosystems in which aboriginal peoples live. The appendix contains some examples of environmental protection rights. For example, the suggestions include a right to good water quality for fish habitat, or a right to clean healthy air. These examples are prepared from the perspective of an environmental lawyer. Aboriginal peoples would themselves want to frame and categorize the rights that they seek to protect. Furthermore, the list as provided does not reflect the integrated reality of ecosystems, nor the related integrated perspectives of aboriginal peoples. Some might object to a piece meal approach to the environmental protection issues with which they are concerned. For the purposes of this paper, "environmental" aboriginal or treaty rights are either aboriginal or treaty rights that aboriginal peoples could use to protect the natural environment, including habitat, water, air, land, food, and the other species who live in the surrounding ecosystem, as well as the inter-related ecological functions between all of these aspects of the environment.

2. Can Environmental Activity or Protection be Characterized as an Aboriginal or Treaty Right?

The jurisprudence of the Supreme Court of Canada dictates that "environmental" aboriginal rights will consist of a collection of possible specific environmental aboriginal rights. The success of any claim for "environmental" aboriginal rights will be dependant upon the Court's "characterization" of the right at issue.

For example, in *Pamajewon*¹ the court characterized the “right” claimed as “the right to participate in, and to regulate, high stakes gambling activities.” However, the right as characterized by the aboriginal peoples making the claim was a right to manage the use of their reserve lands.² This characterization resulted in the Court’s focus on “gambling” and whether control of gambling met the tests that the Court has developed for proof of aboriginal rights. The Court did not accept that the characterization was jurisdiction to manage their own lands, which is what the aboriginal peoples attempted to assert.

A different characterization of a right might result in a different outcome. Madam Justice L’Heureux-Dube pointed out the difficulties arising from the Court’s characterization of the right in *Smokehouse*. She would have characterized the right claimed as “trading fish for livelihood, support and sustenance” rather than characterizing it as commercial fishing as the majority did.³

Professor Slattery has suggested two categories of rights covered by section 35(1): “generic rights” and “specific rights.” Generic rights are standardized and available to all aboriginal groups entitled to the right under general principles of common and constitutional law. Specific rights are rights distinctive to a particular Aboriginal group, as

“determined by the historical practices, customs, and traditions integral to the culture of the group in question. As such, specific rights differ substantially in form and content from group to group.”⁴

Examples of generic rights include aboriginal title, aboriginal language rights to speak a mother tongue and arguably the aboriginal right to self-government. I would suggest that environmental aboriginal rights are a hybrid of these two categories. Establishment of the existence and scope of an environmental aboriginal right may require specificity as to the right, its location, and those entitled to it. There may also be elements of generic rights that apply, such as those derived from aboriginal title principles or self-government principles.

Professor Slattery described the “doctrine of aboriginal rights” as a basic principle of *Canadian* common law already in existence over the centuries before 1982,

“that defines the constitutional links between the Crown and aboriginal peoples and regulates the interplay between Canadian systems of law and government (based on English and French law) and native land rights, customary laws and political institutions. It states the original terms upon which the Crown assumed sovereignty over native peoples and their territories.”⁵

¹ *R. v. Pamajewon* [1990] 2 S.C.R. 821; [1990] S.C.J. No. 20 (Q.L.)

² *Pamajewon* at para. 26-7 (Q.L.); Borrows, *Frozen Rights*, footnote 152, p. 49; Bell, footnote 114 at p. 53

³ *R. v. Smokehouse*, footnote 40, at para. 81 (Q.L.)

⁴ Slattery, Brian, “Varieties of Aboriginal Rights”, 6 *CanadaWatch* 71 (1998)

⁵ Slattery, Brian, “Understanding Aboriginal Rights” (1987) 66 *The Canadian Bar Review* 727 at 732. (The extent to which the Crown “assumed sovereignty over native peoples and their territories” remains disputed in Canada.. See Asch, Michael and Macklem, Patrick, “Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*” (1991) 29 *Alta. L. Rev.* (No. 2) 498)

“Aboriginal rights” is a legal constitutional term under section 35 of the *Constitution Act, 1982*. Slattery noted that three legal systems may be available in considering the legal position of Canadian aboriginal peoples: international law; the domestic law of Canada; and the domestic law of the aboriginal peoples.⁶ These and other rights of Aboriginal peoples⁷ may also arise by virtue of Aboriginal peoples’ own laws, inherent rights of self government, or international law. At the same time, aboriginal rights in Canada, including treaty rights, are “sui generis”; that is, they consist of a unique body of law which the courts are still in the process of developing, specifically intended to forge links between the common law and aboriginal principles - that is to combine two distinct legal systems.⁸

3. The Existing Environmental Governance Paradigm

Canadian environmental law makers often assume that governance is exclusively distributed between the federal and provincial levels of government.⁹ 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.¹⁰

In environmental law practice, there is little recognition of the authority of aboriginal peoples to effect environmental laws. Provincial tribunals' decisions profoundly impact on aboriginal peoples’ environmental rights. However, they rarely recognize that they must consider those rights.¹¹ Tribunals must act consistently with the Crown’s duties to aboriginal peoples.¹² Justice

⁶ Slattery, "Understanding", footnote 5, at 735

⁷ The term “aboriginal peoples” will be used in this paper for purposes of consistency with Section 35 of the Constitution Act. However, the author customarily uses the term First Nations for most of her clients as that is their preference. Chang comments that (in the Hawaiian context), simply the use of terminology can impact on rights, as in the case of the term "indigenous persons" rather than "annexed nation". Chang, footnote 60, p. 865

⁸ Borrows, John and Rotman, Leonard I., “The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?” (1997) 36 Alta. L. Rev. (No. 1) 9 at text surrounding their footnote 98

⁹ McNeil traces this paradigm in part from colonialism and the doctrine of Parliamentary sovereignty, which, he points out "never exactly fit the Canadian context." As he states, there have always been constitutional limits on Parliamentary sovereignty in Canada, including the original power of the Crown (in Britain) to veto legislation, the federal division of powers, and more recently, the *Charter*. McNeil, "Constitutional Space", footnote 151 at p. 117; See also McNeil, "Rethinking", footnote 209, at para. 18 (Q.L.) - the Crown has lacked the "prerogative power to abrogate or derogate from property or other legal rights" since the Magna Carta

¹⁰ *R. v. Hydro Quebec* (1997), 151 D.L.R. (4th) 32 (S.C.C.)

¹¹ Borrows, John, “Living Between Water and Rocks: First Nations, Environmental Planning and Democracy”, 47 *University of Toronto Law Journal* 417 (1997) discussing Ontario’s *Planning Act* and its associated administrative tribunal, the Ontario Municipal Board in land use decision making. Borrows discussed the expression and sources of aboriginal laws as including environmental and land-use planning principles and precedents that remain accessible and relevant to environmental decision makers today. As he pointed out, much of our landscape of human use and occupation today is the result of and was enabled by pre-existing uses and occupations by aboriginal peoples, including the environmental principles of aboriginal peoples. However, in the Ontario example, there are no procedural mechanisms to ensure the inclusion of these principles in provincial planning decisions. Similarly, Ontario’s *Environmental Assessment Act* does not assure inclusion of aboriginal peoples’ environmental principles. Other Ontario examples include landfill siting under the Environmental Assessment Act and the Environmental Protection Act; waste water treatment plant siting under the Environmental Assessment Act and Ontario Water Resources Act; and the recent "Living Legacy" announcements by the Ontario Provincial government in March,

Iacobucci stated this principle in *National Energy Board*:

“It is obvious that the Board must exercise its decision-making function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including s. 35(1) of the Constitution Act, 1982. Therefore, it must first be determined whether this particular decision of the Board, made pursuant to s. 119.08(1) of the National Energy Board Act, could have the effect of interfering with the existing aboriginal rights of the appellants so as to amount to a prima facie infringement of s. 35(1).”¹³

Slattery provided a compelling vision of the constitutional basis of governance that includes aboriginal peoples as well as federal and provincial governments:

“The view proposed here is that whatever its historical origins, the modern Canadian Constitution owes its supremacy to the existence of a fundamental trust that molds and informs our governmental institutions. At the most abstract level, the trust embodies the fundamental doctrine that governments do not possess unlimited powers but are constrained by their intrinsic mandate, which is to govern for the welfare of the people, both those now living and those to be born.... In its distinctive Canadian incarnation, the doctrine holds that the governmental trust is owed not just to individual citizens but also to various communities represented in our confederal structure, to wit the Provinces, the First Nations, and Canada as a whole....the division of powers is not the only collective manifestation of the constitutional trust. I suggest that the Constitution incorporates a particular fiduciary relationship with the Province of Quebec... The third collective facet of the Canadian constitutional trust is the special fiduciary relationship between the Crown and Aboriginal peoples...grounded in historical practices that emerged from dealings between the British Crown and Aboriginal nations in eastern North America, especially during the formative period extending from the founding of colonies in the early 1600's to the fall of New France in 1760. By the end of this period, the principles underlying these practices had crystallized as part of the basic constitutional law governing the colonies and were reflected in the Royal Proclamation...”¹⁴

The widespread exclusion of aboriginal decision making from federal and provincial decisions that profoundly affect the environments in which aboriginal peoples live amounts to a fundamental omission of a constitutional right of participation.¹⁵

1999 which allocated a very large proportion of Ontario's crown lands to specified uses, but failed to take account of aboriginal peoples' section 35 rights

¹² Hutchins and Schulze, footnote 98, at text surrounding their footnote 85

¹³ *Quebec (A.G.) v. Canada (National Energy Board)* [1994] 1 S.C.R. 159; [1994] S.C.J. No. 13 at para. 40 (Q.L.)

¹⁴ Slattery, Brian, “First Nations and the Constitution,” footnote 32, at p. 270

¹⁵ See *Makivik*, footnote 174; 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. She included suggestions as to the value of “a thorough study of the notion of a “sovereign within a sovereign”, including the possibilities of “the distribution of “partial” sovereign powers, interplay between state and indigenous legislation, the location and nature of foreign relations powers, and the capacity to adopt international obligations and their application,” McIver, Jennifer, “Environmental Protection, Indigenous Rights and the Arctic

Furthermore, exclusion of aboriginal peoples from environmental decision making is unnecessary. Aboriginal laws need not be inconsistent with provincial and federal laws. Borrows has suggested that it is incumbent upon Canadian judges to

“Draw upon First Nations legal sources more often and more explicitly in order to assist them in deciding Aboriginal issues.”¹⁶

Borrows argues that First Nation environmental law “can be articulated so as to apply to disputes before Canadian courts.”¹⁷ A further benefit of Canadian courts’ understanding and application of aboriginal laws is the prevention of inappropriate or erroneous understanding of the Aboriginal rights in question.¹⁸

There is a recent trend to transfer of regulatory responsibility from federal and provincial governments to “private” entities, some of which are industry based.¹⁹ This adds another level of complexity. 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 (mainly provincial) regulatory regimes. Many 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 are now escaping such scrutiny.²⁰ Environmental assessments might have been an opportunity for input by, and reflection of the perspectives of aboriginal peoples.²¹

Council: Rock, Paper, Scissors on the Ice?” (1997) *Georgetown International Environmental Law Review* 147 at 167, (citing Jose Paulo Kastrop, *The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective*, 32 *Tex. Int’l. L.J.* 97, 111)

¹⁶ Borrows, footnote 59 “With/Without”, at p. 6 (QL version)

¹⁷ Borrows, footnote 59 “With/Without”, at p. 7 and at text surrounding his footnote 114 (QL)

¹⁸ Borrows, footnote 59 “With/Without”, at text surrounding his footnote 68 (QL)

¹⁹ Examples include the recent devolvement of authority to the Technical Safety Standards Authority, in Ontario, revisions to the *Aggregates Act* in Ontario and proposals for non-governmental control of stream management and stream fisheries currently being discussed in Ontario

²⁰ For example, under Ontario’s revised *Environmental Assessment Act*, 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. At the federal level, aboriginal peoples’ participation is affected by the *Harmonization Accord* (The Canada-Wide Accord on Environmental Harmonization) which anticipates that federal and provincial level governments will follow a new process for environmental assessments over which they both have jurisdiction. Aboriginal peoples were not parties to the *Accord* although the *Accord* does delay inclusion of the Yukon and Northwest Territories in the standards subagreement until “resource management and related environmental protection responsibilities are devolved to the Territorial governments or through intergovernmental agreements, which include appropriate roles for resource management institutions established pursuant to Aboriginal claims agreements.” In a recent federal context, a first nation brought application for judicial review where there was no environmental assessment of a port authority project pursuant to the *Canadian Environmental Assessment Act* or its predecessor, the Environmental Assessment and Review Process Guidelines Order. The applicant was unsuccessful in the judicial review application of the Minister of Environment’s decision refusing to order an environmental assessment, even though the port development would affect the First Nation’s traditional ability to rely on marine resources in the “ecologically sensitive” Fraser River estuary, in part because there were not yet regulations requiring port authorities to comply with CEAA: *Tsawwassen Indian Band v. Canada (Minister of Finance)* [1998] F.C.J. No. 370 (QL) at para. 36 & 134 per Richard J., F.C.T.D.

²¹ Such as occurred during the defunct Demand Supply Plan Hearing before the Ontario Environmental Assessment

The Supreme Court of Canada has yet to appreciate and articulate 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

“The government must ultimately be able to determine and direct the way in which these rights [of aboriginal peoples and of others] should interact.”²²

The implication in a statement such as this is that “the government” is a body, separate from the aboriginal peoples, for example, the “federal” or “provincial” government. I will argue in this paper that environmental aboriginal rights must include rights of governance as to those rights and that aboriginal peoples' governance must be included in our constitutional conception of “government” in Canada.²³ 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. Rather, the courts' involvement would more properly be that of arbitrating the rightful jurisdictional “spheres” of each level of government, including aboriginal peoples', as a body of last resort²⁴. From the Supreme Court's recent decision in *Reference re Secession of Quebec*, it is a small step to arrive at a constitutional conception of governance in Canada that allows for federal, provincial and aboriginal government. In that case, the Court said that,

“The principle of federalism recognizes the diversity of the component parts of 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.”²⁵

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. The Court said there,

“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.”²⁶

To that should also be added, “and for aboriginal peoples within Canada's territory, at an

Board and during the Class Environmental Assessment Timber Management Hearing before the same Board

²² *R. v. Nikal*, footnote 139 at para. 92

²³ Cheng, footnote 235, at para. 11, 12 cogently argues, like Brian Slattery, 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”

²⁴ See Cheng, footnote 235, at paras. 25, 26, 32

²⁵ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; [1998] S.C.J. No. 61 at para. 58 (Q.L.)

²⁶ *Reference re Secession*, footnote 25, at para. 66

aboriginal level.” The argument as to why aboriginal peoples must also see their level of government reflected in Canada’s constitutional understanding was best put by the Court itself:

“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.”²⁷

B. WHOSE RIGHTS ARE ENVIRONMENTAL ABORIGINAL AND ENVIRONMENTAL TREATY RIGHTS?

Is a potential claimant entitled to section 35 rights? Section 35 rights are held collectively, but individuals may claim protection in certain circumstances. One such circumstance is in defending a prosecution. Therefore, issues as to identification of claimants entitled to section 35 protection may arise both as to a group or as to an individual member.

Section 35 provides:

- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada.

This definition does not provide criteria to determine who are the "Indian, Inuit and Metis" peoples.²⁸

Aboriginal and treaty rights are collective rights. For example in *R v. Sundown*, Cory J. said,

“They [fishing rights] are rights held by a collective and are in keeping with the culture and existence of that group . . . [T]hey are the right of aboriginal people in common with other aboriginal people to participate in certain practices traditionally engaged in by particular aboriginal nations in particular territories . . . Any interest in the hunting cabin is a collective right that is derived from the treaty and the traditional expeditionary method of hunting. It belongs to the Band as a whole²⁹ . . .,”³⁰

²⁷ Reference re Secession, footnote 25, at para. 67

²⁸ McNeil, Kent, "The Constitutional Rights of The Aboriginal Peoples of Canada", (1982) 4 *Supreme Court Law Review* 255 at 261; See also *R. v. Powley* footnote 37

²⁹ *R. v. Sundown*, March 25, 1999, Supreme Court of Canada, File No. 26161 at paragraphs 35-6. See also Kapashesit & Klippenstein, footnote 66, at 959; and Slattery, “First Nations and the Constitution”, footnote 32 at 273, and Henderson, William B. and Ground, Derek T., “Survey of Aboriginal Land Claims”, (1994) 26 *Ottawa Law Review* 187 at text surrounding footnote 12

³⁰ Kapashesit and Klippenstein found support for the interpretation that section 35(1) rights are collective, or group rights, from the use of the term “aboriginal peoples” in section 35(1) as the interpretation most consistent with the international law understanding of the word “peoples”: Kapashesit and Klippenstein, footnote 66, at 955; For a discussion of the difficulties that American courts have in understanding collective rights in resource management decisions because of the western liberal individualistic tradition, see Harbison, footnote 232, at p. 370-1

In describing aboriginal title rights as "held communally," Lamer, C.J.C. said that,

"Aboriginal title is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community."³¹

Professor Slattery has explained that:

"From the legal perspective, Aboriginal nations are *constitutional entities* rather than ethnic or racial groups. Although a First Nation, like a Province, may happen to be composed mainly of people of a certain stock, its status does not stem from its racial or ethnic make-up but from its political autonomy."³²

A major purpose of collective rights is to ensure self-direction and the continued existence of the group itself.³³

Pentney provided some suggestions to determine the applicability of section 35 to particular groups as described by section 35(2). He showed that the Courts have interpreted the word "Indian" in section 91(24) of the *Constitution Act, 1867* to include the Inuit. Definitions of "Indian" in various versions of the *Indian Act* could be construed to have included Metis peoples.³⁴

Other sources include the *Royal Proclamation*, many other statutes, Royal Commissions, treaties, the status registration system under the *Indian Act*, reports from traders and colonial governors and others. Pentney noted that no one source is complete, but that there are various sources that enumerate some of the "original inhabitants of this continent." Furthermore, it would be inappropriate, even in determining membership in groups referred to as "Indians" in section 35, to restrict such claims to *Indian Act* definitions.

Similarly, Professor Slattery suggested that identification of aboriginal peoples as entitled to claim the protection of section 35 included:

"The parties asserting [aboriginal title] must constitute an organized group of native people.... The criterion also disqualifies collections of people that lack sufficient coherence, permanence, or self-identity to qualify as an organized group. But these requirements must be applied flexibly, in light of the varying levels of organization found in aboriginal societies . . . regard should be had to a variety of factors, such as (a) the

³¹ *R. v. Delgamuukw* at para. 115

³² Slattery, Brian, "First Nations and the Constitution", 71 *Canadian Bar Review* 261 at 273 (1992); for an additional discussion of "key differences" between "Indian tribes as sovereign governments" and other "communities of color", including the power to make and enforce their own laws, see Suagee, Dean B., "Turtle's War Party: An Indian Allegory on Environmental Justice", 9 *Journal of Environmental Law and Litigation*, 461 at 471 (1994)

³³ Pentney, footnote 223, p. 258

³⁴ Pentney suggested that the "class of persons circumscribed by section 91(24) *might* be identical to that defined by section 35(2) of the *Constitution Act, 1982*; at the very least the Indian and Inuit groups should be similarly defined under both provisions." Pentney, footnote 223, at 266

self-identity of its members, as shown in their actions and statements; (b) the culture and way of life of the group; (c) the existence of group norms or customs similar to those of other aboriginal peoples; and (d) the genetic composition of the group."³⁵

Pentney suggested one test to determine entitlement of a single member to section 35 protection is whether the member is an accepted member by the group. Pentney's suggestion that a court might need to look at several factors, including "ancestry, kinship, culture, community acceptance, lifestyle and self-identification" is probably the best approach.³⁶

In the recent provincial Court case of *R. v. Powley*,³⁷ Vaillancourt, J. found that the applicant accused were Metis persons. He found the relevant provisions of the *Game and Fish Act*³⁸ and its regulatory scheme to be unjustified in its infringement of their aboriginal right to hunt. The applicants had an Ontario Metis and Aboriginal Association card and claimed rights under the Robinson Huron Treaty. The parties in *Powley* called expert evidence that established the historical presence of "a distinct group of people known today as Metis" in the Sault Ste. Marie area. The judge reviewed difficulties of defining "Metis." For the case before him, the Judge defined "Metis" as "a person of Aboriginal ancestry, who self identifies as a Metis and who is accepted by the Metis community as a Metis."³⁹ The court found the appellants met this test.

Being aboriginal peoples entitled to the protection of section 35 rights, the next question will be whether the community can establish environmental rights under the Court's recent jurisprudence.

C. HOW ARE ENVIRONMENTAL ABORIGINAL RIGHTS ESTABLISHED?

Do environmental rights meet the tests as "aboriginal rights" protected by section 35? How would environmental aboriginal rights be established in court rooms? Environmental aboriginal rights should also inform policy-making, legislation, regulation and negotiation. Two of the tests laid out by the Supreme Court of Canada in determining whether section 35 protects rights include whether the rights claimed are "integral to the distinctive culture" and whether they are "existing."

The first consideration is whether the rights are "integral to the distinctive culture." Another question is how rights are proven. A further issue is whether the rights claimed are "existing" as required by the terms of section 35. The Supreme Court of Canada also requires the rights to be "continuing" as a precondition for their recognition today.

³⁵ Slattery, "Understanding", footnote 5, at 756

³⁶ Pentney, footnote 223, at 274: For example, in the case of the Metis peoples of Canada, one source is the Manitoba Metis described in the *Manitoba Act* for the purpose of "scrip" (whether they actually took grants or not); another source is an Alberta statute defining Metis (*The Metis Betterment Act*)

³⁷ *R. v. Powley* [1998] O.J. No. 5310 (Q.L.)

³⁸ *Game and Fish Act* R.S.O. 1990, C. G-1

³⁹ *Powley* footnote 37, at para. 47 (Q.L.)

1. “Integral to the Culture”

(i) The Test

A significant test now applicable to section 35 claims is the “integral to the distinctive culture” test created by Chief Justice Lamer in the *Van der Peet* trilogy⁴⁰ in 1996. He described it in *Gladstone* as follows:

“The second step in the *Van der Peet* test requires the Court to determine whether the practice, custom or tradition claimed to be an aboriginal right was, prior to contact with Europeans, an integral part of the distinctive aboriginal society of the particular aboriginal people in question.”⁴¹

In *Van der Peet* and the other 1996 decisions, Chief Justice Lamer described this “test” as a requirement for the proof of all aboriginal rights and furthermore that integral activities must have continuity with traditions, customs and practices that existed before contact with Europeans. He also said that rights must be “central” to the culture; and that they must be “distinctive”; that is, they cannot be “aspects of Aboriginal society that are true to every human society (e.g., eating to survive).”^{42, 43}

To be protected by section 35, the Court said that the aboriginal right must be more than “incidental” to the activities recognized by the Court. In *Van der Peet* and *Smokehouse*, trading fish was incidental to the “social and ceremonial activities,” whereas in *Gladstone*, the right recognized (trading fish) was “a central and defining feature of Heiltsuk society.”⁴⁴

⁴⁰ The Supreme Court released many aboriginal rights decisions in 1996, but here the reference to the *Van der Peet* trilogy is to *R. v. Van der Peet* [1996] 2 S.C.R. 507; *R. v. Gladstone* [1996] 2 S.C.R. 723; and *R. v. Smokehouse* [1996] 2 S.C.R. 672.

⁴¹ *Gladstone* footnote 40 at para. 25 (Q.L.)

⁴² As Kyle states, the *Sparrow* Court in 1990 did not originally set out this test as a requirement for defining aboriginal rights; rather it was part of the description of the *particular* right in question in *Sparrow*: that is the salmon fishery was an integral part of the Musqueam distinctive culture: Kyle, footnote 233, at page 301

⁴³ *Van der Peet*, per Lamer, C.J., footnote 40 at para. 56 & 63 (Q.L.)

⁴⁴ *Smokehouse*, footnote 40; para. 26: “Further, exchanges of fish at potlatches and at ceremonial occasions, because incidental to those events, do not have the independent significance necessary to constitute an aboriginal right. Potlatches and other ceremonial occasions may well be integral features of the Sheshaht and Opetchesaht cultures and, as such, recognized and affirmed as aboriginal rights under s. 35(1); however, the exchange of fish incidental to these occasions is not, itself, a sufficiently central, significant or defining feature of these societies so as to be recognized as an aboriginal right under s. 35(1). The exchange of fish, when taking place apart from the occasion to which such exchange was incidental, cannot, even if that occasion was an integral part of the aboriginal society in question, constitute an aboriginal right.” per Lamer, C.J.C.; Compare with *Gladstone*, footnote 40; para. 28, 29: “The appellants have provided clear evidence from which it can be inferred that, prior to contact, Heiltsuk society was, in significant part, based on such trade. The Heiltsuk were, both before and after contact, traders of herring spawn on kelp. Moreover, while to describe this activity as “commercial” prior to contact would be inaccurate given the link between the notion of commerce and the introduction of European culture, the extent and scope of the trading activities of the Heiltsuk support the claim that, for the purposes of s. 35(1) analysis, the Heiltsuk have demonstrated an aboriginal right to sell herring spawn on kelp to an extent best described as commercial.” Per Lamer, C.J.C.

(ii) Criticisms of the “Integral to the Culture” Test

The requirement to prove an aboriginal right as “integral to the distinctive culture” in the manner required by the Supreme Court presents an enormous burden of proof of potential environmental aboriginal rights.⁴⁵ Many aboriginal peoples conceive of the interrelatedness of human societies and the natural world as essential to all human societies, whether all human societies recognize it or not. Aboriginal peoples may be placed in the position of arguing that their conception is “distinctive” within Lamer’s definition. At the same time, they would have to argue that their approach is not “true to every human society” so as to defeat their claim that the right in question is “integral.” Professor McNeil criticized the Court’s description of the proof required:

"I have difficulty reconciling Lamer C.J.C.'s assertion that the practice, custom or tradition in question does not have to be distinct with his statement that it cannot be an aspect of the society which is true of every human society. Why should it be disqualified because it happens to be common to all rather than just many human societies, as long as it is a defining characteristic of the society in question? Lamer C.J.C. himself gave the example of fishing for food, which was acknowledged to be an Aboriginal right of the Musqueam Nation . . . I therefore think that one should disregard Lamer C.J.C.'s obiter dictum about aspects of an Aboriginal society that are true of every human society."⁴⁶

Other concerns arise from the Court’s “integral to the distinctive culture” test. Arguing that a particular approach is “integral” under the Supreme Court’s tests will skew the very appreciation and understanding of philosophies, practices, laws, and cultural and religious norms. Putting the Supreme Court’s jurisprudential lens over the “evidence” (the philosophies, teachings, stories, laws, practices of the aboriginal peoples) may affect or alter that heritage.⁴⁷ The majority Court has not recognized this problem. The Court assumes that there is such a thing as “integral” that they may discover upon sufficient evidence, without impacting on the thing perceived to be “integral.” Despite the Court’s acceptance of anthropological evidence, the majority Court seems impervious to the problems inherent in one culture defining another.⁴⁸ For decades, the discipline of cultural anthropology has recognized this quandary.⁴⁹ In *Van der Peet*, Madame

⁴⁵ For example, Barsh and Youngblood Henderson, footnote 156, at text following their note 15, discuss the difficulties with the requirement for “centrality” and with its proof. They note that the *Van der Peet* trilogy added “two hurdles to the Supreme Court’s analysis of “existing aboriginal rights” in *R. v. Sparrow*”, that is, that the “precolonial practice be shown to have been “central” to the First Nation’s culture (which arguably could result in a far smaller set of eligible practices) and be further “reconciled” with British law (implying that the right to engage in the practice may have been circumscribed or extinguished prior to 1982 by the mere existence of British settlement).” They support their argument with a very telling “fable” by overlaying the Supreme Court’s reasoning and requirements on a future “distinct society” clause added to the Constitution on behalf of Quebec

⁴⁶ McNeil, “Connection”, footnote 141 at text surrounding his footnote 29 (QL)

⁴⁷ An even more ominous view of the dangers of stereotypical notions of aboriginal peoples and the natural world is found in Huffman, James L., “An Exploratory Essay on Native Americans and Environmentalism”, 63 *University of Colorado Law Review* 901 (1992): “Unless Indian communities are to be preserved as museums in which people subsist but do not participate in American life, they must be given the opportunity to develop.” (At p. 920)

⁴⁸ See Borrows, “Frozen Rights”, footnote 152, sources listed at page 46, his footnote 56 as to the “difficulties encountered in articulating Aboriginal world-views before common law courts”; See also Bell, footnote 114 at p. 47; and see Barsh and Youngblood Henderson, footnote 156 at text surrounding their footnote 22 (Q.L.)

⁴⁹ See Bohannon, Laura, “Shakespeare in the bush”, (original essay 1966), in Conformity and Conflict: Readings in

Justice L'Heureux-Dube voiced her concern as to this problem in her dissenting judgement:

"Finally, an approach based on a dichotomy between Aboriginal and non-Aboriginal practices, traditions and customs literally amounts to defining Aboriginal culture and Aboriginal rights as that which is left over after features of non-Aboriginal cultures have been taken away."⁵⁰

Similarly, Bell said that

"... [T]he search [for central characteristics] also presumes that a living culture can be accurately described by a shopping list of static characteristics, a presumption abandoned by contemporary anthropological theory."⁵¹

Borrows noted another problem with the Court's approach in its insistence on proof of specific aboriginal and treaty rights.⁵² The Supreme Court of Canada refuses to develop a generally applicable body of law as to what are aboriginal rights. Barsh and Youngblood Henderson, also asked whether this "case-by-case approach to decision making qualifies as 'law'." They argue that the Court's approach has "jettisoned principles" and "guarantees the proliferation of disputes" because of the evidence-driven approach to resolving Crown-aboriginal disputes.⁵³ This approach makes it difficult to develop "a principled protective jurisprudence."⁵⁴ For a successful outcome in the Courts, aboriginal peoples should define the environmental aboriginal right in question as specifically and narrowly as possible, with clear delineation as to geographical territory and the scope of the activities they seek to protect. However, by following that course, aboriginal peoples are participating in a jurisprudential structure that is inherently limited and therefore limiting. This approach mandates either litigation or protracted negotiation in every case where aboriginal peoples seek to protect aboriginal and treaty rights. The more usual approach of the law and the role of the courts is to develop a predictable jurisprudence. Thus most may govern their affairs, privately or in interaction with governments, in a non-adversarial, non-litigious manner. The Court appears to be reluctant to set such principles. If it did so, then those principles might be capable of application by other orders of government, including aboriginal governments, in other fact situations.

Cultural Anthropology, James P. Spradley and David W. McCurdy, editors, 4th edition, 1980, pp 21-31 for a classic illustration of the problems of cross cultural story telling; See also Borrows and Rotman, "Sui Generis", footnote 8 at text surrounding their footnote 184, regarding the Supreme Court's major gaffe in *Jack and Charlie v. The Queen* (1985), 21 D.L.R. (4th) 641 (S.C.C.) in which the Court thought frozen deer meat would do as well as fresh in a spiritual ceremony; and See Tsosie, footnote 242, at p. 270: "The problems of cross-cultural interpretation and the attempt to define "traditional" indigenous beliefs raise a common issue: the tendency of non-Indians to glorify Native Americans as existing in "perfect harmony" with nature)the "Noble Savage" resurrected or, on the other hand, denounce them as being as rapacious to the environment as Europeans (the "Bloodthirsty Savage" resurrected). Both stereotypes are a form of mythology..." She concludes that there is a need for further research, "generated from within Native American groups, to define the unique traditions governing their relationship to their indigenous lands and resources"

⁵⁰ *R v. Van der Peet*, footnote 40, per L'Heureux-Dube, at para. 154

⁵¹ Bell, footnote 114, at p. 47.

⁵² Borrows, "Frozen Rights" footnote 152 at p. 50

⁵³ Barsh and Youngblood Henderson, footnote 156 at text surrounding their footnote 49 (Q.L.)

⁵⁴ Borrows, Frozen Rights, footnote 152 at p. 50

The difficulties with the “integral to the culture” test, including the problems of cross cultural definition, the “shopping” list approach, and the lack of a principled jurisprudence threaten to make the project of proving environmental aboriginal rights appear to be impossible. Nevertheless, based on an assumption that the Court would not establish a test that proved impossible to meet, I turn next to a discussion of how aboriginal peoples might undertake proof of integral environmental rights.

(iii) How to Prove “Integral to the Culture”?

For the moment, we are left with the Supreme Court’s requirement to prove that the aboriginal right was “integral” to the culture. How do aboriginal peoples prove such a thing in environmental aboriginal rights?

Justice Raymond Austin, Associate Justice of the Navajo Supreme Court outlined some aboriginal peoples’ approach to the environment:⁵⁵

“[H]umankind is a component part of the coherent whole . . . each integral part is connected through kinship . . . This kinship among all of creation defines roles, duties and responsibilities within the coherent whole. The earth is the mother of all life, including humans, because she nourishes, shelters, and clothes all of her children . . . that human beings are blessed with powers of language and reason . . . make humans the designated caretakers (our role) of all things in the universe. We thus have a duty to maintain a clean, safe, and habitable environment. We owe that duty to members of our own kind and all of relatives - the animals, birds, and every other species which has been created. We must, therefore, be accountable for all of our actions that affect the environment . . . When we pollute, our pollution permeates and harms all component parts of the coherent whole, including our own species, because everything is interrelated through universal kinship . . . we must ensure the well-being of the seventh generation after us. This means that we, the living, hold the future in our hands. If we deplete and pollute the species and resources, the consequences will burden our posterity. This is equivalent to irresponsibility, greed and selfishness . . . ”⁵⁶

The Navajo’s approach to environmental protection as described is highly distinguishable from the approach of the dominant western legal system to environmental protection.⁵⁷ All human beings do need clean and healthy air, clean and healthy food, and clean and healthy water, to name just a few environmental imperatives. However, our regulatory and legal system does not ensure their protection according to the principles described by Justice Austin. For example, our legal system rarely, if ever, incorporates future generations into the environmental decisions it makes. Our legal system rarely, if ever, conceives of a duty owed by human beings to other

⁵⁵ Austin, footnote 56 at pages x-xi; Note Huffman, footnote 47 as to the dangers of overgeneralization and stereotyping

⁵⁶ Austin, Justice Ramond D., “Native People of America and the Environment”, 14 Stanford Environmental Law Journal, ix-xi (1995)

⁵⁷ Chang, footnote 60

species; nor does it frame duties in terms of our caretaker role. Furthermore, our legal system does not impose a notion of accountability, to either future generations or to other species.⁵⁸

Aboriginal peoples might choose to argue that the "dominant" cultural understanding of the environment compared to their understanding of the natural world, and their place in it, are profoundly different. Perhaps this difference will be sufficiently distinctive to meet the difficult burden⁵⁹ to prove that an environmental aboriginal right is integral to the culture.

For example, Chang discussed the dominant Western view that the natural world is a "wasteland." He described an adversarial relationship between individuals and nature, manifested in a relationship of "separation and conquest" and an "economics of scarcity."⁶⁰ In contrast with that view the president of the National Congress of American Indians, Gaiashkibos, in a 1994 letter to the American President said:

"Although there are differences among the tribes, we have a common set of beliefs and traditions regarding our responsibilities as caretakers for the natural world. In our philosophy, we are part and inseparable from the natural world, linked together by the gifts of life and spirit . . ."⁶¹

Another example was provided by Valencia-Weber who described the distinguishing perspective of tribal common law as the

"cultural perspective underlying those customary beliefs. A world view focussed upon collective values, where nature is part of the community, presents different principles upon which to decide the recurring disputes among members. More than individual victims are considered when the restoration of harmony and balance is the objective."⁶²

John Borrows provides an example of a perspective that is distinctive. He described a specific example of the environmental principles of Anishinabe law. His example was a traditional story of resource use:

"If resources are not honoured and respected, and the link of our relationships not recognized, there is the eventual consequence that these resources will no longer usefully

⁵⁸ Morito, Bruce, "Value Analysis and Natural Resource Policy: Defining Conservation", paper presented October 16-18, 1998 to the Nawash Fisheries Conference, Georgian College, Owen Sound, Ontario; copy in possession of author

⁵⁹ I will endeavour to be as specific as possible as to the source of the description when describing aboriginal peoples' conceptions of the natural world. These examples are modified by the word "some" aboriginal peoples, since over generalization is not only inaccurate and a cause of stereotypes, but also apt to defeat environmental aboriginal rights claims. See Huffman, footnote 47 below; See also Borrows, John, "With or Without You: First Nations Law (In Canada)", 41 *McGill Law Journal* 629 at Notes 6 and 12

⁶⁰ Chang, Williamson B.C., "The 'Wasteland' in the Western Exploitation of 'Race' and the Environment", 63 *University of Colorado Law Review* 849 at 849 (1992). Contrast Austin, footnote 56.

⁶¹ Quoted in Grijalva, James M., "Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters", 71 *North Dakota Law Review* 433 at 433

⁶² Valencia-Weber, footnote 247, at p. 262

exist in our lands . . . as the ratio or rule of the case states: ‘everything is dependent upon everything else. The loss of even one inevitably affects the well-being of the rest. The delicate balance between us must be preserved in favour of the continuation of the resources . . . ’⁶³

Another principle that may be relevant to environmental aboriginal rights is the sacredness of place and the inability to replace land. One Hopi member in Arizona eloquently described this approach:

“Our life is our religion, and our religion is the land.”⁶⁴

Kapashesit and Klippenstein also found possibilities for understanding traditional management and customs of aboriginal peoples as “regulations” or “rules” or “norms.” Among the Koyukon Indians of Alaska and the Waswanipi Cree of northern Canada,⁶⁵ such rules require people to use all harvested. They ban leaving plants and animals unused or ban killing more than is needed or for fun. Other rules require rotation of hunting and food sources and require supervision of hunting territories.⁶⁶

Similarly, Long, writing of what he learned from the White Mountain Apache said that

"White Mountain Apaches maintain that their relationship to the land is integral to their being, and that changes in the land are linked to changes in Apache conduct . . . Apaches believe in respecting nature while using its bounty to live. Cultural principles encourage seeking a balance between immediate needs and future prosperity. Although these principles embody the need to conserve finite resources, they go beyond self-interest into a realm in which the natural world and the Apache people are unified in their identity . . . This construction of identity carries with it responsibilities to the land . . . In the Apache language, "land" and "mind" are the same word, "ni." The Apache perspective demands that we recognize the problems of the land and people are deeply interrelated. Not only do the Apache suffer from social ills in their struggle to maintain the proper relationship with the land, but the land suffers from the illnesses of the Apache people . . ."⁶⁷

The Supreme Court of Canada has encouraged the use of anthropological evidence to help with the delineation of an aboriginal right and in proving the right in question to be “an integral part of their distinctive culture.” Although the right must be continuing, as discussed below, the

⁶³ Borrows, footnote 11 (water and rocks) at p. 461

⁶⁴ Johnson, Trebbe, “Between Sacred Mountains: The Hopi and Navajo Concept of Place”, 9 *The Amicus Journal* Summer 1987, pp 18 - 23 at 22 quoting member Thomas Katenay.

⁶⁵ Kapashesit and Klippenstein, footnote 66

⁶⁶ Kapashesit, Randy and Klippenstein, Murray, “Aboriginal Group Rights and Environmental Protection”, 36 *McGill Law Journal* 925 (1991) at 931-934.

⁶⁷ Long, Jonathan W., "Restoring the Land and Mind," (1998) 18 *Journal of Land, Resources, and Environmental Law* 51-2 and 57

exercise of the right may continue in contemporary form.⁶⁸

In another context, the Supreme Court recognized that “the potential consequences for a community’s livelihood, health and other social matters from environmental change are integral to decision-making on matters affecting environmental quality . . . ”⁶⁹ The Court must also apply this idea in determining whether aboriginal peoples have proven that environmental protection matters are “integral” to their distinctive cultures.

2. “Existing”

The Court has also established tests with respect to the requirement expressed in section 35 that aboriginal and treaty rights are "existing."

(i) Unextinguished

Environmental aboriginal rights must be unextinguished. The Supreme court discussed the meaning of the term “existing” in section 35(1) in *R. v. Sparrow*:⁷⁰

“The word ‘existing’ makes it clear that the rights to which S. 35(1) applies are those that were in existence when the Constitution Act, 1982 came into effect. This means that extinguished rights are not revived by the Constitution Act, 1982 . . . an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982 . . . ‘existing’ means ‘unextinguished’ rather than exercisable at a certain time in history . . . Far from being defined according to the regulatory scheme in place in 1982, the phrase ‘existing aboriginal rights’ must be interpreted flexibly so as to permit their evolution over time.” (various pagings) . . . “That a right is controlled in great detail by the regulations does not mean that the right is thereby extinguished . . . The test of extinguishment to be adopted, in our opinion, is that the Sovereign’s intention must be clear and plain if it is to extinguish an aboriginal right.” (various pagings)

Any extinguishment of environmental aboriginal rights would have to have happened before 1982 when the Constitution entrenched "existing aboriginal and treaty rights."⁷¹

As the Court stated in *Van der Peet*,

⁶⁸ *R. v. Sparrow*, footnote 70 at page 11 (Q.L.)

⁶⁹ *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3; [1992] S.C.J. No. 1, per La Forest J., at p. 18 (Q.L.)

⁷⁰ *R. v. Sparrow* [1990] 1 S.C.R. 1075; [1990] S.C.J. No. 49 per Dickson C.J. and La Forest J.; See also *Gladstone* footnote 40 at para. 34.

⁷¹ McNeil, footnote 141, "Connection", at his footnote 100: "Aboriginal title could be extinguished by clear and plain federal legislation prior to the enactment of s. 35(1) of the Constitution Act, 1982, but since then that is no longer possible: see *Sparrow* (at 174-175); *VanderPeet* at 193 (para. 28)"

"It is this which distinguishes the Aboriginal rights recognized and affirmed in s.35(1) from the Aboriginal rights protected by the common law. Subsequent to s.35(1) Aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in Sparrow."⁷²

Accordingly, one of the requirements in an environmental aboriginal rights claim will be to prove that the right claimed is still existing; that is, to refute any allegation that the right was extinguished before 1982. On the other hand, the Crown may not deny that the right is existing, but may allege that they are justified in infringing that right, (as discussed further below) and so the aboriginal peoples concerned will be denied the full enjoyment of that right so long as the infringement continues and is justified.

(ii) Continuing

Another requirement of the Supreme Court as set out in *Van der Peet* is to show "continuity between pre-contact practices, customs and traditions of aboriginal societies."⁷³ In the case of aboriginal title, aboriginal peoples must show continuity from the date the Crown asserted sovereignty over the area in question. Aboriginal peoples may show continuity in the case of an aboriginal title claim by evidence of the "continuity of the relationship of an aboriginal community to its land over time."⁷⁴ For other aboriginal rights, including site-specific aboriginal rights, aboriginal peoples must prove continuity from pre-contact between the first Europeans and the aboriginal peoples.⁷⁵

Each claim requires a legal and factual enquiry about the date of contact in the case of most aboriginal rights claims, or the date of the Crown's assertion of sovereignty over the territory in the case of most aboriginal title claims.⁷⁶ Aboriginal peoples will also have the burden of proving continuity of their claimed right or activity or of use and occupation from that date.

In the case of a water quality protection claim, aboriginal peoples might show elements of stewardship over that river or lake system. They would have to prove their stewardship in continuing fashion since the date of first contact of those peoples with Europeans. Aboriginal peoples could make an aboriginal title claim to some lands, and a site-specific aboriginal rights claim to other nearby lands. It is then conceivable that they might prove continuity of their respective claims from dates separated by centuries. A land cession treaty could cover only some of the land, with retained site-specific aboriginal rights. The same aboriginal peoples may

⁷² *R. v. Van der Peet* [1996] 2 S.C.R. 507 at para. 28

⁷³ As quoted in *Delgamuukw* footnote 182 at para. 83

⁷⁴ *Delgamuukw* footnote 182 at para. 126

⁷⁵ *Delgamuukw* footnote 182 at para. 145

⁷⁶ La Forest, J. notes that sovereignty may not be the only relevant time from which to measure continuity. For example, where a relocation occurs post-sovereignty, he would not deny that there is continuity for the purposes of proof of an aboriginal title claim. As he put it, "continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area." *Delgamuukw*, footnote 182 per La Forest, J. at para. 197

never have ceded the other land. Interruptions to the "continuity" of the right will not necessarily cause the claim to fail. An example is where a government refused to recognize the rights in the intervening years.⁷⁷

In *Delgamuukw*, the Court acknowledged that proof of pre-contact activities might be very difficult. It suggested that aboriginal peoples might prove pre-contact activities by proof of "post contact practices" that "have their origins pre-contact." Similarly, proof of use and occupation may establish aboriginal title claims.⁷⁸

In the case of Metis peoples, the Court will determine the date for establishment of the right according to the right claimed. If the Metis peoples base the right claimed on aboriginal ancestry, it might be traced pre-contact.⁷⁹ However, in *Powley*, the provincial court found that "effective control" of the Sault Ste. Marie area only passed from "almost exclusive tribal dominion" (including Metis peoples) to European control in the 1815 to 1850 time frame. The Court required the claimants to prove continuity from that date.⁸⁰ Metis peoples must also prove their entitlement to the treaty and/or aboriginal rights claimed to the satisfaction of the Court. In *Powley*, the court denied the applicants the benefit of the Robinson treaty because the historical record showed that Robinson did not want Metis included in the treaty.⁸¹ This was despite the proof that the applicants were descended from a signatory to that Treaty. However, the provincial court judge did find that the applicants had proven an aboriginal right to hunt for food.⁸²

Proof of aboriginal environmental rights as "existing" will therefore entail proof that they have not been extinguished; that they were enjoyed at the time of contact or at the time of assertion of sovereignty, as the case may be, and that they have continued in some fashion over time. Lawyers and judges are not accustomed to dealing with proof of facts that occurred long ago. In order for aboriginal peoples to enjoy environmental aboriginal rights they may be forced to marshal proof of historical facts and they will be of critical importance in sustaining their rights before a court.

In any geographical area of concern, there may also be aboriginal rights known as aboriginal title, in addition to environmental aboriginal rights, and these I will discuss next.

D. ABORIGINAL TITLE RIGHTS AND ENVIRONMENTAL PROTECTION

Aboriginal title is a category of aboriginal rights. The Supreme Court has varied the tests for proof. The mechanisms to use an aboriginal title right and to enforce the right also differ from

⁷⁷ *Delgamuukw* footnote 182 at para. 123

⁷⁸ *Delgamuukw* footnote 182 at para. 152

⁷⁹ *R. v. Powley* footnote 37 at para. 87

⁸⁰ *R. v. Powley* footnote 37 at para. 90

⁸¹ Query whether this aspect of the decision contravenes the treaty interpretation rule that the perspective of the aboriginal peoples in question must be taken into account

⁸² *R. v. Powley* footnote 37 at para. 100 and 104-7

other aboriginal rights. Environmental aboriginal rights might be proven where there are no aboriginal title lands. Or they might be proven in addition to aboriginal title lands, or even as part of an aboriginal title claim. For example, a right to manage water quality might be proven as an aboriginal right where there have been customary water quality protection practices since time immemorial. Such a right might be proven regardless of whether there is also an aboriginal title claim. Another possibility is that aboriginal peoples might prove that they have traditionally managed and controlled water quality as part of their use and control of the land base and this fact might be used as part of an aboriginal title claim. If aboriginal peoples prove an environmental aboriginal right independently, then it would not matter for that right claim whether they also proved aboriginal title or not. If an environmental right is dependant upon or derived from aboriginal title, then aboriginal peoples may have to prove it as "reasonably incidental" to aboriginal title in order to obtain additional protection for the aboriginal right. For example, management of water quality might be proven as "reasonably incidental" to the use of the aboriginal title lands for sustenance, drinking water, ceremonial and other uses that are among the uses by which the aboriginal peoples prove aboriginal title⁸³. However, aboriginal peoples have flexibility of future use of aboriginal title land and this flexibility may make separate proof of the right as "reasonably incidental" to be unnecessary.

The Court has confirmed that

"Aboriginal title is simply one manifestation of a broader-based conception of aboriginal rights . . . [it] is a species of Aboriginal right . . . it is distinct from other Aboriginal rights . . ."⁸⁴

Aboriginal peoples may perceive division of their conception of aboriginal rights into "aboriginal rights not connected to aboriginal title" and "aboriginal title" claims as bizarre and artificial⁸⁵. Which attributes would they conceive of as so connected to land as to be part of an aboriginal title claim and which not? However, the distinction will remain valuable for those aboriginal peoples who are parties to land cession treaties. There they may have bundles of aboriginal rights, which although centrally connected to the land, are distinct from "aboriginal title" which they may have surrendered.⁸⁶ Aboriginal peoples with unsundered aboriginal title claims are unlikely to want to prove environmental aboriginal rights separately from their aboriginal title claim, other than for very limited purposes. One reason is the greater possible use of the land

⁸³ McNeil, footnote 141, "Connection", at text surrounding his footnote 36 (QL): "In the context of an Aboriginal title claim, relevant practices would encompass the activities and ceremonies the people conducted in relation to the land, including the use they made of the land for their physical needs. No doubt these practices would be intertwined with their customs and traditions. Taking into account their perspectives, their relationship with the land would likely be multi-dimensional, involving spiritual elements, responsibilities, and a sense of belonging, as well as physical sustenance"

⁸⁴ *Delgamuukw*, footnote 182 at para. 137

⁸⁵ McNeil doubts "that any Aboriginal people lacked the requisite degree of occupation and use for them to have Aboriginal title prior to contact." McNeil, footnote 141, "Connection", his footnote 77 and text surrounding his footnotes 37-47

⁸⁶ Slattery, "Understanding", footnote 5, p. 744; *Delgamuukw*, footnote 182, para. 159 per Lamer, C.J.C.: "I should also reiterate that if Aboriginals can show that they occupied a particular piece of land, but did not do so exclusively, it will always be possible to establish Aboriginal rights short of title. These rights will likely be intimately tied to the land and may permit a number of possible uses. However, unlike title, they are not a right to the land itself"

resulting from aboriginal title.⁸⁷ As Chief Justice Lamer stated in *Delgamuukw*,

“Aboriginal title is a right in land, and as such, is more than the right to engage in specific activities which may themselves be aboriginal rights. Rather, it confers the right to use the land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group’s aboriginal title . . . ”⁸⁸

As noted, the Court has asserted a limitation on the use of aboriginal title lands. The Court will not protect use that is inconsistent with the “future relationship to the lands.”⁸⁹ Aboriginal peoples must evaluate the uses they assert and plan on aboriginal title lands. They must ensure future compatibility with the uses on which they prove aboriginal title in the first place.⁹⁰ There is a danger of a paternalistic approach by the courts in making such determinations. Court decisions might limit future development of aboriginal title lands rather than aboriginal peoples’ own decisions. As Zellmer warned,

“The ‘noble savage’ ideal, foisted on tribes by 19th and early 20th century novelists and philosophers, notably, James Fenimore Cooper and Jean-Jacques Rousseau, and some modern day environmental interest groups, would have Indians reject economic development altogether if it did not comport with traditional lifeways ‘in harmony with nature’.”

She went on to advocate that

“any formulation of a standard for reviewing development proposals on Indian lands must eradicate the vestiges of colonialism and respect tribal sovereignty and self-determination.”⁹¹

Aboriginal peoples pursuing environmental aboriginal rights on aboriginal title lands should observe a balance between future decision-making autonomy and the ongoing continuity of the

⁸⁷ McNeil, footnote 141, "Connection", at text surrounding footnote 34 (QL): "If established, it [aboriginal title] should entitle the claimants to conduct any activities permitted by law on the land for as long as their title endures."

⁸⁸ *Delgamuukw*, footnote 182 at para. 111

⁸⁹ *Delgamuukw*, footnote 182 at para. 126-7 & at para. 131 (page 246): "For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims Aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g. by strip mining it)."; see also *Delgamuukw*, footnote 182 at para. 111: "However that range of uses [to use the land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures] is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's Aboriginal title"

⁹⁰ *Delgamuukw*, footnote 182 at para. 127-8

⁹¹ Zellmer, footnote 194, at p. 420-1; See also Huffman, footnote 47; and as to concerns about this statement in *Delgamuukw*, Bell, footnote 114 at p. 60 and see McNeil, Kent, "Defining Aboriginal Rights in the 90's: Has the Supreme Court Finally Got it Right?", Twelfth Annual Robarts Lecture, March 25, 1998, York University, Toronto

uses and occupation that they used to prove their aboriginal title claim.

Aboriginal peoples may prefer to establish aboriginal title claims than aboriginal rights claims for another reason. This is because it is not explicitly necessary to prove that the land was “integral” to the culture in an aboriginal title claim. The Court assumes that the land was “integral” based on proof of the title claim. Proof of occupation before the Crown asserted sovereignty, continuing by way of a “substantial connection” to the land since then, provides sufficient evidence that the land was “integral.”⁹² Proof of aboriginal title does not rest on proof of the same nature of occupation throughout the time since assertion of sovereignty. Instead, the Court requires that the occupation throughout be consistent with future use by the community.⁹³

The Supreme Court has stated that “aboriginal rights recognized and affirmed by section 35(1) fall along a spectrum with respect to their degree of connection to the land.” Environmental aboriginal rights may also fall along such a spectrum. At one end of the spectrum are aboriginal rights not so connected to the land as to support a claim to aboriginal title. In the middle are activities, which, of necessity, take place on land and are intimately related to a particular piece of land. These activities might not be enough to establish aboriginal title, but there might be a site-specific aboriginal right to engage in that particular activity. At the other end of the spectrum is aboriginal title itself.⁹⁴ However, for any particular environmental aboriginal rights claim, aboriginal peoples will have to examine the differences in the Court’s requirements for proof as between aboriginal title claims and other aboriginal rights claims. One example is the date from which continuity of the exercise of the right must be proven. As the courts consider other aboriginal title claims in the future, additional variances in the requirements as to proof of aboriginal title claims may arise.

The next consideration is whether the aboriginal peoples can claim section 35 protection of environmental rights as treaty rights.

E. HOW CAN ENVIRONMENTAL TREATY RIGHTS BE EXERCISED?

The other main source of environmental rights under section 35 is by way of environmental treaty rights. An environmental right may be a treaty right. This would be a question of interpretation of treaty terms. Treaty interpretation principles include consideration of aboriginal peoples' understanding of the treaties into which they entered. Another possibility is that an environmental right is “reasonably incidental” to an expressed treaty right. An environmental right may be unceded and therefore outside of the treaty terms. In the latter case, proof of the right would be by way of aboriginal rights, rather than as treaty rights. However, such a right may coexist in a territory affected by treaty terms.

⁹² *Delgamuukw*, footnote 182 para. 151

⁹³ *Delgamuukw*, footnote 182 para. 151

⁹⁴ *Delgamuukw* footnote 182 para. 158

(i) Interpretation of Treaties

There are particular interpretation principles recognized by section 35 and by the Courts for Treaty rights. One fundamental proposition is that:

“Treaties and statutes relating to Indians should be liberally construed and doubtful expression resolved in favour of the Indians.”⁹⁵

After reviewing the above principle, Chief Justice Dickson, in *Sparrow* said that,

“The government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.”⁹⁶

Youngblood Henderson listed some of the principles that govern a court’s interpretation of treaties. They include a requirement that the interpretation maintain the honour and integrity of the Crown and the Aboriginal nations; that the Courts assume that both parties fully intended to comply with each promise, obligation or right contained in the treaty; that they be given a large, liberal and generous interpretation in favour of aboriginal peoples; and that any limitations that restrict their rights must be narrowly construed.⁹⁷

Environmental treaty rights claims must be framed in the context of these interpretation principles.⁹⁸ An example of a Treaty in which aboriginal peoples might claim environmental treaty rights is Treaty 9 in Ontario. In that Treaty, the Crown expressly agreed

“with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”⁹⁹

⁹⁵ *Nowegijick v. The Queen* [1983] 1 S.C.R. 29 at 36

⁹⁶ *R. v. Sparrow*, footnote 70

⁹⁷ Youngblood Henderson, James, (1997) 36 Alta. L. Rev. (No. 1) 46 at text surrounding his footnotes 8 - 15

⁹⁸ At least one court doubted that these treaty interpretation principles apply to “modern treaties”, in *Eastmain Band v. Canada* [1992] F.C.J. No. 1041 (F.C.A.) Per Decary J. at text surrounding his footnote 2: “We must be careful, in construing a document as modern as the 1975 Agreement, that we do not blindly follow the principles laid down by the Supreme Court in analyzing treaties entered into in an earlier era. The principle that ambiguities must be construed in favour of the Aboriginals rests, in the case of historic treaties, on the unique vulnerability of the aboriginal parties, who were not educated and were compelled to negotiate with parties who had a superior bargaining position, in languages and with legal concepts which were foreign to them and without adequate representation.” However, Hutchins and Schulze provide a rebuttal to this proposition: see Hutchins, Peter W. and Schulze, David, “When do Fiduciary Obligations to Aboriginal People Arise?” (1995) 59 Saskatchewan Law Review 97 at text surrounding their footnote 118 (QL)

⁹⁹ *The James Bay Treaty, Treaty No. 9 (Made in 1905 and 1906 and Adhesions Made in 1929 and 1930)*

Professor Macklem noted that Treaty 9 “did not define the nature of hunting, trapping or fishing rights.” It is unclear as to whether aboriginal peoples simply retained those rights, or whether the Treaty created them. If simply retained, he suggests that those rights continue as unceded incidents of aboriginal title.¹⁰⁰ The result is that there may be aboriginal rights proven in the subject lands, apart from the rights derived from the terms of Treaty 9. Pentney suggested that on lands ceded by treaty “some incidents of the title” may remain “fastened to the land.” He said the “issue of aboriginal title is not entirely foreclosed by the existence of a treaty.” An example is where the treaty itself preserved some incidents of aboriginal title on the ceded land.¹⁰¹

Accordingly, aboriginal peoples might claim environmental aboriginal rights even on lands covered by a treaty. For example, aboriginal rights of habitat protection or for water quality protection could be proven under the above-noted tests for aboriginal rights, even though there is a treaty in place.

The terms of the Treaty itself may provide for environmental treaty rights that require recognition and protection. In *Saanichton Marina*¹⁰², the Court protected “the whole of the Bay” so that it could continue to be enjoyed as a crab fishery. The provision of the Treaty on which the Court based its finding was a term providing that “we are at liberty. . . to carry on our fisheries as formerly.” The Court noted the importance of the Bay as habitat for all kinds of sealife. A proposed marina would have reduced the size of the fishery, derogating from the rights of the Band to enjoy a wide variety of fish, shellfish, sea mammals, and waterfowl that the Court found were important in the economy and diet of the Saanich people.

Another example was that of *Cree Regional Authority v. Canada (Federal Administrator)*.¹⁰³ There the federal court held that the aboriginal peoples were entitled to federal environmental impact assessment procedures provided under the *James Bay and Northern Quebec Agreement* due to the protection of section 35(1). In part this was because the federal government owed a fiduciary duty that arose when the applicant aboriginal peoples surrendered their interests in the subject lands and other rights to the federal government.

The recent case of *R. v. Sundown*¹⁰⁴ is further support for the argument that treaty rights are likely to include environmental rights in specific circumstances. The activity protected was the right to build a log cabin in a park as “reasonably incidental” to the right to hunt under *Treaty No. 6*. The Court reiterated the importance of specific analysis of the Treaty rights in question. It also stressed the importance of evidence of the traditional activities protected by the treaty and

¹⁰⁰ Macklem, Patrick, “The Impact of Treaty 9 on Natural Resource Development in Northern Ontario,” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, Michael Asch, editor. (1997) Vancouver: UBC Press, at p. 110

¹⁰¹ Pentney, footnote 223, at 249; Slattery, “Understanding”, footnote 5 at p. 744

¹⁰² *Tsawout Indian Band v. Saanichton Marina Ltd.* [1989] B.C.J. No. 563 (1989) 57 D.L.R. (4th) 161 (B.C.C.A.) *Per Hinkson, J.A.*; at trial *Saanichton Marina Ltd. v. Tsawout Indian Band* [1987] B.C.J. No. 1892 (Q.L.)

¹⁰³ *Cree Regional Authority v. Canada (Federal Administrator)* [1991] F.C.J. No. 904 (Q.L.); also reported at 84 D.L.R. (4th) 51 (F.C.T.D.) *Per Rouleau J.*

¹⁰⁴ *R. v. Sundown*, footnote 29

the circumstances surrounding the execution of the Treaty.¹⁰⁵ However, the Court's analysis shows that it will require the right in question, such as the right to hunt, to be meaningful and available for exercise.¹⁰⁶

Sundown may indicate that the Court realizes some of the difficulties arising from its *Van der Peet* trilogy. It may be restoring some balance to the test for proof of a right by giving more weight to rights proven to be "reasonably incidental" to other treaty and aboriginal rights. One would hope that the reasoning as to "reasonably incidental" is not restricted to treaty rights, while proof of centrality is reserved for aboriginal rights.¹⁰⁷ *Sundown* showed that some principles under s. 35 are the same, regardless of whether the right is aboriginal or treaty based although issues of proof and interpretation to arrive at the definition of the right may differ. One example is its discussion of such rights as collective.¹⁰⁸ On the other hand, the Court in *Sundown* repeatedly stressed the specificity of both aboriginal and treaty rights:

“The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.’ [Emphasis added]”¹⁰⁹ [emphasis by Cory J.]

Despite other recent case law of the Supreme Court, the Court reiterated its rejection of a “frozen in time” approach. It approved Professor Slattery’s statement that section 35 rights are “affirmed in contemporary form rather than in their primeval simplicity and vigour.”¹¹⁰ To be meaningful, affirmation of section 35 rights in contemporary form must extend to protection of the environmental conditions necessary to exercise the right in question. The rights to hunt, trap and fish would be meaningless if timber clear cutting or mines' toxic emissions destroy habitat or if the fish and game are too dangerous to health to consume for food because of toxicity. Protection of water quality, protection of fish and game habitat and protection of game food sources could all be considered “reasonably incidental” to the treaty rights to hunt, trap and fish. However, the *Sundown* decision shows that aboriginal peoples must still prove the “traditional” manner of exercising that “reasonably incidental” right. They must prove the traditional manner to the court’s satisfaction, albeit in contemporary form. If aboriginal peoples also asserted rights of governance as to those environmental issues (water quality protection, habitat protection and others), they would likely need evidence to show that they have historically taken steps to protect

¹⁰⁵ *R. v. Sundown*, footnote 29, para. 25

¹⁰⁶ See also Borrows, “With/Without”, footnote 59, text around his footnote 70 (QL), including his discussion of *Saanichton Marine v. Tsawout Indian Band* (1989) 57 D.L.R. (4th) 161. For additional discussion of *Saanichton Marine*, see Macklem, “Impact of Treaty 9”, footnote 99 at p. 118, and *Sundown*, footnote 29

¹⁰⁷ For additional arguments as to the problems with the requirement of centrality, see Barsh and Youngblood Henderson, footnote 156, text following footnote 24 (QL). These authors already detected a retreat from proof of "centrality" in the *Cote* and *Adams* cases

¹⁰⁸ *Sundown*, see footnote 29 and text accompanying it

¹⁰⁹ *Sundown*, see footnote 29, paragraph 25, quoting *R. v. Van der Peet* [1996] 2 S.C.R. 507 per Lamer C.J.. Cory also referenced Dickson C.J. and La Forest J. In *R. v. Sparrow*[1990] 1 S.C.R. 1075 at p. 1111 on this point

¹¹⁰ *Sundown*, footnote 29, para. 32; Although a Treaty rights case, the Court has stated that the same principles will usually apply to both Treaty rights and Aboriginal rights protected under s. 35(1), although I would note that this approach that has its own problems, in particular in extending the tests for infringement to Treaty rights

water quality, fish and game habitat and other aspects of their ecosystem.¹¹¹ What those particular steps had to be in the past might have evolved over time. Injunctions and rules applied by aboriginal peoples to prevent waste and disrespect might have evolved over time. Their contemporary form may be to prevent modern day large scale pollution and habitat destruction. Professor Macklem, in discussing Treaty 9, made this argument:

“Hunting, trapping and fishing rights in treaty 9 thus represent an attempt to protect Aboriginal economic, social and commercial practices from the side-effects of railway construction and, more generally, non-Aboriginal economic development. As such, they ought to be viewed as not only conferring the right to engage in the activity listed by the terms of the treaty but also including the right to expect that such activity will continue to be successful, measured by reference to the fruits of past practice.”¹¹²

(ii) Infringement of Treaty Rights

Rotman argues that the Court ought not to extend the *Sparrow* infringement test to justify infringement of treaty rights.¹¹³ In viewing the lower courts' application of the *Sparrow* infringement test to treaty rights he found that the lower Courts have failed to consider the differences between the origins of aboriginal rights and treaty rights. They have failed to consider whether the infringement standard ought to be the same. Although Cory J. did expressly consider their differences in "both origin and structure," in *Badger*, he did not consider these differences in terms of the infringement standard. He based the application of the same standard to both on the statement that,

"Although treaty rights are the result of mutual agreement, they, like Aboriginal rights, may be unilaterally abridged . . . It follows that limitations on treaty rights, like breaches of Aboriginal rights, should be justified."¹¹⁴

Following *Badger*, in *Cote*, the judgment of Chief Justice Lamer was more definitive in saying that

"As a general rule, . . . characterization of the right alternatively as an Aboriginal right or

¹¹¹ Macklem queried whether a right to fish includes “some control over the use to which water can be put”. “Impact of Treaty 9”, footnote 99 at p. 111; and see p. 117 where he discusses the view of Commissioner Scott of the Department of Indian Affairs in 1920 to the effect that in construing the treaties, the courts would imply an “undertaking by the Crown to conserve for the use of the Indians the right to take for domestic, agricultural purposes all such water as may be necessary, both now and in the future development of the reserve from the waters with either traverse or are the boundaries of reserve”

¹¹² Macklem, “Impact of Treaty 9”, footnote 99 at p. 117

¹¹³ Rotman, Leonard I., “Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test,” (1997) 36 *Alberta Law Review* 149 at text surrounding his note 4 (Q.L.)

¹¹⁴ Rotman, “Defining Parameters”, footnote 113, text surrounding footnote 27, quoting *Badger* [1996] 2 C.N.L.R. 77 (S.C.C.) at 105-106 (paras. 77, 78). As to extinguishment, Bell stated that the Court’s 1996/1997 jurisprudence suggests that “characterization of a right as Aboriginal or Treaty is legally insignificant in identifying the legal test for extinguishment of those rights.” Bell, Catherine, “New Directions in the Law of Aboriginal Rights”, 77 *Canadian Bar Review* 36 at 34 (1998)

as a treaty right will not be of any consequence once the existence of the right is established, as the Sparrow test for infringement and justification applies with the same force and the same considerations to both species of constitutional rights."¹¹⁵

Rotman pointed out that the parties negotiated treaties with mutual consideration. Each party derived something of value. Treaty interpretation principles have required "a large liberal and generous interpretation in favour of the aboriginal peoples, . . . to be construed as the Aboriginal signatories understood them . . ." ¹¹⁶ He argues that,

"As negotiated rights, treaty rights should not be susceptible to being arbitrarily or unilaterally derogated from by the Crown . . . Even in situations where treaty rights are identical to existing Aboriginal rights, the solemn nature of the treaties and the mutuality with which they were negotiated and signed militates against enabling the Crown to limit treaty rights without the consent of the Aboriginal peoples affected."¹¹⁷

Rotman further supports this argument on the honour of the Crown, the Crown's fiduciary duty, and the representations made to the aboriginal peoples who entered treaties.¹¹⁸ Rotman suggested that a more appropriate model for infringement of treaty rights is found in the *Sioui* case, namely that the Crown obtain the consent of the aboriginal peoples concerned.¹¹⁹

The Courts should be extremely reluctant to allow infringement of treaty rights. As Youngblood Henderson, put it, "Aboriginal nations entered into the treaties as the keepers of a certain place. . ." ¹²⁰ Federal and provincial governments and their constituents have benefitted from acquiring the lands and resources ceded by aboriginal peoples, often for decades and centuries since many Treaties were entered. It would be dishonourable indeed to allow unilateral federal or provincial governments to infringe those Treaties and thus prevent aboriginal peoples from continuing to be able to act as "keepers of their places" particularly where interpretation of the Treaty shows that both the Crown and the aboriginal peoples intended the latter to continue rights of environmental protection.

Given environmental aboriginal or treaty rights, what can be done with these rights? How can aboriginal peoples assert or protect those rights?

¹¹⁵ *R. v. Cote* [1996] 3 S.C.R. 139; at para. 33

¹¹⁶ Rotman, "Defining Parameters", text surrounding his footnote 45 (Q.L.) See also Macklem, "Impact of Treaty 9", footnote 99 at pp 98-100

¹¹⁷ Rotman, "Defining Parameters", footnote 113 text following his footnote 64 (Q.L.)

¹¹⁸ Rotman, "Defining Parameters", footnote 113 text surrounding his footnotes 65-70 (Q.L.)

¹¹⁹ Rotman, "Defining Parameters", footnote 113 in "Conclusion" (Q.L.); (although I note that the discussion as to the requirement of consent in the *Sioui* case was a requirement in the case of *extinguishment* of a treaty right. *R. v. Sioui* [1990] 1 S.C.C. 1025 per Lamer J.)

¹²⁰ Youngblood Henderson, "Interpreting", footnote 97, at text surrounding his footnote 118

F. HOW CAN ENVIRONMENTAL RIGHTS BE PROTECTED AND ASSERTED?

Given a position of aboriginal peoples that they have environmental aboriginal or treaty rights, how can aboriginal peoples assert or protect those rights? Since they have constitutional protection, the rights must mean something and it must make a difference to have that protection. Aboriginal peoples must have a means of asserting these rights. They must also respond to changing circumstances and to the evolution of the culture that they belong to. There must be a mechanism for decision making about the environmental rights by the collective they belong to. A major concern will be the resistance of infringement of those rights by the Crown. Exercising environmental governance, requiring Crown protection, and joint jurisdiction are among the approaches aboriginal peoples could employ.

1. How Environmental Aboriginal and Treaty Rights Could be Asserted

There are two major means by which aboriginal peoples may assert environmental aboriginal rights as positive rights¹²¹. One is by proof of the specific right (activity, law etc.) itself as an aboriginal right. This would be based upon the Court's tests for proof of the existence of an aboriginal right, as discussed above. For example, it is conceivable that a group of aboriginal peoples could prove an aboriginal right to control stream quality. Alternatively, aboriginal peoples may assert such a right by way of proof of that activity as "reasonably incidental" to the exercise of another right, such as the right to hunt or fish. They could argue that control of stream quality is reasonably incidental to an existing aboriginal or treaty right to fish in particular circumstances. The Court will require proof of each such asserted right. It does not appear that aboriginal peoples can make a generalized assertion that all aboriginal peoples with a right to fish would also have a right to control stream quality. Aboriginal peoples would have to prove that the right to control stream quality was reasonably incidental to the right to fish in each case.¹²²

Cory J. defined "reasonably incidental" as follows:

"That which is reasonably incidental is something which allows the claimant to exercise the right in the manner that his or her ancestors did, taking into account acceptable modern developments or unforeseen alterations in the right. The question is whether the activity asserted as being reasonably incidental is in fact incidental to an actually practised treaty right to hunt . . . Its focus is not upon the abstract question of whether a particular activity is "essential" in order for hunting to be possible but rather upon the concrete question of whether the activity was understood in the past and is understood today as significantly connected to hunting. Incidental activities are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked."¹²³

¹²¹ *R. v. Sundown*, footnote 29

¹²² *Sundown*, footnote 29 at para. 30

¹²³ *Sundown*, footnote 29, at para. 30

In proof of a right as “reasonably incidental” to another aboriginal right, aboriginal peoples must bring evidence that proves the “significant connection” as understood in the past and as understood today. To prove a right to control stream quality as “reasonably incidental” to an aboriginal or treaty right to fish, it would be necessary to bring proof of this understanding, past and present. It would not be sufficient to argue the connection as a matter of “logic” or science alone. Aboriginal peoples may prove this understanding by evidence that they have an understanding of a profound interconnectedness between the fish and its habitat. The language of the Court suggests that the evidence might have to go even one step further. For example they may have to prove an understanding of “stream quality” and a traditional notion of the possibility of controlling or influencing stream quality to ensure good fish habitat. The existence of explicit or customary rules or unspoken customs about what may or may not be disposed of or placed in the stream might prove this understanding; so also may the stories of elders containing precepts about how humans must interact with the stream or its inhabitants.¹²⁴

The language of the Court in *Sundown* stressed that existing rights are to be “interpreted flexibly to permit their evolution over time.”¹²⁵ The Court also accepted the necessity to allow for “modern developments or unforeseen alterations” in the right. Courts should accept proven “past” understandings as applicable in modern contexts which may never have been anticipated by the aboriginal peoples. Aboriginal peoples' past understandings as to water quality may not have included large scale industrial pollution. A contemporary understanding and assertion of the right to control water quality as reasonably incidental to a right to fish should be considered an appropriate contemporary response to the massive new threat presented by such industrial activities. Such large scale impacts could include high levels of mercury, arsenic and PCB's in fish and other wildlife; loss of fish and wildlife aquatic habitat; and severe disruption of food chains. However, proof of traditional stewardship principles should provide a basis for an aboriginal right of stewardship that includes a right to respond to and to control these impacts.

2. Development and Evolution of Environmental Aboriginal and Treaty Rights

Borrows criticized the Supreme Court's “integral to the distinctive culture” test in proof of an aboriginal right as a “retrospective” definition of “aboriginal”:

“It is about what was, ‘once upon a time’, central to the survival of a community, not necessarily about what is central, significant and distinctive to the survival of these communities today.”

He expresses the important concern that

“This test has the potential to reinforce stereotypes about Indians. In order to claim an Aboriginal right, these determinations of Aboriginal will become more important than what it means to be Aboriginal today. This notion of what was integral to Aboriginal

¹²⁴ Borrows, “With/Without”, footnote 59, at text surrounding his footnotes 89-95 (QL) as to the ability to derive the precepts by which the aboriginal peoples concerned are directed to abide from traditional stories of elders

¹²⁵ *Sundown*, footnote 29, para. 32

societies is steeped in questionable North American cultural images.”¹²⁶

The Court requires aboriginal peoples to search for and prove their past understandings in order to prove that section 35 applies to present aboriginal rights. The Court has made repeated statements, even as recently as *Sundown*, that aboriginal rights are not “frozen.” However, this is contradicted by the language of many of their other decisions, the tests applied to proof of those rights, and the results in specific decisions. Borrows eloquently argued this point in a review of the Supreme Court’s 1996 jurisprudence. He said,

“However in further searching for the intention behind the entrenchment of Aboriginal rights, the Court applied disturbing stereotypes of Aboriginal culture to frame the reconciliation it suggested. It defined Aboriginal practices ‘prior to contact with Europeans’ as the legally relevant date for reconciliation . . . In so ruling, the court placed those activities that developed solely as a result of European culture outside of the protection of the Canadian Constitution . . . This decision relegated Aboriginal peoples to the backwaters of social development, deprived them of protection for practices that grew through inter-cultural exchange, and minimized the impact of Aboriginal rights on non-Aboriginal people.”¹²⁷

The fundamental importance of a culture’s ability to change and evolve was stated by Valencia-Weber:

“For people whose principle beliefs and conduct were attuned to nature, the environment, and seasonal factors, adaptability was key to physical survival and cultural continuity. The introduction of European nations and their political power, technology, animal and plant life also challenged the tribal nations’ ability to conserve, yet evolve with the new. The resistance to the European powers’ domination was accompanied by adoption, adaptation, and to ultimately, appropriation of some technology, life forms, and governmental concepts. The three “A’s” of adoption, adaptation, and appropriation provided the process used by indigenous peoples to resolve the tension between conservation and innovation.”¹²⁸

Professor McNeil also stated,

"Denying Aboriginal peoples the opportunity to change their land uses in response to the massive impact European colonization had on their ways of life would have condemned

¹²⁶ Borrows, *Frozen Rights*...footnote 152, at p. 45

¹²⁷ Borrows, John, *Frozen Rights*... footnote 152 at p. 45; reviewing *R. v. Van der Peet*; *R v. Gladstone*; *R. v. N.T.C. Smokehouse* and *R. v. Pamajewon*, all of the Supreme Court’s 1996 term; see also Slattery, "Understandings", footnote 5, at p. 746 who in this 1987 article warned against such an approach: "Some courts, however, have expressed the view that a native group is permanently limited in its use of aboriginal lands to customary practices followed at a distant historical period, such as the time the Crown first acquired sovereignty. On this supposition, aboriginal title is like an historical diorama in a museum.... Any rule that would hold them in permanent bondage to ancient practices must be regarded with scepticism"

¹²⁸ Valencia-Weber, footnote 247, at p. 256-7

their societies to extinction."¹²⁹

As Borrows suggested, aboriginal peoples should continue law making, in either traditional or contemporary forms, or both. This is consistent with a supportable, resilient legal tradition that aboriginal peoples may continue to develop and apply within their own traditions. Where necessary, Canadian common law courts should accept, recognize and apply those traditional and contemporary laws. In *Van der Peet*, Madam Justice McLachlin recognized, although in dissent, that aboriginal rights are based on the common law's recognition of aboriginal peoples' ancestral laws and customs.¹³⁰ One would hope that the majority Court will come to recognize the essential importance of the ability of aboriginal peoples to continue their cultural evolution and change, as well as the importance of protecting their s. 35 recognized aboriginal rights in contemporary form. If the Court does not follow this approach, one wonders about the applicability of one criticism of the U.S. Supreme Court to Canada's Supreme Court:

“the conquest of American Indian nations continues, waged by the Supreme Court of the United States.”¹³¹

3. Environmental Governance

One suggestion as to the way forward comes from Barsh and Youngblood Henderson, by way of the 'doctrine of continuity'. This doctrine states that the common law receives the "lex loci" of a territory at the moment of conquest or annexation to the Crown and therefore local law remains "intact unless and until clearly altered by the Crown in its prerogative jurisdiction, or today by Parliament."¹³²

Furthermore, there are several other important reasons for aboriginal peoples to engage in positive environmental law making and protection. Aboriginal peoples may also find the authority to continue to exercise governance decisions as to environmental aboriginal rights in a right of self-government.¹³³ Slattery described some features of the Aboriginal right of self-government. Self-government is protected and recognized by section 35; not created by section

¹²⁹ McNeil, footnote 141, "Connection" at text surrounding his footnote 84 (QL); Pentney also noted, "this right,[aboriginal title], like all other rights, has the capacity to evolve over time. The latter approach is appropriate to s. 35, because the constitutional guarantee of these rights is to be interpreted in a forward-looking manner which ensures their continued vitality." Pentney, footnote 223, at p. 238

¹³⁰ *Van der Peet*, footnote 40, per McLachlin, J., at para. 263(Q.L.)

¹³¹ Suagee, "Turtle's.", footnote 32, at p. 493, quoting Professor Joseph William Singer. For example, see the criticism by Barsh and Youngblood Henderson, footnote 156, at text following their footnote 19

¹³² Barsh and Youngblood Henderson, footnote 156, text surrounding their footnote 55. They point out that this is the approach taken by the High Court of Australia in *Mabo* (1992) 175 C.L.R. 1. They argue that section 35(1) entrenched "the lex loci of Aboriginal nations, to the extent that their own laws had not clearly been extinguished prior to 1982. To state the proposition somewhat differently, section 35(1) is a choice-of-law rule. Moreover, under section 52 of the Constitution Act, 1982, this choice-of-law rule has become part of 'the supreme law of Canada' and overrides any ordinary legislation inconsistent with it." Ibid, text surrounding their footnote 60

¹³³ See McNeil, Kent, "Aboriginal Governments and the Charter", (1996) 34 *Osgoode Hall Law Journal* 61 at 65-6

35. It is operational within constitutional limits (“parallel to those that circumscribe the powers of the Federal and Provincial governments”). It is “supreme” within its sphere (more analogous to provincial governments than to municipal governments, by way of analogy) and therefore not subject to override by any other level of government within that sphere.¹³⁴

McNeil also argues that:

"...The key is to meet the Court's unarticulated, but evident, concern that a jurisdictional and legal vacuum would result if federal authority over Aboriginal and treaty rights was excluded by s. 35(1) . . . To do this, one first needs to redefine the British conceptions of parliamentary sovereignty and the rule of law in ways that are appropriate for Canada. Canadian definitions of these concepts must take into account not only our federal system and the *Charter of Rights and Freedoms*, but also the presence of Aboriginal peoples with governments and laws which have as much claim to legitimacy as the federal and provincial governments and laws. 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. To cling to the old notions of parliamentary sovereignty and the rule of law is to perpetuate outdated and unacceptable colonial attitudes."¹³⁵

Turpel expressed another important reason for the exercise of environmental aboriginal rights by way of governance. Mere participation or consultation is

“an unattractive political option if to exercise their rights they must integrate into a dominant nation state and relinquish their distinctiveness without hope of real influence in the national political processes because of their small numbers.”

She points to an expression of this concern by the Mikmaq Tribal Society in which the Mikmaq said,

“A small people would not likely choose freely to integrate itself with a very large state, precisely because it would have no real influence on national-level democratic processes. They would be more likely to insist upon some measure of local autonomy.”¹³⁶

Claims to a right of governance will have to be articulated in very specific terms. In *Pamajewan*,

¹³⁴ Slattery, “First Nations and the Constitution”, footnote 32, at pp 280-281; See also Borrows, “Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation”, 28 *U.B.C. Law Review* 1 at 13 (1994): “Some principles which were implicit in the written version of the Proclamation [of 1763] were made explicit to First Nations in these other communications [oral statements and belts of wampum]. For example, First Nation peoples approved terms of the Proclamation which encompassed more than a system of land allotment, including express guarantees of First Nations sovereignty.”; Ibid at 25

¹³⁵ McNeil, footnote 151, “Constitutional Space”, at p. 133-4

¹³⁶ Turpel, Mary Ellen, “Indigenous Peoples’ Rights to Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition”, 25 *Cornell International Law Journal* 579 at 595-5

Lamer, C.J. stated that,

"Aboriginal 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."¹³⁷

It would remain to delineate the aspects of environmental decision making that fall within the "sphere" of self government by the aboriginal peoples exercising a right of self government. The answer to this latter 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 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." Differences among the models included territory, citizenship, jurisdiction, internal government organization and other matters.¹³⁸

Establishment of an environmental aboriginal right may imply a prima facie right of governance as to the scope of that established right. Aboriginal peoples may exercise 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 may enforce decisions that aboriginal peoples have made about allowable impacts on the environment of their "own" lands.¹³⁹

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

¹³⁷ *R. v. Pamajewon*, [1996] 2 S.C.R. 821; [1996] S.C.J. No. 20 at para. 27; For a critical review of *Pamajewon* and of the Court's statement that an aboriginal right of self-government must meet the same tests as any other aboriginal right, see Morse, Bradford, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997), 42 McGill L.J. 1011 at text surrounding his footnote 93 and 109

¹³⁸ *Pamajewon*, footnote 1 at para. 27; *Delgamuukw* footnote 182 at para.170-1

¹³⁹ But see *Attorney General of B.C. v. Vale et al* [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 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 also apparently had a concern 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*, the Supreme Court of Canada based its analysis on the validity of Band By-laws that provided that Gitksan-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. *R. v. Nikal*, [1996] 1 S.C.R. 1013; [1996] S.C.J. No. 47 at para. 25 (Q.L.)

treaty rights are ¹⁴⁰

Professor McNeil suggests that the *Van der Peet* Court anticipated "different kinds or degrees of connection with the land, some of which are adequate to make out an Aboriginal right to fish or carry on other activities on that land without being sufficient to establish Aboriginal title."¹⁴¹

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.¹⁴² 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, caution would be required. 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 assume "rights" to other uses that may interfere with the environmental aboriginal rights? The issue of justified infringement then arises. (Whether the

¹⁴⁰ See also Bell, footnote 114, at p. 56: "...freeing rights from 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 development is particularly important for some Metis peoples who have a difficult time for meeting the existing tests for proving Aboriginal title and other Aboriginal peoples who have had their title extinguished prior to 1982."; See also Appendix 2 as to some of the approaches taken in the United States to effect control over lands beyond tribal boundaries

¹⁴¹ McNeil, Kent, (1997), "Aboriginal Title and Aboriginal Rights: What's the Connection?" 36 *Alberta Law Review* 117 at text surrounding footnote 14 (QL); see also *Delgamuukw* footnote 182

¹⁴² This suggestion is to be distinguished from the situation that prevails upon proof of aboriginal title; in that case, then 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

province can infringe aboriginal rights is discussed elsewhere in this paper.)

Aboriginal peoples may therefore find it expedient to consider an assertion of a description of all of the territory over which they have a right to exercise environmental aboriginal rights, and to communicate this assertion to the other levels of government.¹⁴³ 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 "nonuser" in the future in case the Court allows lack of use to defeat a claim.¹⁴⁴ 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.

A related issue, also highlighted by Professor McNeil, 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 the aboriginal peoples "draw the line in the sand" and insist on protection of all further opportunities for the exercise of those aboriginal rights? Furthermore, aboriginal peoples should also have rights 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.¹⁴⁵

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 those aboriginal rights.¹⁴⁶ 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 has impacts on other areas. The common law normally supports the idea that an "owner" (including the Crown and its licensees) can use the

¹⁴³ Along with such a communication may be a statement of some of the uses by the Crown that they would permit as compatible with their asserted environmental aboriginal rights and a statement of some of the uses and impacts that would be incompatible with their environmental aboriginal rights. Such a strategy would have to be seriously considered, including whether to state the basis upon which jurisdiction or a right of governance was based; whether to include any evidence to support that assertion; and the impact that such an assertion would have upon the political relationships among the aboriginal peoples concerned and other levels of government

¹⁴⁴ McNeil, footnote 141, "Connection", text surrounding footnote 51 (QL): *Sioui* - non-user of a treaty claim would **not** defeat that claim

¹⁴⁵ *R. v. Sparrow*, footnote 70 per Dickson, p. 22 (Q.L.) "...Third does the regulation deny to the holders of the right their preferred means of exercising that right?"

¹⁴⁶ McNeil, footnote 141, "Connection", text surrounding footnote 45 (QL): "Rather than wander indiscriminately, they would return on a regular basis to the places where food and the other materials for the maintenance of their ways of life were available. They formed deep attachments with the land they knew and used, usually involving obligations to care for and conserve it as they derived their sustenance from it, all of which was intertwined with their spiritual and socio-political as well as their physical existence"

land in any way desired, subject to relatively few restrictions¹⁴⁷. 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.

The constitutional and jurisdictional limits on each order of government (federal, provincial and aboriginal peoples) may dictate the necessity of cooperation so that each respects 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 objectives¹⁴⁸. The exercise of governance as to environmental aboriginal rights could provide concrete manifestations of these rights that provincial and federal governments must accommodate. It might also increase the likelihood that these governments seriously attempt to accommodate these rights.¹⁴⁹

4. How can Aboriginal Peoples Resist Infringement of Environmental Aboriginal and Treaty Rights?

(i) The Infringement Test

Surprisingly, the Supreme Court stated in *Sparrow* that

“there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands [aboriginal peoples’ traditional lands] vested in the Crown.”¹⁵⁰

The Court then created a federal government override of constitutionally guaranteed aboriginal rights, subject to a justification test. The Constitution Act in section 33 provides that section 35 is not subject to Section 1 of the *Charter*, but the Court created an analogous approach. This gave the federal government the purported ability to unilaterally infringe section 35 rights.¹⁵¹ The Court expressed its test as a “restraint” on sovereign power. It assumed that without the test that it was about to articulate, the exercise of sovereign power could be absolute.¹⁵² Section

¹⁴⁷ Walters, “Ecological Unity”, footnote 169, at text surrounding his footnote 26

¹⁴⁸ Makivik, footnote 174

¹⁴⁹ Borrows, footnote 59, “With/Without”, at text surrounding his footnote 50 (QL)

¹⁵⁰ R. v. Sparrow footnote 70 at page 15 (Q.L.)

¹⁵¹ See also McNeil, Kent, “Envisaging Constitutional Space for Aboriginal Governments”, (1993), 19 *Queen's Law Journal* 95 at 105; Section 35(1) is not limited by section 1 of the Charter, nor is it subject to provincial or federal legislative override under section 33 of the Constitution Act, 1982: R. v. Sparrow footnote 70

¹⁵² For another discussion as to the Court’s understanding of the locus of “sovereignty” under the Canadian constitution, see Borrows, John, “Frozen Rights in Canada”, 22 *American Indian Law Review*,” 37 (1998) at 43 in

35(1) and section 33, section 25 and the *Royal Proclamation*, were not considered by the Court sufficient to prevent the federal government from infringing section 35 rights.¹⁵³ It therefore created a test to restrain and limit such power. The Court authorized federal government infringement of constitutionally guaranteed section 35 rights and laid out the methodology for doing so.

That is, the court imposed a two-step test:

1. Was the government acting pursuant to a valid legislative objective (such as conservation, prevention of harm to the general populace or the aboriginal peoples themselves or other objectives “found to be compelling and substantial”)?¹⁵⁴
2. “Second, the government would have to show that its actions are consistent with the fiduciary duty of the government toward aboriginal peoples.”¹⁵⁵

The Court in *Sparrow* rationalized a justification test to restrain unlimited sovereign power. It is therefore ironic that the Supreme Court’s approach in its 1996 decisions restrained the scope of protection for aboriginal rights because the Court feared that aboriginal peoples would exercise their rights in an unlimited and exclusive manner. The Court in *Gladstone* interpreted the priority of aboriginal rights from *Sparrow* to be only a requirement of consideration in allocation decisions.¹⁵⁶

The Court could have taken another approach. 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 executive branches, the judiciary, and of course, aboriginal peoples. “Sovereign power” therefore should be understood as the combination or collection of all of these sources of authority. It is not the

his discussion of Chief Justice Lamer’s judgement in *Van der Peet* (137 D.L.R. 4th 289): “...If Aboriginal peoples have prior rights to land and participatory governance, how did the Crown and Court gain their right to adjudicate here? He [the Chief Justice] has to stem the flow. He has to regain his footing. He plants a flag, ‘[A]boriginal rights recognized and affirmed by section 35(1) must be directed towards their reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown’

¹⁵³ Pentney’s discussion in a 1988 commentary (written prior to the *Sparrow* decision) about the need to “temper” the exercise and possible abuse of the sovereign’s “absolute authority” referred only to the pre-1982 power to extinguish aboriginal title. His comments were not directed at post-1982 exercise of authority, since elsewhere in the article he found that the sovereign could no longer abrogate aboriginal rights. His comments were directed at extinguishment, not infringement. See Pentney, footnote 223, at 254

¹⁵⁴ *R. v. Sparrow* footnote 70 at 1113 (see also *Gladstone* footnote 40 at para. 54)

¹⁵⁵ As stated in *Gladstone*, footnote 40 para. 54, citing *Sparrow* footnote 70 at p. 1116

¹⁵⁶ *R. v. Gladstone* [1996] 2 S.C.R. 723 at 765; See Kyle, footnote 233 at p. 308; See Borrows, John, Frozen Rights, footnote 152 p. 59: “The concern that motivated the widening of permissible legislative infringement in *Gladstone* was the lack of any inherent limitation for Aboriginal people on the exercise of their rights. This concern is curious because there are limitations placed on these rights - the laws and traditions of Aboriginal peoples...”; and see, Barsh, Russel Lawrence and Henderson, James Youngblood, “The Supreme Court’s Van der Peet Trilogy: Naive Imperialism and Ropes of Sand”, (1997) 42 McGill L.J. 993, at text following note 3 (QuickLaw): “The purpose of enshrining a reference to ‘aboriginal rights’ in the constitution, he [Chief Justice Lamer] asserted (without any recourse to learned treatises or the travaux préparatoires), was to achieve a “reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown

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.¹⁵⁷

Professor Lyon argued that

“Legal thinking about federalism, and the cases on the subject, reflect a world that no longer exists: a self-contained nation-state whose dominant characteristics were its division into regions, and the division of powers between those regions and the central government.”

In describing a preferred vision, he described the responsibilities of three orders of government, federal, provincial, and First Nations, as all exercising constitutional responsibilities for sustainable development¹⁵⁸. 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.¹⁵⁹

With this approach, there would have been no need for the “restraint” on the federal government that the 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. The same reasoning applies to provincial governments, (even if the infringement test is considered applicable to provincial governments, which is debatable).

Aboriginal peoples must contend with the existing state of the case law. The Supreme Court of Canada allows the possibility of 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 a vis aboriginal peoples”, if with “as little infringement as possible in order to effect the desired result”, and if with “fair compensation”

¹⁵⁷ Slattery, “First Nations and the Constitution”, footnote 32, at p. 281: “The implication is that, while Aboriginal peoples have the inherent legal right to govern themselves, this right can only be exercised within the basic framework of Canadian Confederation...Rather, Aboriginal governments are in the same position as the Federal and Provincial governments: their powers are *limited* to a sphere defined by the Constitution. Within that sphere, however, I suggest that Aboriginal governments possess *supreme* authority. That is, legislation enacted by such governments within their acknowledged constitutional arena is not subject to indiscriminate Federal or Provincial override.” See also McNeil, “Constitutional Space”, footnote 151 at p. 119; and see Asch, Michael, “Aboriginal Self-Government and the Construction of Canadian Constitutional Identity,” (1992) 30 *Alta. L. Rev.* (No. 2) 465 at text surrounding his footnote 61 where he argues that any constitutional theory that allows that aboriginal sovereignty may have been unilaterally extinguished is “abhorrent” on the world stage and inconsistent with international principles

¹⁵⁸ Lyon, footnote 159, at 355

¹⁵⁹ Lyon, Noel, “Canadian Law Meets the Seventh Generation”, 19 *Queen’s Law Journal* 350. Lyon’s description of our legal system’s traditional approach to sovereignty is apt: “So long have we lived in the shadow of the divine right of kings that our habit of deferring to governments that use and abuse public power and common wealth, is proving difficult to shed. It is systematic deference, calling for some rethinking at a fundamental level.” See also Slattery, footnote 32 “First Nations and the Constitution”, and text accompanying it; and see Brooks, Richard O., “A New Agenda for Modern Environmental Law”, (1991) 6 *Journal of Environmental Law and Litigation* 1 at 14 discussing the need for a conception of environmental law grounded in multiple trust obligations

and “consultation” with the affected aboriginal group.¹⁶⁰ Infringement that meets these tests is a “justified” limitation on the exercise by aboriginal peoples of environmental aboriginal rights.

The Court, in *Gladstone* and *Delgamuukw*, elaborated upon the 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 McNeil characterized the broad list of infringing circumstances in *Gladstone* as analogous to a mere test of “public interest.”¹⁶¹ 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.”¹⁶²

These additional circumstances are not constitutionally protected rights. Nor are they necessary for “reconciliation” of sovereignty with preexisting aboriginal peoples. Nevertheless, those comments raise a significant possibility of attempted infringement by federal and perhaps provincial governments. These governments may frame infringing legislation in the “economic balancing” terms mentioned by the Court.¹⁶³

The range of activities envisaged by the Chief Justice's opinion in *Delgamuukw* as potential justified infringements is astounding. It appears to consist of 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.”¹⁶⁴

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 approach by the Court may accord a right of infringement to the government whenever its economically driven value system is

¹⁶⁰ R v. Sparrow, footnote 70 at page 22 (Q.L.)

¹⁶¹ McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?”, (1997) 8 *Constitutional Forum* 33 at 35

¹⁶² McNeil, Infringements, footnote 161 at 36; *Gladstone* footnote 40 per Lamer C.J. at para. 75

¹⁶³ For a more complete criticism of this aspect of *Gladstone* and *Van der Peet*, see McNeil, Infringements, footnote 161, at 39

¹⁶⁴ *Delgamuukw*, footnote 182, para. 161

contradictory to the environment-supporting value system of aboriginal peoples claiming environmental aboriginal rights. This is contrary to 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 *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."¹⁶⁵

There is no apparent evidence or authority cited for the Chief Justice's opinion that these activities would justify infringement. He merely says that they would have to be proved case by case. 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. This range of infringing activities may amount to de facto extinguishment of aboriginal title and aboriginal rights.¹⁶⁶

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, the court will not accord those environmental rights the kind of priority that is has 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 in the year in question.¹⁶⁷ Therefore the Court, in effect, found that an abstract need for conservation measures by non-aboriginal government outweighed the Band's right of management of the fishery pursuant to its aboriginal right to fish. A better approach would recognize the right 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.

The Supreme Court may also have to consider the different uses of the word "conservation." As Tsosie noted, "conservation" for aboriginal peoples stresses

"reciprocity and kinship with other living things and counsel avoidance of waste or misuse of natural resources... Conservation in the utilitarian sense of American environmental policy, however, merely indicates the 'rational, prudent exploitation of

¹⁶⁵ See also McNeil, "Defining", footnote 91 "Isn't this turning the Constitution on its head by allowing interests that are not constitutional to trump rights that are?"

¹⁶⁶ See also McNeil, "Defining", footnote 91, "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 "

¹⁶⁷ *R. v. Nikal*, footnote 139, at para. 94

natural resources to obtain from them the maximum sustained yield.”¹⁶⁸

It should not be problematic to have more than one jurisdiction with environmental responsibility. Environmental issues are already addressed in Canada by two levels of government. Walters even describes environmental regulation as the

“embodiment of a particularly Canadian attitude toward federalism, namely, that of cooperative federalism.”¹⁶⁹

Walters noted that the challenges of sustainability and the reality of ecological interconnectedness demands 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.”¹⁷⁰

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 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.”¹⁷¹

The prerequisite obligations of "consultation" and "compensation" may be far too inadequate

¹⁶⁸ Tsosie, footnote 242 at 312, quoting J. Baird Callicott

¹⁶⁹ Walters, Mark, “Ecological Unity and Political Fragmentation: The Implication of the Brundtland Report for the Canadian Constitutional Order”, (1991) 29 Alta. L. Rev. (No. 2) 420, at text surrounding his footnote 4

¹⁷⁰ Walters, “Ecological Unity”, footnote 169, at text surrounding his footnote 16

¹⁷¹ Walters, “Ecological Unity”, footnote 169, at text surrounding his footnote 18, citing the MacGuigan Report: 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), pages 90-2

given the extent of impacts and infringements that such projects can cause.¹⁷² However, the Chief Justice did go on to say that the failure to consult may itself be a breach of section 35 rights. The kind 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 and fishing regulations in relation to Aboriginal lands."*¹⁷³ (Emphasis added)

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.¹⁷⁴ The Court expressly considered the obligation of the federal and provincial Crown to consult and negotiate with the aboriginal peoples affected pursuant to section 35. After reviewing the basis for the right, the Court granted declaratory relief that:

- “1. The respondents have a duty to consult with the applicant prior to establishing a park reserve in Northern Labrador. The duty to consult includes both the duty to inform and to listen.
2. The respondents have a duty to consult and negotiate in good faith with the applicant its claims to Aboriginal rights in certain parts of Labrador, prior to the establishment of a national park in Northern Labrador.
3. If an agreement between the Government of Canada and the Government of Newfoundland and Labrador to establish such a national park is reached before final land claim settlement, the lands are to be set aside as a national park reserve, pending land

¹⁷² For a description of the pressures of resource development and the perspectives of those advocating development, See Mirande, Michael, "Sustainable Natural Resource Development, Legal Dispute, and Indigenous Peoples: Problem Solving Across Cultures," (1997) 11 *Tulane Environmental Law Journal* 33 describing the experience between the Nez Perce Tribe and IPCo (Idaho Power Company) and the impact of the latter on the Snake River Basin and its fisheries. The statement quoted in O'Connor from an Ecuadorian state oil company executive demonstrates the universality of resource development pressures, despite pre-existing aboriginal peoples' rights: "[i]f the oil is there, the situation of the country demands that we get it out. There is no alternative income that satisfies the needs of the country." in O'Connor, Thomas S., "We are Part of Nature": Indigenous Peoples' Rights as a Basis for Environmental Protection in the Amazon Basin", (1994) *Colorado Journal of International Environmental Law and Policy*, 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

¹⁷³ *Delgamuukw* footnote 182 at para. 168

¹⁷⁴ *Nunavik Inuit as represented by Makivik Corporation v. The Minister of Canadian Heritage and The Attorney General of Canada* [1999] 1 F.C. 38 [1998] F.C.J. No. 1114 Court File No. T-545-97 (FCTD) per Richard A.C.J.

claim negotiations.”¹⁷⁵

Aboriginal peoples protecting their environmental aboriginal rights must be aware that in litigating a breach of those rights, it may be essential to prove to the Court the seriousness of the breach. Proving an aboriginal right under the Court's tests such as "integral to the distinctive culture" will not be sufficient to obtain the appropriate remedy. If the desired remedy, for example, is full consent, failing which the Crown activity in question cannot proceed, the aboriginal peoples should prove that the breach has a very serious impact on the right in question. *Makivik*, if upheld, demonstrates the seriousness of the obligation to consult. A province cannot decline to consult and negotiate in good faith when their actions will affect aboriginal peoples' section 35 rights. Further elaboration of the degrees of consultation that the court will find to be acceptable in particular cases must await future litigation of such instances. 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.¹⁷⁶

(ii) Priority Interests

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)¹⁷⁷, 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 the aboriginal right. Then it seems that inconsistent management by another government must infringe that right. Compatible management may not infringe the aboriginal right. In that 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 government. It may even be constitutionally mandated if the other level of government desires to remain involved in management of the resource or environment.¹⁷⁸

¹⁷⁵ *Makivik* footnote 174 at para. 128

¹⁷⁶ *Delgamuukw*, footnote 182 para. 169; See also McNeil, "Defining", footnote 91 in pointing out that normally government powers of expropriation, even for non-constitutionally protected private property, is limited to expropriation for *public* purposes; whereas the list of infringing activities that the Chief Justice envisages would be largely for private economic purposes

¹⁷⁷ Walters, Mark D., "Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada", 23 *Queen's Law Journal* 301 (1998) at 303

¹⁷⁸ Walters, "Aboriginal Rights" footnote 177 at 368; Kapashesit and Klippenstein, footnote 66, p. 935 as to co-management; McIver, footnote 15 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-

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.”¹⁷⁹

Lamer assumes 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).¹⁸⁰ His statement appears based on an assumption that an aboriginal commercial fishery would be unlimited,¹⁸¹ 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.”¹⁸²

The statement reads remarkably like a classic western notion of the principles of demand-supply economics and assumes that the Heiltsuk will follow that paradigm. 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.

The Chief Justice also made an assumption of exclusivity, derived from his assumption that there are no limitations on the exercise of the right. That is, he assumed 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. He even referred to the possibility of “extinguishment” of those common law rights.¹⁸³ 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, discussed below, that the

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”

¹⁷⁹ *Gladstone*, footnote 40, para. 62; See also McNeil, “How Can” footnote 161, p. 38

¹⁸⁰For a more extensive discussion of aboriginal group rights to environmental management, see Kapashesit and Klippenstein, footnote 66, p. 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 Kyle, footnote 233, at p. 3

¹⁸¹ 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*, footnote 40 at para. 302

¹⁸² *R. v. Gladstone* per Lamer, [1996] 2 S.C.R. 723 at para. 57

¹⁸³ *Gladstone* footnote 40 at para. 67

Court failed to consider.¹⁸⁴

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.¹⁸⁵

(iii) Co-Management and Joint Jurisdiction

There are many examples of co-management underway in Canada and the U.S., and programs are in various stages of negotiation or exercise.¹⁸⁶ Co-management has been defined as:

"generally refer[ring] to the sharing of responsibility for management functions by indigenous peoples and the government."¹⁸⁷

Smith explained the range of co-management approaches as follows:

"There are many ways to strike the balance of power and responsibility. Government control over management decisions, with limited input from indigenous peoples, marks one end of the spectrum. Indigenous control, with input from government marks the other end. Between these two poles are virtually endless possibilities for shared decision-making authority . . . In deciding on what an "appropriate" system of co-management might be, it is helpful first to evaluate the types of "management" functions that are

¹⁸⁴ In *Delgamuukw*, Chief Justice Lamer 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. See *Delgamuukw*, footnote 182 at para. 158. 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." *Delgamuukw*, at para. 159

¹⁸⁵ As to authors who share the view that the Court has taken a "narrow view" see also Kyle, footnote 233 at p. 310; Bell, footnote 114 at p. 53; McNeil, "Connection", footnote 141 at text surrounding his footnote 67; As to the difficulty of the Courts in determining the content of section 35 rights in prosecutions, see Dickson, C.J.C. in *Sparrow*: "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..." p. 13 (Q.L.)

¹⁸⁶ One example is described 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"

¹⁸⁷ Smith, Eric, footnote 188

involved . . . basically . . . research, regulation, allocation, and enforcement."¹⁸⁸

Smith and an extensive literature describe many existing examples of co-management, with successful examples at both ends of the "range." The Supreme Court of Canada should include an appreciation of co-management opportunities in future decisions as to governance and management of aboriginal peoples' rights. Even where a system of co-management is not in place failure to consider other management possibilities leaves the Court with a single model or understanding of jurisdiction over resource management. That is, that it is only federal or provincial governments that have the jurisdiction and capacity to carry out such functions. It would be important in future cases to bring examples to their attention. Evidence as to such approaches could enable the Court to make vibrant, creative decisions that accord aboriginal peoples full jurisdiction over their rightful spheres of interest.¹⁸⁹

Meanwhile, aboriginal peoples need not await formal co-management agreements before acting within their spheres of jurisdiction. Negotiating formal agreements may become intractable. Eventually 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. However, as a rule, neither federal nor provincial governments await the "agreement" of the other before acting within their own jurisdiction.¹⁹⁰

Even with established environmental aboriginal or treaty rights, and even with no infringement by the federal government, the role of provincial governments must be considered.

G. WHAT ROLE DOES THE PROVINCIAL GOVERNMENT HAVE AS TO ENVIRONMENTAL ABORIGINAL AND TREATY RIGHTS?

The role of provincial governments needs special consideration. Many impacts on environmental aboriginal rights are from provincial government decisions due to the allocation of responsibility over resources within the province under section 92 and 92A of the Constitution Act, 1867, as amended. In addition, for provinces where there are treaties that contain a "lands

¹⁸⁸ Smith, Eric (Hon.), "Some Thoughts on Comanagement", (1997), 4 *Hastings West-Northwest Journal of Environmental Law and Policy* 1 at 3

¹⁸⁹ See also Henderson & Ground, "Survey", footnote 29, at text surrounding their footnote 153 (QL) in arguing that in the federal land claims process, "there should be creative options such as different types of interests that can be acquired in settlement of a land claim, different lands in different places for different uses, co-management and resource sharing. These options are necessary for communities which are making decisions for the Seventh Generation." However, Courts must also be cognizant of the necessity to order remedies in accordance with judicial principles - Provincial Court Judge Gregoire of Manitoba was overturned in having rendered conditional discharges to two Metis persons accused of moose hunting contrary to the provincial regulations, on condition that they assist the Crown in preparing a register of Metis persons. The judge had crafted the order based on *Schacter* [1992] 2 S.C.R. 679. The possibility of this order had not been argued before him and the appellate court overturned the remedy because of that fact. Counsel also argued that a provincial court lacks the inherent jurisdiction of superior courts and are limited to their statutory powers, and that a more appropriate remedy was to read down the offending regulation, because a provincial registry would be ultra vires the province: *R. v. McPherson* [1994] 2 C.N.L.R. 137 (*Man. Q.B.*), per Schulman, J., but the Court did not rule on these latter arguments

¹⁹⁰ Hogg, Peter, Constitutional Law of Canada, (3rd Ed.) (1992) Toronto: Carswell at p. 98

taken up" clause, provincial decisions as to settlement and resource development also have impacts. These impacts are both on expressed treaty rights, and, potentially, on aboriginal rights claims that may remain in those lands. There are additional impacts specific to one or the other of the provinces, such as the Natural Resources Transfer Acts in the western provinces which are considered constitutional instruments.

1. Fiduciary Duties

Do provincial governments owe constitutional fiduciary duties to aboriginal peoples? Professor Slattery has suggested that the trust relationship with aboriginal peoples affects both Federal and Provincial governments. He argues that the Crown's fiduciary obligations to aboriginal peoples followed the various powers as allocated by the *Constitution Act, 1867*. Most of the responsibility is held federally because of section 91(24) but fiduciary responsibilities are also held by provincial governments. This is because "the Provinces have powers and rights enabling them to affect adversely Aboriginal interests protected by the [trust] relationship." He located provincial fiduciary obligations due to the constitutional division of powers and due to the fact of Provincial benefit from land surrenders.¹⁹¹ Hutchins and Schulze state that,

"It should no longer be controversial to say that the fiduciary duty binds the provincial Crown insofar as its activities affect Aboriginal peoples."¹⁹²

Their argument included not only the fact of provincial benefit from land and rights surrenders but also the English Court of Appeal's decision in *Secretary of State* which confirmed that the "various divisions of the Crown" took on the obligations of the original Crown "simpliciter".¹⁹³

Zellmer made a similar argument in the U.S. context. She argued that the fiduciary responsibilities of the state arise in part from the benefits they have derived from the "massive transfers of lands from First Nations to the federal government."¹⁹⁴

2. Provincial Infringement

The Chief Justice included a lengthy list of resource development initiatives in his obiter comments in *Gladstone* and *Delgamuukw* as potentially meeting the justification test for infringement. This list raises enormous concern. As McNeil points out, most of the possible developments on his list are within provincial jurisdiction:

¹⁹¹ Slattery, footnote 32, *First Nations and the Constitution*, at pp 274-5; see also Hutchins and Schulze, footnote 98, at text surrounding their footnote 14 where they note that constraints on aboriginal peoples' exercise of rights to lands or resources arise in part from "historical concessions made in return for promises"

¹⁹² Hutchins and Schulze, footnote 98, at text surrounding their footnote 67

¹⁹³ Hutchins and Schulze, footnote 98, at text surrounding their footnote 69

¹⁹⁴ Zellmer, Sandi B., "Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First", 43 *South Dakota Law Review*, 381 at 388 (1998) She said that there, "agencies cannot simply make a 'judgment call' in favour of public accommodation if tribal interests would be adversely affected "

"the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims,"

as

"the kinds of objectives that are consistent with this purpose [reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty] and, in principle, can justify the infringement of aboriginal title."¹⁹⁵

Slattery suggested that where conflict occurs among provincial, federal and aboriginal laws,

"the Federal or Aboriginal laws will take precedence. So *within its sphere of authority*, an Aboriginal government may prevent the application of Provincial statutes by enacting divergent legislation." (Emphasis added)¹⁹⁶

He argued that section 35 and the *Sparrow* infringement test do not provide authority for provincial governments to override Aboriginal laws. This is because of the lack of authority to legislate as to "Indians and lands reserved for Indians" under section 91(24). It is also because of the paramountcy of federal laws over provincial in case of conflict. Slattery argues that paramountcy extends to Aboriginal laws under section 35.¹⁹⁷ However, in *Delgamuukw* and *Sundown*, for example, the Supreme Court appeared to merely assume the possibility of provincial override under the infringement test.¹⁹⁸

In *Delgamuukw*, the Court held that provincial governments may not *extinguish* Aboriginal rights (because such a law would be *ultra vires* due to section 91(24)). The Court seemed to consider, however, that provinces may *infringe* aboriginal rights if they meet the justification test.¹⁹⁹

As Professor McNeil pointed out, Chief Justice Lamer's decision is internally inconsistent in this regard. Chief Justice Lamer found that federal jurisdiction over "Lands reserved for the Indians" under section 91(24) extends to aboriginal land rights beyond aboriginal title lands, and precludes *extinguishment* before 1982 by the provinces.²⁰⁰ Section 91(24) jurisdiction over "Indians" extends to "a core of Indianness" which "encompasses the whole range of aboriginal

¹⁹⁵ *Delgamuukw*, footnote 182; para. 165; McNeil, "Rethinking", footnote 209, para. 35-6

¹⁹⁶ Slattery, "First Nations and the Constitution", footnote 32, p. 284

¹⁹⁷ Slattery, "First Nations and the Constitution", footnote 32, at p. 285; See also McNeil, "Rethinking", footnote 209 and Bankes, footnote 206

¹⁹⁸ *Delgamuukw*, footnote 182 para. 160

¹⁹⁹ *Delgamuukw* (1997) 153 D.L.R. (4th) 193 at 269, 270; Bell, footnote 114, p. 62

²⁰⁰ *Delgamuukw*, footnote 182 para. 175-6: "...although the submissions ...focussed on aboriginal title...in my opinion the same reasoning applies to jurisdiction over any aboriginal right which relates to land...those relationships to the land however may be equally fundamental to aboriginal peoples and for the same reason that jurisdiction over aboriginal title must vest with the federal government, so too must the power to legislate in relation to other aboriginal rights in relation to land"

rights that are protected by s. 35(1)." The Chief Justice expressly included "practices, customs and traditions that are not tied to land as well" as within federal jurisdiction and ultra vires provincial legislatures.²⁰¹ The Chief Justice appeared to believe that the jurisdiction over these subjects had to be either federal or provincial (at least insofar as having authority to extinguish aboriginal title and rights). He completely neglected to consider that they may be the jurisdictional preserve of the aboriginal peoples themselves. Even before the enactment of s. 35, Lamer found, the provinces lacked the jurisdiction to extinguish any of these rights due to section 91(24). Section 88 does not authorize the provinces to extinguish the rights of Aboriginal peoples.

However, as Professor McNeil shows, the Chief Justice's decision is inconsistent with these statements later in the decision when he discusses the possibility of infringement. The Chief Justice suggests that both federal and provincial governments may infringe section 35 rights by virtue of extending the *Sparrow* justification test to both. Professor McNeil argues that the Court neglected to lay a foundation for provincial authority to infringe aboriginal rights at all before considering what justification standard they would have to meet to do so. The division of powers analysis would indicate that the provincial governments have no jurisdiction to infringe aboriginal rights and so no question of a justification test would arise.²⁰²

McNeil concludes that

"When exclusive federal jurisdiction in relation to Aboriginal title is combined with Lamer C.J.C.'s description of the content of that title as the right to exclusive use and occupation, provincial authority to infringe Aboriginal title seems to be excluded."²⁰³

The Chief Justice found, based on section 88 that provincial laws otherwise invalid due to section 91(24) are incorporated by reference even though touching the "core of Indianness." The reason that section 88 does not provide for extinguishment by provinces through such laws is the

²⁰¹ *Delgamuukw*, footnote 182 para. 177-8

²⁰² McNeil, "Rethinking", footnote 209, at paragraphs 27 - 34 (Q.L.)

²⁰³ McNeil, "Rethinking", footnote 209, at para. 41 (Q.L.) Professor McNeil pointed out that the *Badger* case which Lamer, C.J.C. referred to in *Cote* and *Delgamuukw* was a case of specific *constitutional* authority on the part of the province of Alberta to legislate as to Indian hunting because of the *Natural Resources Transfer Act*, a constitutional document for the province of Alberta. It does not stand for the principle that the provinces have the jurisdiction generally to legislate as to Indians or lands reserved for Indians and therefore does not provide a foundation for provincial jurisdiction to infringe aboriginal rights protected by section 35. McNeil, "Rethinking", footnote 209 para. 41 (Q.L.); See also McNeil, "Defining", footnote 91: "How then, was Chief Justice Lamer able to conclude that provincial laws can infringe Aboriginal title, particularly if the infringement involved something as intrusive as engaging agriculture, forestry or mining on Aboriginal lands? It is perfectly obvious that activities like these would interfere with the Aboriginal titleholders' right of exclusive use and occupation. Frankly, I do not have an answer to this. It appears to be an oversight, a case of the left hand having forgotten what the right hand has done. The Supreme Court will have to return to this issue in the future, and resolve this glaring contradiction.... In my opinion, it will be virtually impossible for the Court to backtrack on its conclusion that Aboriginal title comes under exclusive federal jurisdiction... Instead, I think the Court will be obliged to accept the consequences of its decision that Parliament has exclusive jurisdiction over Aboriginal title. This means that, to the extent that infringements of Aboriginal title can be justified....the power to do so is exclusively federal"

lack of sufficient “clear and plain intent” to do so.²⁰⁴ However, with respect to infringement, there is no requirement of a “clear and plain intent” to be shown. Accordingly the court must have assumed, since section 88 validates provincial laws and incorporates them by reference, that they are subject to the same infringement test as federal laws. On this basis, absent a repeal of section 88 or a direct challenge to its constitutional validity, provincial governments could infringe and satisfy the court that section 88 authorizes that infringement. However, this is a highly unsatisfactory basis for a right of provincial infringement as it is an indirect, almost “accidental” power to fundamentally affect aboriginal peoples’ constitutionally protected rights by way of a non-constitutional section of the *Indian Act*.

Bankes said that the *Delgamuukw* Court's conclusion that any right or title protected by section 35 is by definition within the “core” of federal legislation under section 91(24) and

“thereby protected (i.e., immunized from provincial legislation.)... Although the Court expresses this conclusion solely in terms of extinguishment, I find it difficult to see why the same reasoning should not apply to provincial laws that do not go as far.”²⁰⁵

Bankes also argued that the *Delgamuukw* decision supports the principle that provincial laws that affect a "matter of primary federal jurisdiction," such as "Indians" and "Lands reserved for Indians," will be invalid, based on section 91(24) of the *Constitution Act*. Furthermore, otherwise valid provincial laws that might affect "Indians" and "Lands reserved for Indians" will be inapplicable in that respect, under the doctrine of "interjurisdictional immunity." In particular, he suggested those provincial laws as to mineral, oil and gas, and forestry sectors that extinguish aboriginal peoples’ rights will be invalid to that extent.²⁰⁶

Bankes argued that the Court's reasons in *Delgamuukw*, if followed by "a broad reading" of the heads of jurisdiction in section 91(24), especially the "lands reserved" head,²⁰⁷

“offers considerable scope for creating a jurisdictional area within which aboriginal governments can operate . . . I believe that previous attempts to create space for aboriginal governments have been hampered by a narrow reading of s. 91(24) which in turn has allowed provincial laws to intrude and regulate a broad range of activities on reserves.”²⁰⁸

As mentioned above, Professor McNeil shows that section 88 does not incorporate provincial laws that affect Aboriginal land rights. It is only applicable to provincial laws that affect Indians

²⁰⁴ *Delgamuukw*, footnote 182 para. 183

²⁰⁵ Bankes, footnote 206, para. 30 (Q.L.)

²⁰⁶ Bankes, Nigel, "Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights", *University of British Columbia Law Review*, (1998) 32 U.B.C.L.Rev. 317-351 at para. 3 (Q.L.)

²⁰⁷ Bankes, footnote 206, para. 9 (Q.L.) states that *St. Catherine's Milling* found that the "lands reserved" head includes all lands reserved under any terms for Indian people; not just Indian reserves, and includes for example, all of the land subject to the Royal Proclamation

²⁰⁸ Bankes, footnote 206, para. 5 (Q.L.)

as "valid provincial laws of general application." However, provincial laws aimed at Indians would be ultra vires.^{209 210}

Section 88 presents another issue as to the possibility of provincial legislative impact on environmental aboriginal rights. There is another category of provincial laws, applicable by section 88, which are not "in pith and substance in relation to land," such as safe motor vehicle operation. The issue that will arise with respect to provincial environmental laws is whether they are laws "in relation to land" or not. Where there is an absence of relevant aboriginal laws the Court may search for an applicable jurisdiction to avoid a health and safety "gap" in legislation.²¹¹

While there is no apparent Aboriginal legislation, control or regulation of health and safety or conservation matters, the Courts will be tempted to ensure the application of federal or provincial legislation.

For example, the Court in *Sundown* discussed a possible limitation on the permanency of the right to build hunting cabins. This was that Provincial legislation that relates to conservation and passes the justificatory standard test might some day affect the right.²¹² The *Sundown* court also discussed in *obiter* the possible "generous construction" of conservation laws²¹³. Such construction could include not only conservation of game and fish but also to the environment they inhabit, habitat and biodiversity legislation, water quality of ground water, lakes, rivers and streams, topsoil conservation and prevention of erosion. This would be to the effect that such provincial laws may be justified in infringing the treaty rights in question.

Section 88 is not applicable to render provincial laws applicable if they are contradictory to or restrictive of the terms of any Treaty. This includes both land cession Treaties and other treaties such as those providing for "general confirmation of aboriginal rights" or providing for "political or social rights."²¹⁴ As a result, provincial legislation cannot restrict such rights. In *Simon*²¹⁵, the Court held that section 88 could not cause the right of a Mic Mac member to hunt provided in the Treaty of 1752 to be abridged by a law of general application.

²⁰⁹ McNeil, Kent, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction", (1998), 61 *Saskatchewan Law Review* 431 at para. 11-12 (QL)"Section 88 is inapplicable to Indian lands"

²¹⁰ Query whether section 88 is valid after section 35(1): See McNeil who refers to Slattery, *First Nations and the Constitution: A Question of Trust* (1992) 71 *Can. Bar Rev.* 261 at 284-86.) See McNeil's full footnote 48 in "Rethinking", footnote 209

²¹¹ *Brantford Township v. Doctor* [1996] 1 C.N.L.R. 49 at 53 (Ont. Gen. Div.). Bankes argues that the application of section 88 as to "Indian lands" (as opposed to "Indians") has been left open by the Court following *Delgamuukw*. footnote 206

²¹² *Sundown*, footnote 29, at para. 38 (Q.L.)

²¹³ *Sundown*, footnote 29, at para. 45 (Q.L.)

²¹⁴ *Indian Act*, R.S.C. 1985, c. I-5, as amended, Section 88; *Simon v. The Queen*, (1985) 24 D.L.R. (4th) 390 (S.C.C.) at para. 48 per Dickson, C.J.C.; *R. v. Sioui* [1990] 1 S.C.C. 1025; [1990] S.C.J. No. 48 at p. 18 (Q.L.) per Lamer, J. (as he then was.)

²¹⁵ *R. v. Simon* [1985] 2 S.C.R. 387; [1985] S.C.J. No. 67 at para. 57 (Q.L.) per Dickson, J.

In *Sundown*, the Court seemed to assume that only federal or provincial governments would be properly concerned with environmental protection legislation. However, aboriginal peoples who have aboriginal and/or treaty rights in the area in question would also have valid concerns as to governance over environmental protection. Aboriginal peoples with environmental aboriginal rights and with deep-rooted knowledge, understanding and traditions concerning the care of the environment around them would make this assumption of the Court highly questionable.²¹⁶

3. “Lands Taken Up”

Imai suggested that the *Delgamuukw* decision has implications for lands affected by aboriginal treaty rights. The implications include the ongoing relevance of the internal laws of Aboriginal nations at the time of signing the treaty; the application of fiduciary duties to provincial exercise of the “lands taken up” clause found in most treaties and the possibility of a very high justification standard being imposed upon the provincial government; the possibility of the requirement of full consent from First Nations for infringement of hunting and fishing rights; and finally the possibility that the province lacks the authority to act under the “lands taken up” clause at all if it means infringement of aboriginal and treaty rights because of the lack of provincial jurisdiction to infringe those rights.²¹⁷

An example of the “lands taken up” clause is provided above from Treaty 9. An issue arises as to whether the expressed treaty rights to hunt, fish and trap preclude the exercise of aboriginal rights to hunt, fish and trap once the lands are “taken up” for the listed purposes. Are existing aboriginal rights abridged or inapplicable on “lands taken up”?²¹⁸ Would the same limitation apply to environmental aboriginal rights on those lands? As a matter of logic, any unceded aboriginal rights remaining on those lands should not be affected by the terms of a treaty and should not be impacted by the “lands taken up clause” either. Professor Macklem reviewed the historical record as to the understanding of the aboriginal peoples affected by Treaty 9 when they entered into that treaty. He concluded that they would not have understood the treaty to “involve an absolute surrender to the Crown of their rights to those lands.” He concluded that their understanding of the use of lands outside the reserve areas was that those lands “would be shared.”²¹⁹

There is a further issue whether the “lands taken up” proviso could completely deny aboriginal peoples the rights guaranteed in, for example, Treaty 9, to hunt, trap and fish. As Professor Macklem noted, the province probably cannot take this approach because it owes fiduciary duties to the aboriginal peoples affected by the treaties from which it has benefitted. Professor Macklem discussed this fiduciary duty as limiting the province from allowing unchecked a list of activities beyond those listed in the treaty that would interfere with the exercise of aboriginal peoples’ treaty rights. A province's fiduciary duty should also preclude a province from allowing

²¹⁶ See also McNeil, footnote 151 “Constitutional Space”, at p. 112

²¹⁷ Imai, Shin, “Preliminary Thoughts on Delgamuukw and Treaty Rights”, 6 *CanadaWatch* 74 at 74-45

²¹⁸ Cory J. mentioned the “lands taken up” clause as one of the limitations on the exercise of a treaty right in *R. v. Sundown*, footnote 29 at para. 42

²¹⁹ Macklem, “Impact of Treaty 9”, footnote 99, at p. 119

all or even a substantial portion of the lands required for the exercise of aboriginal peoples' treaty rights from being "taken up" to defeat the meaningful exercise of those rights. The question would be how to define the quantity of lands the province could take up without breaching the terms of the treaty. The courts should seriously consider evidence of the ecological interconnections that support the fish and game to which aboriginal peoples have treaty rights protected by section 35. Even where aboriginal peoples do not prove activities protective of water quality and habitat as "reasonably incidental" to their treaty rights, there may nevertheless be a limitation on the provinces "taking up" lands with negative effects on these elements. One measure of the limits of the lands taken up allowed to the province may then be the sustainability of the ecosystem that supports the fish and game covered by the treaty. The lands taken up clause, then, is not a means by which environmental treaty rights may be automatically defeated. As those rights are constitutionally protected by section 35, the consequence is that even on lands taken up, the province has resulting constitutional obligations. They must ensure that those lands are taken up in such a way as to interfere as little as possible with the aboriginal peoples' treaty rights.²²⁰

H. ENFORCEMENT OF ENVIRONMENTAL ABORIGINAL AND TREATY RIGHTS

After proof of environmental aboriginal or treaty rights, the next issue that will arise is that of enforcement of those rights. Given an environmental aboriginal or environmental treaty right, how could it be enforced?

In *Delgamuukw*, the Supreme Court of Canada acknowledged that there will continue to be new aboriginal rights protected by section 35(1) that have not previously been recognized by the Court:

"I hasten to add that the constitutionalization of common law Aboriginal rights by s. 35(1) does not mean that those rights exhaust the content of s. 35(1). [From Cote]: Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers."²²¹

Some instruction could be taken from aboriginal peoples in the U.S. who choose to regulate the environment on Indian lands and have done so under three main sources of authority: inherent tribal authority; treaties with the United States; and federal statutory delegation of authority. The latter two sources are enforceable by the United States courts.²²²

²²⁰ *Sparrow* footnote 70 [1990] S.C.J. No. 49 at p. 22 (Q.L.) Per Dickson, C.J.C.: "whether there has been as little infringement as possible in order to effect the desired result"

²²¹ *Delgamuukw* footnote 182 at para. 136

²²² Slade and Stern, "Environmental Regulations on Indian Lands: A Question of Jurisdiction" (1995) *The Compleat Lawyer* Fall 1995 24 at p. 26; For an earlier discussion of the possibilities for air shed regulation, see Smith, Patrick and Guenther, Jerry, "Environmental Law: Protecting Clean Air: The Authority of Indian Governments to Regulate Reservation Airsheds", 9 *American Indian Law Review* 83 (1982); See Appendix 2 and the *Albuquerque* decision discussed in Grijalva as an example of enforcement by the state Courts

The most "straightforward" (although by no means the easiest) means of enforcement in the face of a breach of a section 35 protected environmental aboriginal right is by means of an application to the Court to have the offending law, regulation, policy or government action declared to be "of no force and effect" by way of section 52(1) of the *Constitution Act, 1982*²²³ at least insofar as it infringes the aboriginal or treaty right. Other remedies could include reading down, reading in, or severing offending provisions, in clear cases.²²⁴ In *Cree Regional Authority*²²⁵ the Federal Court of Canada granted mandamus to "private plaintiffs" "seeking to compel a public official to carry out his statutory duties." The Court reviewed the requirements for a writ of mandamus, including that there must be no doubt as to the right that the claimant seeks to protect. It must be based on a "clear legal right to have the thing sought by it done by the person sought to be coerced."²²⁶ These remedies, of course, require that there be some offending government legislation or action.

Hutchins and Schulze also suggest that there are constitutional remedies from breach of section 35 as a result of inaction. Inaction includes failure to address aboriginal concerns when drafting policy and narrow reading of obligations by government.²²⁷

Another means of enforcement was suggested by Kapashesit and Klippenstein. Positive rights may be developed and may be the "least intrusive means" of achieving an objective of the government. Then, section 35 and the justification test may require that the government "integrate Aboriginal ecological management systems into environmental protection programs."²²⁸ This would require of course, that the government objective in question and the system adopted by the aboriginal peoples in question be consistent and compatible. The government should be required to adopt an approach that interfered as little as possible with any codified or expressed rules of the aboriginal peoples as to the environmental aboriginal right in question, and to endeavour to shape their governmental objective so as to minimize the possibility of conflict with the aboriginal right.²²⁹ A current threat is that governments will shape their objectives more in the direction of "economic balancing" of non-constitutional rights of other Canadians because of the language of the Court in *Gladstone* and *Delgamuukw*.

In looking for enforcement of environmental aboriginal rights, aboriginal peoples and Courts

²²³ Pentney, William, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982: Section 35: The Substantive Guarantee", (1987) 22 *U.B.C. Law Review* 207 at 210

²²⁴ *R. v. Schacter* [1992] S.C.R. 679; [1992] S.C.J. No. 68 at p. 10 ff (Q.L.) per Lamer, C.J.

²²⁵ *Cree Regional Authority*, footnote 103, at page 13 (Q.L.)

²²⁶ *Cree Regional Authority*, footnote 103, at page 43 (Q.L.), citing with approval *O'Grady v. White* [1983] 1 F.C. 719

²²⁷ Hutchins and Schulze, footnote 98 at text surrounding their footnote 114

²²⁸ Kapashesit and Klippenstein, footnote 66, p. 961

²²⁹ For a similar argument, see McNeil, "Constitutional Space", footnote 151 at p. 134-5: "What the Aboriginal peoples have to do if they want to exercise their jurisdiction is to fill this constitutional space with Aboriginal laws...To the extent that Aboriginal and treaty rights are adequately regulated by Aboriginal laws, federal laws [nor provincial laws] infringing those rights cannot apply to them...before federal laws are allowed to infringe...that objective has to be pursued in a manner which infringes those rights as little as possible. But if an Aboriginal people is already regulating its own rights in a way which is consistent with the legislative objective, there can be no need, and therefore no justification, for the federal laws to apply"

interpreting these rights must beware of the assumption that a right or a right of governance must be exclusive. On that basis, the court then finds it difficult to uphold the right at all²³⁰. The constitutional basis of governance and sovereignty as allocated over various institutions in Canada is discussed elsewhere in this paper. In seeking to enforce a right or to exercise governance of the right, aboriginal peoples need not claim absolute exclusivity. There may be a claim that another order of government lacks jurisdiction to affect their right. There may even be a claim to supremacy in a particular sphere. Even then, constitutional supremacy does not mean that there is no valid jurisdictional role for other orders of government within their respective spheres.

Harbison has pointed out that tribal governments in the U.S. suffer from this approach by the courts. He described the U.S. case of *Montana* in which a tribe's inherent right to regulate the use of its resources within reservation boundaries was "virtually extinguished." A better result would have been a requirement that the right be applied in a nondiscriminatory manner. The court's decision was based on an "unarticulated and unsupported assumption that tribal governments will treat non-members unfairly."²³¹ Accordingly it struck down the power instead of allowing it to coexist with the federal and state jurisdiction.

Kyle expressed a similar concern in a review of the Supreme Court of Canada's 1996 aboriginal fishing rights decisions. She found the Court's reluctance to "fully recognize commercial and self-regulatory elements in the Aboriginal fishing right" to be due to the concern of the Chief Justice in "recognizing special rights for one group in society." Accordingly, she showed that he attempted to narrow the definition of Aboriginal rights. He did so in part by requiring other interests in society to be taken into account by way of "reconciliation" at the point of *definition* of the aboriginal rights in question rather than at the point of *justification* of an infringement.²³² The result is that on this approach, jurisdictional room is not left to aboriginal peoples. This approach can and should be modified by the Court.

I. CONCLUSION

Section 35 could be a powerful tool for protection of environmental aboriginal rights and environmental treaty rights. Aboriginal peoples entitled to the protection of section 35 could consider characterizing the rights they seek to protect as specifically as possible. They could now lay a foundation for possible future proof or assertion of these rights. Communities should consider the kind of evidence that they would need for proof of environmental aboriginal rights as integral to the culture, or as reasonably integral to other aboriginal rights. Alternatively, environmental rights founded on existing treaty rights could be proven as reasonably incidental to those treaty rights.²³³ For aboriginal title rights, the preference may be to exercise

²³⁰ As was the case in *R. v. Nikal*, footnote 139

²³¹ Harbison, John S., "The Broken Promise Land, 14 *Standard Environmental Law Journal* 347 at 366 (1995)

²³² Kyle, Rosanne, "Aboriginal Fishing Rights: The Supreme Court of Canada in the Post-Sparrow Era", 31 *U.B.C. Law Review* 293 at 300 (1997)

²³³ An example of the type of proof that the Court has accepted as traditional activities in support of arguments as to the existence of aboriginal and treaty rights is provided in *Sundown* where evidence was adduced as to the

environmental aspects of those rights under the aboriginal title rights.

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 must government 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 United States case of *Albuquerque*.²³⁴ 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. Some successful examples can be found in this respect.

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.²³⁵ For example, Borrows demonstrates a way to

“shift the ground upon which decisions are made. Indigenous legal knowledge must be an integral part of our decision-making standards within democracy. This knowledge must be considered and received as precedent in law to guide answers to the questions we have concerning the environment.”²³⁶ (Emphasis added).

In his land use planning case study, Borrows showed one way in which traditional aboriginal laws may be interpreted to derive applicable environmental law principles such as designing to

traditional “hub and spoke” expeditionary method of hunting of the Joseph Bighead First Nation. “[The] traditional method of hunting of the Joseph Bighead First Nation is “expeditionary”, a hub-and-spoke style of hunting in which hunters set up a base camp for some extended period of time ranging from overnight to two weeks. Each day they move out from that spot to hunt. They then return to the base camp to smoke fish or game and to prepare hides.” per Cory J, [1999] S.C.J. No. 13 at para. 11 (Q.L.)

²³⁴ *Albuquerque v. Browner*, 865 F. Supp. 733 (D. N.M. 1993) discussed in Appendix 2; See also *R. v. Lewis* [1996] 1 S.C.R. 921; [1996] S.C.J. No. 46 at para. 71 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, Chilwin Chienhan, (1997) 55(2) U.T. Fac. L. Rev 419 at para. 11 (Q.L.)

²³⁵ Borrows, John, “A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government”, 30 *Osgoode Hall Law Journal* 291 (1992)

²³⁶ Borrows, footnote 11, (water and rocks) at p. 452

scale; habitat restoration; monitoring; enhancement; and prevention of resource loss.²³⁷

Similarly, with the White Mountain Apache described by Long, environmental law principles for their land could be derived from what he relates as the advice of the Apache elders:

"Learn the names.' Apaches knew the names of all the mountains from their homes to the sea, along with the names of the plants and animals that lived in those places. The names are tied to stories that impart wisdom about how to live in harmony with the land and with other people. By recalling the stories, Apaches can make better decisions and further the process of restoring their world."²³⁸

It may also be possible to codify²³⁹, amend and enact new environmental laws according to the continuing traditions and laws of the aboriginal peoples in question.²⁴⁰ Tsosie describes 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".²⁴¹

There are several reasons in support of this approach. These include that aboriginal peoples recognize preexisting duties and obligations as caretakers as a fundamental principle²⁴², and the need to continue their law making traditions.²⁴³ 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,²⁴⁴ and the

²³⁷ Borrows, footnote 11 (water and rocks) at p. 464

²³⁸ Long, footnote 67, at p. 58

²³⁹ 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...." Chang, footnote 60, at p. 858

²⁴⁰ See Grijalva and Pueblo of Isleta described in Appendix 2; See also Kapashesit & Klippenstein, footnote 66, at p. 957 as to examples of aboriginal peoples who have codified environmental management practices; and see Zellmer, footnote 194, p. 411-412 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 agreements and acknowledgement that tribes are the 'appropriate governmental entities' to manage tribal lands and resources', among other initiatives, all as found in executive order; See also Borrows, footnote 59 "With/Without", at text surrounding his footnote 119 (Q.L.) as to the accessibility of First Nations law

²⁴¹ Tsosie, Rebecca, "Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge, (1996) 21 Vermont Law Review" 225 at 244

²⁴² See Chang, footnote 60, and Austin, footnote 56

²⁴³ See Borrows, "Frozen Rights"; "A Genealogy of Law", "With or Without You", and "Water and Rocks", footnotes 152, 236, 59, and 11

²⁴⁴ Grijalva, footnote 61, at p. 471; Zellmer, Sandi, footnote 194 at p. 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, footnote 66, at p. 961 as to further arguments in support of positive law making by aboriginal peoples and the use of an existing

importance of the exercise of the inherent rights of sovereignty and self government by aboriginal peoples.²⁴⁵

As Professor Borrows suggested:

“Indigenous law should not merely be received as *evidence* of a particular culture’s environmental values, but along with other laws should be accepted as *legal standards* through which North American practices can be measured.” (emphasis in the original)²⁴⁶

Environmental governance by aboriginal peoples may be essential for the protection of environmental aboriginal and treaty rights as recognized by section 35 of the *Constitution Act*, 1982. Aboriginal peoples could choose from some or all of these actions. If not already doing so, they should gather the stories, laws, principles, and rules of the First Nation and record them in a variety of formats. This could include video, audio recordings of elders, searches through written materials and archives, interpretation of cultural objects, and many other approaches. This should be an ongoing project. Just as in the case of the development of the common law, the "project" is never completed. There are also the Court's requirements for "evidence" that is "cognizable" to the courts²⁴⁷ and for proof that the rights are continuing.

To make such evidence "cognizable" to the common law constitutional courts, another option is that aboriginal peoples may wish to discover, repeat, codify, and interpret existing norms, principles, rules, and laws as "legal" precepts. This may also make such requirements "cognizable" to other non-governmental actors who may otherwise impact upon the aboriginal peoples' section 35 rights, but who wish to avoid doing so.

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

body of law to resist the filling of a regulatory “gap” by another order of government, and see McNeil, "Constitutional Space", footnote 151, at p. 125

²⁴⁵ See McNeil, Kent, “Rethinking” and “Constitutional Space”, footnotes 91, 151, and Brian Slattery, “Varieties”, footnote 4

²⁴⁶ Borrows, footnote 11, (water and rocks) at p. 454; See also Valencia-Weber, “Tribal Courts: Custom and Innovative Law”, 24 *New Mexico Law Review* 225 (1994) at 248 in which she discusses the use of custom and its application in tribal courts, advocates for the exercise of judicial decision making by tribes and expresses 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”

²⁴⁷ Delgamuukw, footnote 182 paras. 83-5

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 is not contested and that the governance structure is 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, the possibility of a failure by the courts to recognize the rights in question, and many other matters.

This review of the law and the literature with respect to section 35 rights shows that section 35 has real promise as a tool of environmental protection for aboriginal peoples, although section 35 claims are not without pitfalls. Pitfalls include justified infringement by government, lack of compliance by provincial governments, the possible necessity to litigate to establish recognition of entitlement to those rights, limited characterization of a right by the courts and the requirements for new elements that courts may impose in the future.

Regardless of the barriers, courts and other levels of government will be forced to consider claims to environmental aboriginal and treaty rights as framed and argued by aboriginal peoples. In the meantime, Aboriginal peoples may not want to await complete agreement with other levels of government before exercising governance decisions over their existing environmental aboriginal and treaty rights which are protected by section 35 of the *Constitution Act, 1982*.

Appendix: Statutory References

SECTION 25

Section 25 of the *Constitution Act, 1982*, provides that:

“The guarantees in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.”

Section 88, *Indian Act*

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

Appendix - Constitutional Entrenchment of Environmental Rights

For a description of some of the attempts at constitutional entrenchment of environmental rights in nations' written constitutions, see Brynhildsen, Megan, "Constitutional Provisions for Environmental Protection", [1996] *Colorado Journal of International Environmental Law and Policy* 97; see Brandl, Ernst and Bungert, Hartwin, "Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad", (1992) 16 *Harvard Environmental Law Review* 1 and see Brooks, Richard O., (1992) "A Constitutional Right to a Healthful Environment", 16 *Vermont Law Review* 1063; and see Schlickeisen, Rodger, "Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment" (1994) 8 *Tulane Environmental Law Journal* 181.

Appendix 1

Possible subsets of "aboriginal environmental rights":

- the right to clean air
- the right to healthy air
- the right to air that does not harm food (plants, fish, animals), directly or by impact on their habitat
- the right to clean air as an element of spirituality or worldview
- the right to clean water (surface or groundwater)
- the right to healthy water
- the right to water that does not harm food (directly or through the food chain)
- the right to water that does not detrimentally impact on livelihood (e.g. commercial fisheries or other aspects of fisheries)
- the right to the flow of water
- the right to the water table / groundwater
- the right to the functions of the water system (water table support; groundwater recharge; water flow; springs; sustaining other elements of the ecosystem; supporting wetlands; habitat, etc.)
- the right to the functions of land along streams, creeks, rivers, such as water storage, energy transfer, leaf litter, temperature control, all to sustain habitat, both for food and cultural purposes, and due to the inherent value of the ecosystem
- the right to sustainment of habitat, for food, food chain, medicinal, livelihood, cultural and spiritual values
- the right to wildlife habitat for food, materials, cultural, spiritual reasons
- the rights to sustainment of trees for cultural, spiritual significance, and for materials, habitat and livelihood.

Appendix 2

The U.S. Example

Canadian aboriginal peoples who are considering exercising their authority over environmental issues on their lands should pay attention to the U.S. experience in deciding on their continuing approach.

In a distinct constitutional context, tribal governments in the United States have begun to assert regulatory control over activities both within and outside of “Indian country”.²⁴⁸ In 1984 the U.S. Environmental Protection Agency adopted an Indian Policy that expressly acknowledged tribal sovereignty that envisaged working with tribes “on a government-to-government basis” rather than as “subdivisions of states”.²⁴⁹ A few years later, the federal enabling legislation was amended to authorize EPA to treat “tribes as states”.²⁵⁰ This history of U.S. federal statutory delegation is an important difference compared to Canada to consider when reviewing the experience of environmental regulation by U.S. aboriginal peoples.²⁵¹ Nevertheless, the experience is valuable and demonstrates some of the issues that arise when aboriginal peoples’ regulation making activities affect non-aboriginal people or affect extra territorial activities²⁵². One of the requirements for a tribe to assume regulation making authority

²⁴⁸Monette, Richard A. “Treating Tribes as States under Federal Statutes in the Environmental Arena: Where Laws of Nature and Natural Law Collide”, 21 *Vermont Law Review*, 11: “Indian country” in U.S. law has a defined meaning described by Richard Monette as “a term of art denoting “territoriality”; “generally synonymous with all lands within the exterior boundaries of an Indian reservation”; A good discussion of the kinds of issues that U.S. tribes should consider in enacting environmental legislation is found in “Suagee, Dean B. And Parenteau, Patrick A., “Fashioning a Comprehensive Environmental Review Code for Tribal Governments: Institutions and Processes”, 21 *American Indian Law Review* 297 (1997)

²⁴⁹The development of this policy is discussed in Topper, Martin D., “Environmental Protection in Indian Country: Equity or Self-Determination?”, 9 *Environmental Protection in Indian Country* 693 (1994)

²⁵⁰Grijalva, James M. “Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters”, 71 *North Dakota Law Review* 433 at 437. See also Smith Haner, Jennifer, “Tribal Solutions to On-Reservation Environmental Offenses: Jurisdictional Parameters, Cultural Considerations, and Recommendation”, (1994)19 *American Indian Law Review* 105

²⁵¹For a readable summary of environmental regulation in general on “Indian lands” in the U.S., see Stern, Walter E., “Environmental Regulation on Indian Lands: A Business Perspective”, (1993) 7 *SPG Natural Resources & Environment* 20. In part he says, “Gone are the days when most tribes participated in reservation economic development only by passively receiving royalty revenue.... tribal leaders increasingly view their roles as stewards of reservation economies and environments.... A development proposal must accommodate tribes’ concerns over the long-term quality of reservation environments, and recognize the expanding scope of possible tribal environmental regulatory powers.” at page 21-2

²⁵²However, in the air quality context, the experience of tribal regulation of off-reserve sources of air pollution (under federal designation) has not been very successful, in the view of Epel and Tierney, in part because of the

over water quality standards under the U.S. program is an assertion of the tribal government's authority to govern, along with the tribal lawyer's statement explaining the basis for the assertion and a description of the waters over which the tribe asserts its authority. One of the possible sources is described as "inherent sovereignty, which flows from a source other than the United States Constitution and predates Congress and the Supreme Court", but this authority is not generally extended to non-members of the tribe who possess "fee lands within the reservation". However, there is an important exception to this limitation which is analogous to the kinds of arguments that may be mounted in Canada under section 35 of Canada's Constitution Act. That is the "needs-based" exception whereby a tribe in the U.S. may "regulate 'the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.'"²⁵³

In the event that aboriginal peoples assert law making authority over environmental regulation, the scope of their authority may be determined by a test analogous to the U.S. regulatory approach to determine valid tribal regulation making authority over surface waters. The requirements there are to demonstrate that "there are surface waters and critical habitat within the tribe's reservation that are covered by the [U.S.] Clean Water Act; that tribal members use those waters and/or critical habitat, and thus may be exposed to pollutants present in or introduced into those waters and habitat" and to assert that "impairments of the quality of reservation waters caused by non-Indian activities would have serious and substantial effects on the health and welfare of the tribe".²⁵⁴ There are minimum federal requirements: the tribe's regulations must at least protect recreational uses in and on the water and uses by fish, shell fish and wildlife "for protection and propagation". They may also protect other uses as long as they are consistent with the *Clean Water Act*, such as public drinking water supplies, irrigated agriculture, recreational activities, power generation, industrial and commercial activities and cultural or religious activities. The chosen uses are then protected with water quality criteria, expressed either as narrative statements or as numeric standards.²⁵⁵ Standards more stringent than an adjacent state's are expressly permitted. Enforcement in part is ensured by the requirement for non-aboriginal persons to obtain a certificate from the tribe as a condition of obtaining the federally issued permit that is required for the discharge. If an applicant challenged the tribe's decision, at least for lands on reserve, the challenge must be heard in the tribal court under tribal law.²⁵⁶ In an action between the City of Albuquerque, New Mexico and the EPA, a U.S. federal court upheld this approach and the validity of the EPA's requirement that the City meet the Pueblo of Isleta's strict water quality standard for a portion of the Rio Grande river within the reservation. Grijalva described the Pueblo of Isleta's view of the Rio Grande as "the

limited ability of tribes to enforce the standards - under that scheme, it is ultimately up to the EPA. The tribe's authority to bring statutorily authorized "citizen's suits" has been largely ineffective. However, one court has upheld the tribe's authority to protect "air resources on its reservation from the off-reservation emissions: *Nance v. U.S.E.P.A.* 645 F.2d 701 (9th Cir. 1981): Epel, Joshua and Tierney, Martha, "Tribal Authority over Air Pollution Sources on and off the Reservation," (1995) 25 *Environmental Law Reporter* 10583 at 19 of 53 (WestLaw)

²⁵³Grijalva, footnote 251, at 445-446, citing *Montana v. United States*, 450 544 (1981) U.S. at 565-66.

²⁵⁴Grijalva, footnote 251, p. 449

²⁵⁵Grijalva, footnote 251, p. 452

²⁵⁶Grijalva, footnote 251, p. 462

source of life” and the water quality standard as having been developed to protect it. The standard was adopted to protect ceremonial uses by tribal members of the Rio Grande.²⁵⁷

²⁵⁷Grijalva, footnote 251 at p. 467 discussing *Albuquerque v. Browner*, 865 F. Supp. 733 (D. N.M. 1993)

List of Authorities

| <u>Authority</u> | <u>Footnote #</u> (full reference cited) |
|--|---|
| <i>“First Nations/ Province to Co-Manage Resources”, (1994), 23 Saskatchewan Indian (No. 6) 10</i> | 186 |
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