

First Nations' Environmental Governance

Theresa McClenaghan

Canadian Environmental Law Association

January 8, 2013



Canadian
Environmental Law
Association

EQUITY. JUSTICE. HEALTH.

About CELA

- CELA was federally incorporated in 1970 as a not for profit organization dedicated to using and improving laws to protect the environment
- CELA is also an Ontario Legal Aid clinic with a mandate for client representation, advice, law reform, public legal education and community outreach
- Our priorities presently focus on environmental equity, environmental health, safe and sustainable energy, safe and sustainable water, community planning and sustainability, and local to global issues.

SECTION 35 OF THE CONSTITUTION ACT, 1982:

- (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.

Are S. 35 rights “environmental” rights?

- Section 35 may protect environmental rights directly
 - for example a direct right of water quality protection might be proven
- It may also protect environmental rights indirectly when they are "reasonably incidental" to another aboriginal or treaty right.
 - An example might be proven where a right to fish implies water quality and habitat supportive of the fishery

What types of environmental rights might be protected under s. 35?

- 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)

Subcategories of potential aboriginal environmental rights cont'd

- 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

Sub-categories of potential aboriginal environmental rights cont'd

- 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, 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

Sub-categories of potential aboriginal environmental rights cont'd

- 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.

Who defines the rights

- 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.
- Aboriginal peoples would want to frame and categorize the rights that they seek to protect.

Discussion Point

- Are there other “environmental” rights that should be added to the list?
- Any that don’t belong there?
- Are there ways of different ways of framing those rights that would work better?

Characterized as an Aboriginal or Treaty Right?

- Supreme Court of Canada case-law dictates that “environmental” aboriginal rights will consist of a collection of possible specific environmental aboriginal rights.
- If a claim to an environmental aboriginal right found its way to the Courts, it would depend on how the Court “characterized” the rights in dispute

Why “characterization” matters

- In Court disputes, a different characterization of a right might result in a different outcome.
- For example is the right “gambling” or “land use” (*Pamajewon* case – Court there said “gambling” and it wasn’t protected)
- In another example, is the right “trading fish for livelihood, support and sustenance” or “commercial fishing” (*Smokehouse* case - Court said latter and again it wasn’t protected)

Discussion Point

- What work could be done to articulate and characterize aboriginal rights in advance of any specific disputes?

Specific Rights

- Law professor Brian Slattery looked at an idea of “Specific rights” which he says 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.”
- This is distinct from “generic” aboriginal rights which might be available to all aboriginal peoples (for example language rights)

Whose legal system?

- The same law professor suggested that aboriginal legal rights could arise under three distinct legal systems:
 - international law;
 - the domestic law of Canada;
 - the domestic law of the aboriginal peoples.
- He suggests part of the job of the Courts in Canada is to develop and fuse these distinct legal systems in their decisions

Discussion Point

- How could the idea of distinct First Nations legal systems apply in practice?
- Is there capacity to articulate aboriginal rights in terms of these distinct legal systems in First Nations communities?
- What could be done to build capacity?

What should courts & tribunals be doing

- Another law professor, John 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.”
- Borrows argued that First Nation environmental law
“can be articulated so as to apply to disputes before Canadian courts.”

Aboriginal rights in Canadian Federalism

- I would argue that Aboriginal environmental governance should be acknowledged in our federal system of decision making. In a non-aboriginal context this idea was well put by the Supreme Court of Canada:

“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.” (The Quebec *Secession* case)
- It’s not much of a leap to add the idea of aboriginal decision making to this matrix.

Discussion Point

- Does this idea work as a way to reconcile decision making by federal, provincial and aboriginal governments in Canada?
- How would conflicts be resolved? (Right now they are partly resolved between federal and provincial governments by looking at which level has the better claim to the category of decision making under our 1867 Constitutional list of powers.)

Why should aboriginal peoples see their government reflected in Canada's constitutional framework?

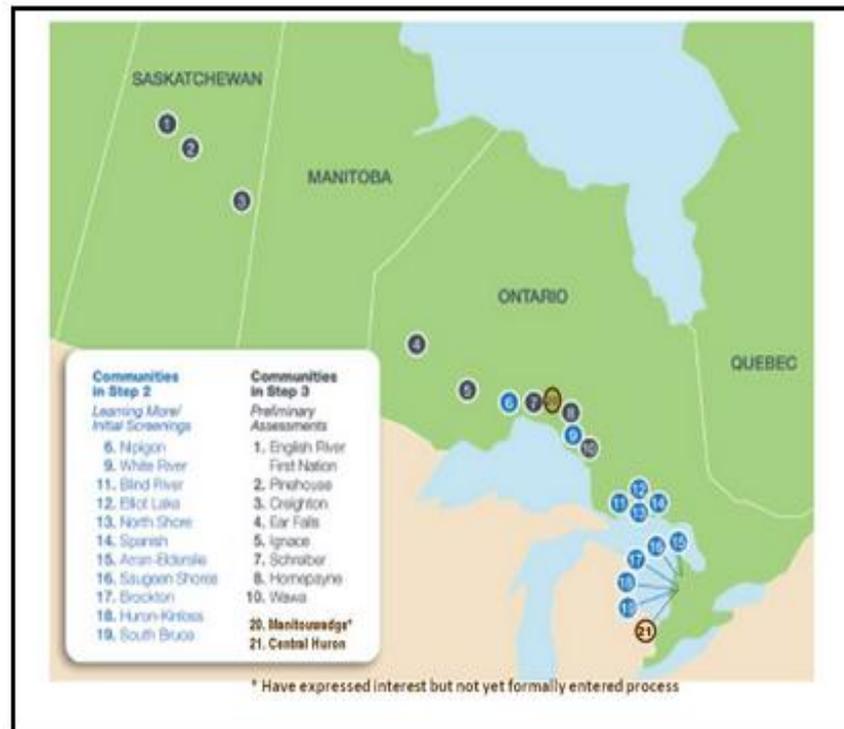
- The Supreme Court in the *Secession* case said:
 - “A political system must also possess **legitimacy**, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the **aspirations of the people**. But there is more. Our law's claim to legitimacy also rests on an appeal to **moral values**, many of which are embedded 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.” (emphasis added)

Discussion point

- Do the ideas from the Supreme Court resonate? i.e. Legitimacy, aspirations of the people, and moral values?
- If so, are there examples of aboriginal environmental governance that would better demonstrate the fulfillment of these values in Canada for aboriginal communities?

A specific example - NWMO

- Nuclear Waste Management Organization, established by federal legislation but consisting entirely of the nuclear power plant industry, is looking for a “host” community for high level nuclear fuel waste burial
- In addition to the Canadian shield, the potential geology for a “deep geological repository” was extended to sedimentary rock
- 21 communities in Saskatchewan and Ontario have entered into the process of having their localities considered for high level nuclear fuel waste at one stage or another (See maps)



Communities Involved in the Nuclear Waste Management Organization's Siting Process

Saskatchewan

1. English River First Nation (Step 3)
2. Pinehouse (Step 3)
3. Creighton (Step 3)

Northern Ontario

4. Ear Falls (Step 3)
5. Ignace (Step 3)
6. Nipigon (Step 3)
7. Schreiber (Step 3)
8. Hornepayne (Step 3)
9. White River
10. Wawa (Step 3)

Central Ontario

15. Aaran-Elderslie
16. Saugeen Shores
17. Brockton ((Step 3)
18. Huron Kinloss
19. South Bruce
21. Central Huron



* Have expressed interest but not yet formally entered process

Communities involved in the NWMO siting process (as of August 2012)

Saskatchewan	Northern Ontario	Central Ontario
1. English River First Nation (Step 3)	4. Ear Falls (Step 3)	15. Aaran-Elderslie
	5. Ignace (Step 3)	16. Saugeen Shores
	6. Nipigon (Step 3)	17. Brockton ((Step 3)
	7. Schreiber (Step 3)	18. Huron Kinloss
2. Pinehouse (Step 3)	8. Hornepayne (Step 3)	19. South Bruce
3. Creighton (Step 3)	9. White River	21. Central Huron
	10. Wawa (Step 3)	
	11. Blind River	
	12. Elliot Lake	
	13. Township of the North Shore	
	14. Spanish	
	20. Manitouwadge (considering)	

Nuclear Fuel Waste Act

- The Nuclear Fuel Waste Bureau was formed in 2002 within the federal department of Natural Resources; its mission is to administer the *Nuclear Fuel Waste Act* to oversee the nuclear industry which is given responsibility under that *Act*, to meet certain financial requirements and carry out “approved long-term nuclear fuel waste management activities within a comprehensive, integrated and economically sound approach for Canada” (NRCan)

NWMO

- In 2002 the Nuclear Waste Management Organization was established by the nuclear energy corporations (Ontario Power Generation Inc., Hydro-Quebec and New Brunswick Power Corporation) under the Nuclear Fuel Waste Act.
- The NWMO, as an industry organization, is responsible under the Act for implementation of an approach to the long term management of Canada's nuclear fuel waste (which it itself recommended to government, and which government then approved). They titled it "Adaptive Phased Management".

NWMO & Accountability Concerns

- The owners of radioactive waste are therefore responsible for the funding, organization, management, and operation of disposal and other facilities required for their waste.
- Concerns about the Act include the lack of transparency and accountability (despite much apparent transparency), the control by the nuclear industry of both the Nuclear Waste Management Organization and its advisory council, and the absence of a role for parliament.

NWMO Process

- The NWMO is proceeding to implement its approach to Adaptive Phased Management
- It has been seeking communities interested in further discussions
- The NWMO predicts a several decades long process to establish a long term used fuel facility (10 years to site; 30 years or so just to design and build the facility, 30 years to fill)

Concerns re NWMO Process for Siting a deep geological repository

- In our view, this lengthy process significantly impairs the ability of members of the public to be appropriately involved
- Is there any potential for informed consent with the level of scientific uncertainty present in this case
- Issue of effectiveness of “right to withdraw” and at what point the “final agreement” would be made rendering a community unable, allegedly, to withdraw
- Impact on those along transportation routes

Concerns about process continued

- Intergenerational equity issues – decisions made by this generation will affect every generation thereafter essentially “forever”
- Concerns about impact of the staged and “voluntary” process on communities
- Danger of the “problem” becoming perceived as the people who disagree or challenge or ask questions who may be seen as being opposed to economic opportunity in their community - Proponent company can “stand aside”

Conclusions

- Situating environmental governance rights within the context of section 35 of the *Constitution Act* may be a useful approach
- However such rights should be specifically articulated, based on historical tradition and the laws of the community, and should continue to be exercised within the community on an ongoing basis
- The case law dealing with duty to consult is of prime relevance and not dealt with in this presentation

Contact Info

Theresa McClenaghan, Executive Director & Counsel
Canadian Environmental Law Association

theresa@cela.ca

416-960-2284

www.cela.ca

130 Spadina Avenue, Suite 301

Toronto, ON M5V 2L4



Canadian
Environmental Law
Association

EQUITY. JUSTICE. HEALTH.

The screenshot shows a web browser window displaying the homepage of the Canadian Environmental Law Association (CELA). The browser's address bar shows the URL <http://www.cela.ca/>. The page features the CELA logo, which consists of four icons: a red leaf with a white 'C', a yellow sun with a white 'e', a green house with a white 'L', and a blue water drop with a white 'a'. To the right of the logo, the text reads "Canadian Environmental Law Association" in a large, bold, brown font, with the tagline "EQUITY. JUSTICE. HEALTH." below it. A search bar and a "Subscribe to our mailing list" form are located in the top right corner. Below the logo, a navigation menu includes links for "HOME", "ABOUT CELA", "E-BULLETIN", "FRANÇAIS", "LIBRARY", and "CONTACT US". The main content area is divided into three columns. The left column lists "News", "Publications", "Our Services", "Frequently Asked Questions", "CELA in the Courts", and "Access to Environmental Justice". The middle column contains a paragraph about CELA's mission: "CELA works to protect human health and our environment by seeking justice for those harmed by pollution and by working to change policies to prevent such problems in the first place. For 40 years, CELA has used legal tools to increase environmental protection and safeguard communities. As a **Legal Aid Clinic**, our top priority is to represent low income individuals and communities and to speak out for those with less influence and who receive less of a say in decision-making." Below this is another paragraph: "Through **landmark legal cases** CELA has helped shape government and industry approaches to pollution and other environmental threats and has forced polluters to clean up their act. CELA has also been part of shaping **innovative collaborations** to improve sustainability and human health including the Low Income Energy Network, the". The right column features "CELA's Lawyer Referral List" and "News and Events", with a specific event listed for "Sep 18 2012": "Bi-national Great Lakes Citizen Coalition Calls on US Agency Not to Remove Niagara-area Hazardous Waste Site From Superfund". The browser window also shows several open tabs, including "CELA Powerpoint Te...", "Windows Screen Sho...", and "Featured Items a...". The browser's user interface includes a search bar, social media sharing options, and a user profile for "Kathleen Cooper".



Canadian Environmental Law Association

EQUITY. JUSTICE. HEALTH.