INDIGENOUS CUSTOMARY LAW AND THE ENVIRONMENT

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Indigenous customary law with respect to the environment has existed since time immemorial. It is only recently, however, that public attention outside of First Nations communities has turned in its direction.

Environmental customary laws are grounded in the physical reality of the environment and the sustainability and interconnectivity between land and people who live on the land.

To First Nations peoples, the land provided everything. The land gave life, sustained life and assured the quality of life. To thrive, populations required a healthy and sustainable environment. It is clear from scientific inquiry as well as from oral and written history that indigenous peoples were well aware of their dependant relationship with the environment.

In broad terms the purpose and scope of customary environmental law was to ensure that the environment was able to sustain all life forms. First Nations understood that all living things have importance and value. For example, in sweat lodges, rocks used to provide the heat are called "grandfathers" as they are the oldest representations of the earth. All aspects of the environment are recognized as being interdependent and that no one form of life can survive and thrive on its own. Observed through a contemporary world lens, biodiversity, climate change and global warming are clear examples of interconnectivity and interdependence of all elements within the environment.

1. How Are Indigenous Customary Laws Relevant Today?

In today's context of looming environmental chaos, one can readily argue that First Nations assertions of sovereignty and self-government over lands and traditional territories combined with indigenous customary environmental laws could provide practical models of sustainable development and growth. Rights confirmed under Section 35 of the Constitution Act and recent jurisprudence stating that development on First Nations lands and territories cannot occur without meaningful consultation and accommodation, speaks to the validity and importance of First Nations' distinctive values. The legal responsibility on government to directly consult and engage First Nations on development to ensure that development will meet the needs and requirements of the First Nations affected provides an important environmental check.

2. How Does Environmental Customary Law Work?

First Nations have often spoken of the concept that the, "land is you and one with you." An example of the operation of environmental customary law is the long- standing requirements of rice and berry picking by Manitoba First Nations peoples. Elders who knew about growth cycles and past practices would tell their people the locations where and when they were allowed to harvest the rice or the berries. Everyone would obey the elders' direction even though more benefit could be gained from harvesting the entire

area in a short period of time. If a person disobeyed the direction of the elders, they would be shunned by other members of the community, a serious consequence. The implicit understanding was that the land cannot be simply exploited to accumulate immediate wealth and that the long term interests of the community must prevail over individual short term gain. Another example is the use of the bear. Some bear organs were more highly valued than others, such as the gall bladder, which was used for medicinal purposes. Customary law, however, did not permit the killing of bears for selective use of certain organs or the sale of highly valued organs. If a bear was killed, all parts of it were consumed or used by the community. The rule was that only what was needed was taken, no more. This approach respected the sustainability of the bear population and ensured its vital role in the ecosystem would be undisturbed.

In modern development terms, these values speak to the importance of engaging First Nations as full partners in planning sustainable projects, be they for oil and gas development, mining or hydro electricity projects. Since First Nation lands and traditional territories comprise only one half of one per cent of the total land mass of Canada, the land base is finite and precious. Unless sustainable practices inform development decision-making on First Nations lands, the very existence of First Nations communities could be compromised in the future. The customary principles of law are the same as they are for rice and berry picking and the hunting of bears,, but the consequences if not adhered to, are infinitely greater.

3. Jurisdiction and Capacity

Recent court decisions and government action have broadened the ability of First Nations to exert some jurisdiction over their lands. The responsibility and capacity to develop laws and public policy respecting the environment however cannot be done without enhanced resources and clarity of responsibilities between federal, provincial and First Nations governments. As the federal government steadily devolves First Nation jurisdictional responsibilities, it is essential that it provide the necessary technical and financial support to develop local capacity at the same time. Failure to do so hampers First Nations' ability to effectively exert jurisdiction to apply and implement their customary environmental laws. Moreover, unless the jurisdictional responsibilities are clarified, gridlock results.

An example of this problem is the control and treatment of water on reserves. In some situations, the federal government insists on First Nations meeting high standards of water quality while at the same time, not providing the necessary training or resources to enable the communities to meet these standards. In other situations where the quality of the water is below acceptable standards, the federal government argues that the water quality standards are the jurisdictional responsibility of provinces. Provinces on the other hand argue that First Nations and First Nations lands are a federal responsibility. In the result, there is jurisdictional gridlock with no one acting to protect the interests of the First Nations communities. The best example of this gridlock occurring at the expense of the First Nations citizens, is the community of Kasashchewan. The people in that community continue to suffer deplorable water conditions while the federal and

provincial governments argue about who is responsible. In this and similar situations, the First Nations are prevented from applying customary environmental laws and policies to address water quality because they do not have the resources and capacity to do so.

If federal aboriginal environmental policies were developed in closer consultation with the communities affected, better results would be obtained. A positive example of this is in the Little Red River First Nation in Northern Alberta, which is situated in prime timber area. Logging interests wanted to harvest the timber but the community wanted to keep its timber resource intact. Instead of foregoing the compensation altogether however, the Nation, in cooperation the federal government and its Kyoto obligations, engaged in carbon trading and the community was able to receive compensation for not cutting its timber.

In order to have stable and effective policies as well as respect and implement customary laws, First Nations' must be first and foremost responsible to their citizens rather than to the federal government.

In summary on this point, any change in the levels of authority and responsibility must be accompanied by meaningful consultation as well as a very strong and truly effective capacity building component. Not only must governance capacity be enhanced, but infrastructure must also be addressed.

4. False Equivalencies

The power imbalance between First Nations and other governments is obvious and must be taken into account when customary environmental laws and government legislation and policy interact When one central body has the power to make and enforce laws, develop, establish and implement policy, it is unreasonable to demand that First Nations deliver the identical model. This can only occur if First Nations possess the same powers the other governments have. Unfortunately the vast majority of First Nations do not have self-government agreements and it is impossible for them to deliver effective laws and policies in the ways other governments are able to do. This results in the undermining of local politicians and authority on reserves, making the implementation of customary laws, including environmental laws, much more difficult.

An example of this occurred on the Sagkeeng First Nation, where the Sagkeeng government, at the request of the provincial government, passed a law to protect endangered sturgeon in its section of the Winnipeg River. Most of the citizens respected the law but some did not. Because of the lack of power of the Sagkeeng government to enforce the law, nothing could be done when the law was broken. When situations like this occur, the local people lose respect not only for their own government but for all governments.

In summary, without true accommodation and recognition of First Nation authorities by all levels of government, sustainable wealth creation and genuine environmental protection will never be a reality. There must be tangible activities to create a better

environment for business on reserves and traditional territories. Access to equal opportunities is a prerequisite to creating sustainable development in First Nations communities. With such opportunities, First Nations will be empowered to influence the pace and kinds of development which takes place in their territories. With steady levels of revenues flowing to First Nations from their own sources, the ability to finance their own governments will become a reality and the ability to enforce and develop laws and policies that meet the needs of their citizens will follow.

5. The Role of First Nations Leadership

First Nations leaders have and continue to lead and their legitimacy is unquestioned by their constituents. They play a leading role in interpreting, asserting and enforcing First Nations customary and other laws and policies. Leaders have consistently emphasized the importance of education, not only in secondary schools but in universities and colleges as well. They recognize that the need for better trained and better educated people in First Nation communities is crucial for sustainable growth and environmental protection. Education will continue to be promoted with ever increasing effectiveness and benefit.

Over the years, the leadership itself has become significantly better educated and politically skilled. For example, it would have been unthinkable in 1952 to have First Nations leaders sit as equals during any Constitutional debate. But in 1982, First Nations leadership served notice that they were as skilled in negotiations and as professional as any other government group in Canada. Section 35 of the Constitution Act was created through the political and negotiating abilities of First Nation leaders. During the Meech Lake debates it was First Nations leaders who skilfully prevented the adoption of the Meech Lake Accord while the rest of the nation supported it.

First Nation leaders have effectively used the courts to challenge government laws and policies. Favourable rulings have increased First Nations capacity to exert greater control over their activities. The diligence of the leaders has also kept the United Nations Declaration on Indigenous Peoples alive despite concerted attempts by numerous nation states (including Canada) to prevent its ultimate ratification. The crucial role of First Nations leaders in advancing the interests of First Nations citizens, increasing political power of their governments and expanding the capacity of their communities is undeniable.

6. Relationship of Customary Law to Canadian Law

There is no reason why customary laws could not be included and enforced within any legal framework – federal or provincial. Since environmental degradation knows no boundaries, all affected interests should be considered and acted upon in the legal regimes designed to protect the environment. Moreover, the successful preservation and protection of the environment is a responsibility shared by all and it would make no political or moral sense to exclude or limit First Nations involvement in its preservation. History has taught us that unless First Nations are fully included and involved in the

creation of laws or policies affecting them or their interests, they will be flawed and likely rejected, rendering certainty impossible.

While court decisions are undeniably important, true environmental protection and sustainability requires governments to work co-operatively. Protection of political sacred cows and inter-governmental jurisdictional wars are barriers that, unless overcome, will negatively impact on environmental protection.

First Nations believe that environmental protection laws must carry at least the same weight as other laws, if not more. First Nations laws applicable on First Nations lands and traditional territories should have primacy. This is because detrimental effects of environmental damage often impact first and more profoundly on the First Peoples than other Canadians. They are a bell weather of sorts for Canada and the North American continent. A good example of this is he profound detrimental effects of global warming on the Inuit and their habitat in the Eastern Arctic. Other Canadians so far, have only been slightly affected. First Peoples connect to the physical environment on a fundamentally different level than corporate or political interests do. Often it is a matter of survival of communities and a way of life as opposed to interests in making profits from economic development. Thus any environmental law or policy developed by First Nations for this higher purpose should carry more weight.

It is assumed that First Nation environmental laws will be constitutionally valid, and will strengthen provincial and federal laws, but First Nations laws should not be superseded on their territories. That means that First Nations authorities have to be recognized as legitimate and equal to any other. There may be fears by some that First Nations laws could be distorted by legislating them into Canadian law. However, good law and good government must be recognized for what it is. If First Nations laws are better than what currently exists, First Nations should take part in changing and improving the elements needed to insure environmental protection and sustainability.

There is no reason to believe that First Nations laws would be inconsistent with Canadian law, quite the contrary. First Nations are confident that their customary environmental laws and their contemporary interpretation of them will enhance any protective regime devised by the courts or the legislatures. The ability of First Nations to develop, implement, enforce and give life to their own environmental laws is well understood in the First Nations community. They are confident that their environmental laws will meet any test or standard required to assure the future generations that their legacy will be protected.