Environmental Governance in First Nation Communities

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Why should aboriginal peoples exercise governance over environmental issues?

- For aboriginal and treaty lands, if aboriginal peoples don't exercise governance over environmental issues, the likelihood is that no-one will
- Making governance decisions on environmental matters may be essential to protect the environment and natural resources that are integral to aboriginal peoples' culture

What do I mean by environmental governance?

- The scope of environmental governance is potentially as broad as the environment itself, and as broad as our human interactions with the environment and our impacts on the environment
- I want to speak particularly about the formal decisions made by aboriginal peoples, whether traditional decision making or Indian Act decision making or otherwise

What is governance?

- Examples could include decisions as to use of resources, both by aboriginal peoples or by others with the consent of aboriginal peoples, First Nations' land use decisions, permitting and licensing of access to resources, development, water takings, establishment of water, sewer and landfill systems

Resources

- Resources include land, water, air and wind, timber, fish, wildlife, and minerals, to name a few
- Decisions both as to traditional and contemporary uses of these resources must be considered
- Not only taking or use of resources, but also degradation or using up of resources if not done sustainably

Does the Canadian Constitution encompass governance by aboriginal peoples?

- Canadian environmental law makers in other levels of government often assume that governance is exclusively distributed between the federal and provincial levels of government.
- The Constitution Act 1867, which provided lists of "powers" to federal and provincial governments did not include "environment"

The Constitution on Environment

- The Supreme Court of Canada has confirmed that each order of government has a role to play. Does this include aboriginal peoples?
- I argued in a paper completed in 1999 and just published last year, that environmental aboriginal rights must include rights of governance

Who is government?

- In my view, aboriginal peoples' governance must be included in our constitutional concept of "government" in Canada.

Who makes the rules?

- If aboriginal peoples don't make environmental decisions, then decisions made by other jurisdictions may overtake them by default
- For example, aboriginal peoples may wish to develop rules regarding aboriginal rights, aboriginal title lands, aboriginal fishing and hunting lands where otherwise provincial schemes will prevail

Scrutiny of Projects

- Similarly, aboriginal peoples may wish to develop processes or rules about how to look at projects proposed by other people or levels of government in environmental terms
- Otherwise, many projects are escaping provincial or federal scrutiny and the consultation process designed by others may not be suitable

The Supreme Court of Canada

- The Supreme Court of Canada has not yet articulated an approach that recognizes full rights of governance by aboriginal peoples, even as to aboriginal and treaty rights matters.
- This is because the Court fears that if the federal government cannot determine how aboriginal and non-aboriginal rights interact, there will be unsolvable conflict

There is a solution

- However, the Supreme Court's own case law does provide a solution. We already have a system of sorting out federal and provincial heads of power and how much each can cover the other's "territory"
- A better approach would recognize aboriginal peoples as having constitutionally recognized rights of governance and aboriginal peoples as another level of government

Avoiding "conflicting rights"

- This approach would avoid the "conflicting rights" problem that the Supreme Court seems to fear.
- Then the Court's role, as a body of last resort, would be to arbitrate the rightful jurisdictional "spheres" of each level of government, including aboriginal peoples

The Quebec Reference model

- You may recall that the Supreme Court was asked by the federal government to rule on whether Quebec's separation referendum process was legal. That case provides a useful model to consider the governance situation of aboriginal peoples in Canada

Room for federal, provincial and aboriginal government

- In the Secession case, the Supreme Court said, "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 . . . The function of federalism is to enable citizens to participate concurrently in different collectivities…"

Applies to aboriginal governance too

- This description by the court of federalism, in a Quebec-Canada context, applies with just as much force, in my view, to the role of aboriginal peoples in governance over environmental rights.
- The Canadian constitution, thus viewed, allows for the "pursuit of collective goals" by many diverse groups within Canada.

Do aboriginal peoples see themselves in the Constitution?

- Aboriginal peoples must also see their level of government reflected in Canada's constitutional understanding
- The Supreme Court said in that same case, "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 … It would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional values."

Section 35

- Some professors of aboriginal law have argued that section 35 of the Charter doesn't create a right of self-government, but rather protects and recognizes an already existing right of self-government
- This is a fundamental difference because this perspective appreciates that self-government is founded on principles that pre-dated the formal constitutional documents

Rule of Law

- According to one professor, Kent McNeil, the fundamental rule of law in Canada therefore should consist of not only the common law (as interpreted by Courts) and statutory law (as enacted by the federal and provincial legislatures), but also of Aboriginal laws.

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

- Unfortunately, the Supreme Court has not favoured an approach of defining self government in excessively general terms. The Court requires that the claim to self government be very specific as to its scope. This will vary from nation to nation.

Delgamuukw

- You will recall the Delgamuukw decision; in that case, the Supreme Court indicated that self-government may take many different forms, and that models may be based on territory, citizenship, jurisdiction, internal government organization or defined in other ways.

Examples

- So, in one case, a group of aboriginal peoples may claim and establish an environmental aboriginal right - for example to control a resource - and that then might imply the right to govern the scope of that right. This might extend even to use of the resource by non aboriginal peoples.

Own lands and members

- Another approach might see a group of aboriginal peoples making rules about activities on their own lands (aboriginal title or reserve lands), and/or about members' activities, both on those lands and elsewhere.

Other orders of government

- Yet another approach to aboriginal governance over environmental matters might see that neighbouring or other orders of government require their members to comply with rules to avoid specified impacts on aboriginal peoples, based on decisions that had been made by the aboriginal peoples.

Courts could enforce

- Canadian common law courts could enforce decisions that aboriginal peoples have made about allowable impacts on the environment of their own lands.
- Furthermore, a right of environmental governance could impact lands beyond their "own lands", upon which other aboriginal or treaty rights are exercisable.

Control may vary

- Various environmental rights might have differing levels of control over the land
- A proven environmental right tied to particular land and of high significance to the culture of the community might bring the highest degree of control
- The level of control perceived to be necessary will also differ with the proposed uses by the Crown and others

Depending on the interference

- A proposed use that is perceived to interfere little with the environmental right in question might require little control
- A proposed use that will interfere with an environmental right will give rise to the need to assert control over that territory, resource or other matter

Can environmental rights and others' uses co-exist

- A proposed land use or resource licence from the Crown that would eliminate the environmental right cannot co-exist with the right. The aboriginal peoples may then require a form of total control or veto over those lands.
- Other uses might co-exist, such as in some hunting, fishing and parks situations.

Establishing limits

- However, even when it is perceived that aboriginal environmental rights and other uses can co-exist, aboriginal peoples should exercise governance, in part to ensure that the use does not transform over time so as to become an incompatible use. So for example, in one case, the court allowed a park to co-exist, but not a winter road.

Describing the territory

- It would be a very good idea to formally describe all of the territory over which an aboriginal group claims a right to exercise environmental aboriginal rights, and to communicate this to other levels of government.
- At a minimum, this assertion may be invaluable at a future time if the Crown attempts an incompatible use.

Continuity

- Another extremely important reason to establish and communicate a description of territory and the environmental rights claimed is that it can help defeat a future argument by the Crown that the right has been lost due to "non-use" and to help establish the continuity that the courts require in proving aboriginal rights.

What about non-territorial rights?

- A different concern is raised with aboriginal environmental rights that are not linked to occupation or use of particular lands. There is a greater risk of incremental Crown actions removing or reducing opportunities for the exercise of those aboriginal rights.

The preferred means of exercising the right

- In the Sparrow case, the Supreme Court acknowledged that aboriginal peoples should be able to choose their preferred means of exercising the right. Which opportunities among many are most suited; how should other customary, traditional or socially significant factors affect those decisions. These decisions should be up to the aboriginal peoples concerned.

Are environmental rights ever separate from land?

- Even without all of the incidents of "ownership" that the British common law tradition considers (exclusivity, permanent occupation, recording ownership), aboriginal environmental rights may be integrally connected to the landscape. Use in one area impacts on other areas. Aboriginal people should describe those lands and assert environmental control.

Can aboriginal environmental and governance rights be infringed?

- Provincial governments have limits on their decision making. They do not have the option of disregarding aboriginal or treaty rights to certain lands and must seek a method of accommodating those rights while pursuing their provincial objectives.

What to accommodate

- A statement by a group of aboriginal peoples as to what their environmental rights are provides a concrete example to the provincial or federal government of what they must accommodate. The existence of such a statement also increases the likelihood that these governments seriously attempt to accommodate these rights.

A new definition of "sovereign"

- I argue that "sovereign power" should be understood as allocated among the federal and provincial legislative and executive branches of government, the courts, and aboriginal peoples. It is the combination or collection of all of the sources of constitutional authority; is not the property of only one branch or order of government.

We could get rid of the infringement test

- One significant problem with the Supreme Court of Canada's approach so far to aborignal and treaty rights is that the Supreme Court has viewed the sovereign as the Crown only. The Court then felt it needed to create a test as to when infringement of aboriginal rights is "valid". This "infringement test" described in the Sparrow case is acting to seriously undermine aboriginal and treaty rights

Crown can't extinguish section 35 rights

- Based on these arguments then, since 1982, the Crown cannot extinguish aboriginal peoples' aboriginal and treaty rights. If the Crown can't extinguish the rights, there is no need to "restrain" the Crown and create an infringement test.

Damage from the infringement test

- The infringement test otherwise allows federal legislation to interfere with exisitng aboriginal rights, including aboriginal title, if certain tests are met: a "valid legislative objective", "consistency with the special trust relationship and responsiblility of the government vis-à-vis aboriginal peoples", with "as little infringement as possible" and "fair compensation and consultation?

Infringement getting worse

- The Supreme Court went on to make the infringement test even worse in the Gladstone and Delgamuukw cases. In the Gladstone case, the Crown could justify an infringement because they felt the right claimed by the aboriginal peoples lacked "internal limitation". The Court also recited objectives such as "economic and regional fairness and historical reliance by non-aboriginal groups".

But they're not in the constitution

- Those additional considerations listed by the Court in Gladstone like economic and regional fairness have no constitutional basis. However, the court's listing of these factors has the potential to seriously limit aboriginal and treaty rights claims.

Delgamuukw

- The Delgamuukw decision makes these concerns even more vivid. In that decision, the court listed a range of activities astounding in scope, that might justify infringement of aboriginal and treaty rights, including activities such as resource extraction and only expressly excluded "relatively unimportant reasons such as sports fishing without a significant economic component"

Are values only economic?

- The approach in Delgamuukw raises the concern that the court will allow infringement when there is "a significant economic component" even for "unimportant activities".
- But what if the environmental right claimed is an environment supporting value system not measured economically?

Multiple jurisdictions can act

- More than one jurisdiction can exercise environmental responsibility - this is already the recognized constitutional situation in Canada with federal, provincial and municipal governance. To this paradigm should be added aboriginal peoples' governance.
  Should aboriginal peoples exercise governance over environmental rights and how?
- Despite these concerns, the Supreme Court's decisions provide additional reasons for aboriginal peoples to exercise governance now over environmental rights that they want to protect.
- Governance should include management activities over resources, and recording and documentation of applicable aboriginal principles governing those rights

Documentation

- Documentation, or as one writer has put it, "codification" should encompass as much history as possible, supporting the long-time principles inherent in the aboriginal peoples' approach to a resource or another environmental right.
- Professor Burrows has written very persuasive articles whereby traditional stories can be interpreted as law in common law courts

Showing internal limits

- Based on the Gladstone case and others, it is also necessary for the aboriginal peoples to demonstrate that the traditional exercise of an aboriginal right also contains principles of limitation and control. Burrows' stories contain good examples of long-standing unwritten rules against waste of resources and this is the type of approach that should be documented.

Proactive engagement of other levels of government

- Another strategy is that aboriginal peoples may want to lay out requirements that the other levels of government enforce over non-aboriginal persons. One way to do this is to adopt standards or impact measures for non-aboriginal land reserve that are the same as those developed by aboriginal peoples on aboriginal or treaty lands, and that protect the aboriginal lands.

How to interpret tradition as law

- An American professor, Rebecca Tsosie, outlined potential requirements for enacting customs as law. One requirement is that the community consider the custom or norm to be binding on them. Another requirement is that there is "an appropriate incentive structure"; in other words a mechanism to enforce the custom.

Documentation Projects

- While there are many documentation projects underway in communities, these are often aimed at establishing land claims and other claims. These projects, or new ones, should specifically be expanded and designed to capture history, tradition, custom, rule making in all their various forms and to derive and document the "legal" principles that they illustrate.

Another form of common law

- These descriptions should be gathered and published. A great project would be to establish an aboriginal law reporter service that publishes the results of these enquiries. They would then be available as "case precedent" when common law courts are asked to find that there is an existing aboriginal right of governance based on a pre-existing history of rule making.

Enforcement

- If the further step is taken of "codifying" these principles and laws (which is possible, but not necessary), then the question arises of enforcement. Do the means to ensure compliance need to be revised or made more explicit? Internal enforcement may or may not be court-like. However, it will be valuable to later show courts that the aboriginal peoples claiming a right of governance have historically enforced the right.

Should aboriginal peoples exercise governance over environment?

- Many aboriginal peoples may recognize responsiblities as caretakers of the environment to be a fundamental principle
- Many aboriginal peoples may see a need to continue their own law making traditions
- Other reasons include the possibility of future proof and defence of these principles in non-aboriginal courts

There is no gap

- Yet other reasons to exercise environmental governance include the need to assert the existence of a body of law to avoid the perception by other governments or courts that there is a regulatory “gap” that other governments need to fill in the future, and that the exercise of inherent rights of sovereignty and self government by aboriginal peoples are of fundamental importance in themselves.